III. Notice of Hearing Under 21 CFR Part 15

The Commissioner of Food and Drugs is announcing that the public hearing will be held in accordance with part 15 (21 CFR part 15). The presiding officer will be the Commissioner of Food and Drugs or his designee. A panel of government employees with relevant expertise will accompany the presiding officer.

Persons who wish to participate in the part 15 hearing must file a written or facsimile notice of participation with Linda Grassie (address or fax number above) by 4:30 p.m. eastern time on October 23, 2001. To ensure timely handling, the outer envelope should be clearly marked with Docket No. 01N–0423 and the statement ''Animal Feed Rule Hearing.'' Groups should submit two copies. The notice of participation should contain the speaker's name, address, telephone number, fax number, business affiliation, if any, a brief summary of the presentation, and approximate amount of time requested for the presentation.

The agency requests that persons or groups having similar interests consolidate their presentations and present them through a single representative. FDA will allocate the time available for the hearing among the persons who properly file notices of participation. FDA will reserve the hour from 4 p.m. to 5 p.m. for those who have not registered to present orally at the meeting to make oral presentations to the panel.

After reviewing the notices of participation and accompanying information, FDA will schedule each appearance and notify each participant by mail, telephone, or fax, of the time allotted to the person and the approximate time the person's presentation is scheduled to begin. The hearing schedule will be available at the hearing. After the hearing, the schedule will be placed on file in the Dockets Management Branch (address above) under Docket No. 01N–0423.

In order to facilitate the efficiency of the hearing process, presenters at the hearing should indicate the format in which their presentations will be made so that appropriate visual aids can be made available. Presenters should note that a hardcopy version of their presentations should be submitted to FDA on the day of the hearing for inclusion in the official record of the hearing.

Under § 15.30(f), the hearing is informal and the rules of evidence do not apply. The presiding officer and any panel members may question any person during or at the conclusion of their presentation. No participant may interrupt the presentation of another participant.

Public hearings under part 15 are subject to FDA's policy and procedures (part 10 (21 CFR part 10, subpart C)) for electronic media coverage of FDA's public administrative proceedings. Under § 10.205, FDA permits persons, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants. The hearing will be transcribed as required in § 15.30(b).

Any disabled persons requiring special accommodations in order to attend the hearing should direct those needs to the contact person listed above.

To the extent that the conditions for the hearing, as described in this notice, conflict with any provisions set out in part 15, this notice acts as a waiver of those provisions as specified in § 15.30(h).

IV. Request for Comments

To permit time for all interested persons to submit data, information, or views on this subject, interested persons may submit to the Dockets Management Branch written comments for this hearing at any time; however, the official record of the hearing will remain open to receive written comments until November 21, 2001. Such written comments can be submitted to the Dockets Management Branch (HFA–305), Animal Feed Rule Hearing, Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, or FAX written comments to the Dockets Management Branch, Animal Feed Rule Hearing, 301–827–6870. Two copies of any comments are to be submitted, except individuals should submit one copy. Comments are to be identified with Docket No. 01N–0423.

V. Transcripts

Transcripts of the hearing will be available for review at the Dockets Management Branch (address above) approximately 30 days following the hearing and at http://www.fda.gov.; also orders can be placed with Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857.

Dated: October 1, 2001.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 01–25108 Filed 10–4–01; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

28 CFR Part 100

[FBI 100P]

RIN 1110–AA00

Implementation of Section 109 of the Communications Assistance for Law Enforcement Act: Definitions of ''Replaced'' and ''Significantly Upgraded or Otherwise Undergoes Major Modification''

AGENCY: Federal Bureau of Investigation, DOJ.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Federal Bureau of Investigation (FBI) proposes to make three amendments to the Communications Assistance for Law Enforcement Act (CALEA) Cost Recovery Regulations. First, the FBI proposes to amend regulations by making a minor technical change to harmonize the rule's language with CALEA's statutory language. Second, the FBI proposes to amend regulations by adding a definition and examples for the term ''replaced.'' Third, the FBI proposes to amend regulations by adding a definition and examples for the term ''significantly upgraded or otherwise undergoes major modification.'' This supplemental notice of proposed rulemaking (SNPRM) provides the text and rationale for the minor technical change, the two proposed definitions, and the proposed examples following the definitions. These amendments will clarify the applicability of the CALEA Cost Recovery Regulations and should assist the telecommunications industry in assessing its responsibilities under CALEA.

DATES: Comments must be received on or before December 4, 2001.

ADDRESSES: Comments should be submitted to the Telecommunications Contracts and Audit Unit, Federal Bureau of Investigation, P.O. Box 230040, Chantilly, VA 20153–0450, Attention: CALEA FR Representative.

FOR FURTHER INFORMATION CONTACT: Walter V. Meslar, Unit Chief, Telecommunications Contracts and Audit Unit, Federal Bureau of Investigation, P.O. Box 221286, Chantilly, VA 20153–0450, telephone number (703) 814–4900.

SUPPLEMENTARY INFORMATION:

Supplementary Information Table of Contents

A. Request for Comments

The FBI encourages you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address; identify the regulation identifier number for this rulemaking (1110-AA00, FBI 100P); indicate the specific section of this document to which each comment applies; and give the reason for each comment. You may submit your comments and material by mail, hand delivery, fax, or electronic means to the Telecommunications Contracts and Audit Unit at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or hand delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know when they were received, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of the comments.

B. Background and Purpose

In 1994, Congress passed the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1001–1010, to preserve law enforcement's ability to carry out lawfully authorized electronic surveillance without impeding the development of new communications services and technologies. Under the act, telecommunications carriers are required to facilitate the unobtrusive delivery of intercepted communications and reasonably available call-identifying information to law enforcement. 47 U.S.C. 1002. Telecommunications carriers are also required to ensure that their systems are capable of accommodating simultaneously the number of interceptions, pen registers, and trap and trace devices specified in the government's capacity notices. 47 U.S.C. 1003(b). Conversely, law enforcement is prohibited from dictating system design features and cannot bar the adoption of new features and technologies. 47 U.S.C. 1002(b)(1).

CALEA also contains a number of reimbursement provisions that were designed to ease the transition to full compliance with the assistance capability and capacity requirements. First, to the extent that telecommunications carriers must install additional capacity to meet law enforcement's needs, the act provides that the Attorney General may agree to reimburse a telecommunications carrier for the reasonable costs directly associated with modifications made to attain the capacity requirements. 47 U.S.C. 1003(e). Second, if the Federal Communications Commission (FCC) determines that compliance with the assistance capability requirements is not reasonably achievable with respect to a telecommunications carrier's equipment, facilities, or services installed or deployed after January 1, 1995 (post-equipment), the Attorney General may agree to pay the telecommunications carrier for the additional reasonable costs of making compliance with the assistance capability requirements reasonably achievable. 47 U.S.C. 1008(b). Finally, the Attorney General may agree to pay a telecommunications carrier for all reasonable costs directly associated with making modifications to its equipment, facilities, or services installed or deployed on or before January 1, 1995 (preexistent equipment) necessary to bring such preexistent equipment into compliance with the assistance capability requirements. 47 U.S.C. 1008(a) & (d). This rulemaking proceeding is primarily concerned with the last reimbursement provision.

CALEA entrusts the Attorney General with a number of implementation responsibilities. The Attorney General has delegated many of these implementation responsibilities to the Director of the FBI. 28 CFR 0.85(o). One of these delegated responsibilities was the establishment of regulations necessary to effectuate timely and cost-efficient payment to telecommunications carriers. 47 U.S.C. 1008(e). The Director assigned the task of establishing the CALEA Cost Recovery Regulations to the Telecommunications Contracts and Audit Unit (TCAU) of the Finance Division. On May 10, 1996, TCAU published a Notice of Proposed Rulemaking (NPRM) for the purpose of establishing the CALEA Cost Recovery Regulations.[1] 61 FR 21396. TCAU published its final rule on the CALEA Cost Recovery Regulations on March 20, 1997. 62 FR 13307.

Section 100.11(a) of the CALEA Cost Recovery Regulations states:

Costs that are eligible for reimbursement under section 109(e) CALEA are:

[1] On November 19, 1996, the FBI initiated this separate rulemaking proceeding by publishing an Advanced Notice of Proposed Rulemaking in the **Federal Register.** 61 FR 58799. This rulemaking proceeding was originally limited to defining the term ''significant upgrade or major modification.'' The purpose of using a separate proceeding was to avoid delaying the publication of the final rule regarding the CALEA Cost Recovery Regulations.

(1) All reasonable plant costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with section 103 of CALEA, until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modifications * * *.

(emphasis added). This provision is based upon CALEA Section 109(d), which places certain limitations on the reimbursement eligibility of preexistent equipment. Section 109(d) states, in part:

If a carrier has requested payment in accordance with [the CALEA Cost Recovery Regulations], and the Attorney General has not agreed to pay the telecommunications carrier for all reasonable costs directly associated with modifications necessary to bring any equipment, facility or service deployed on or before January 1, 1995, into compliance with the assistance capability requirements of section 103, such equipment, facility, or service shall be considered in compliance with the assistance capability requirements of section 103 until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification.

(emphasis added). Essentially, under both the statute and the CALEA Cost Recovery Regulations, preexistent equipment loses its reimbursement eligibility if it is ''replaced or significantly upgraded or otherwise undergoes major modification.'' Under Section 109(d), preexistent equipment also loses its ''considered in compliance'' status once such equipment is ''replaced or significantly upgraded or otherwise undergoes major modification.''

The terms ''replaced'' and ''significantly upgraded or otherwise undergoes major modification'' appear in only one other location in the act. CALEA precludes enforcement against a telecommunications carrier with preexistent equipment unless the Attorney General has agreed to reimburse the reasonable costs necessary to bring the equipment into compliance with the assistance capability requirements or the preexistent equipment ''has been replaced or significantly upgraded or otherwise undergoes major modification.'' 47 U.S.C. 1007(c)(3).

These terms play a very important role in the determination of reimbursement eligibility. Neither the statute nor the CALEA Cost Recovery Regulations define these important terms. This rulemaking proceeding was initiated to remedy this situation.

C. Regulatory History

The FBI initiated this rulemaking with an Advanced Notice of Proposed Rulemaking (ANPRM), published in the **Federal Register** on November 19, 1996. 61 FR 58799. The ANPRM solicited comments from interested parties on defining the term ''significant upgrade or major modification'' in the CALEA Cost Recovery Regulations. On April 28, 1998, the FBI published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**. 63 FR 23231. In the NPRM, the FBI proposed a definition of the term ''significant upgrade or major modification'' based on the comments it received in the ANPRM. In this SNPRM, the FBI is publishing a new version of the term ''significantly upgraded or otherwise undergoes major modification.'' The FBI has also decided to use this SNPRM to define the term ''replaced'' and to make a minor technical amendment to Section 110.11(a)(1).

D. Amendment to Section 110.11(a)(1)

The proposed amendment to Section 110.11(a)(1) is very minor and intended to correct a typographical error that appears at the end of the subsection. The word ''modifications'' appears in two places in the subsection. This proposed amendment substitutes the second appearance of the word ''modifications'' with the word ''modification.'' The proposed subsection reads as follows:

§ 100.11 Allowable costs.

(a) * * *

(1) All reasonable plant costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with section 103 of CALEA, until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification;

(2) * * *

This change is being made so that the term ''significantly upgraded or otherwise undergoes major modification'' contained in the rule is identical to the language contained in the CALEA statute. See 47 U.S.C. 1007(c)(3)(B) & 1008(d).

E. Definition Development

1. Significantly Upgraded or Otherwise Undergoes Major Modification

The term ''significantly upgraded or otherwise undergoes major modification'' can be found in the proposed amendment to Section 100.11(a)(1) of the CALEA Cost Recovery Regulations. In the NPRM, the FBI proposed to define the term ''significant upgrade or major modification'' by creating a new section in the CALEA Cost Recovery Regulations. 63 FR 23231. Rather than create a new section entitled ''significant upgrade or major modification,'' the FBI now proposes to amend Section 100.10 of the CALEA Cost Recovery Regulations by adding a definition for the term ''significantly upgraded or otherwise undergoes major modification'' followed by 15 examples of the definition's operation.

The definition proposed in this SNPRM is a substantial departure from the NPRM proposed definition. It was developed after careful analysis of the CALEA statutory language, the NPRM definition, and the comments submitted by the telecommunications industry in response to the ANPRM and the NPRM. The proposed definition was developed with the goal of preserving law enforcement's ability to conduct electronic surveillance without impeding the introduction of new technologies, features, or services. It strikes an appropriate balance between the needs of law enforcement and the needs of the telecommunications industry. Most importantly, it is entirely consistent with the CALEA statutory scheme.

a. Background

Since the SNPRM proposed definition was based, at least in part, upon the NPRM definition of ''significant upgrade or major modification,'' a brief review of that definition's development is appropriate. The FBI began the process of developing the NPRM proposed definition of ''significant upgrade or major modification'' by considering three different definitional approaches: Accounting, technical, and public safety. The FBI rejected the accounting approach mainly because it triggered a ''significant upgrade or major modification'' whenever the cost of a modification exceeded a set percentage of the equipment's value, regardless of whether the modification had any detrimental impact on law enforcement's ability to conduct lawfully authorized electronic surveillance. 63 FR 23233. The FBI also considered and rejected a number of technical approaches to defining the term ''significant upgrade or major modification.'' The FBI discovered that while some technical approaches worked well for some types of equipment, facilities, or services, they did not necessarily work well for all types of equipment, facilities, or services. Each technical definition considered by the FBI left ambiguities

and called for constant definition of the terms used. Id. The FBI concluded that the public safety approach to the definition was the most consistent with the statutory intent of CALEA. Under the public safety approach, a key consideration is whether a given modification has created an impediment to lawfully authorized electronic surveillance. 63 FR 23233.

In accordance with the public safety approach, the FBI proposed in the NPRM to define the term ''significant upgrade or major modification'' as follows:

• 100.22 Definition of ''significant upgrade or major modification.''

(a) For equipment, facilities or services for which an upgrade or modification has been completed after January 1, 1995 and on or before October 25, 1998, the term ''significant upgrade or major modification'' means any fundamental or substantial change in the network architecture or any change that fundamentally alters the nature or type of the existing telecommunications equipment, facility or service, that impedes law enforcement's ability to conduct lawfully authorized electronic surveillance, unless such change is mandated by a Federal or State statute;

(b) For equipment, facilities or services for which an upgrade or modification is completed after October 25, 1998, the term ''significant upgrade or major modification'' means any change, whether through addition or other modification, to any equipment, facility or service that impedes law enforcement's ability to conduct lawfully authorized electronic surveillance, unless such change is mandated by a Federal statute.

63 FR 23230. The comments received by the telecommunications industry in response to this definition were very useful in developing the SNPRM proposed definition. Many of the features contained in the SNPRM proposed definition are the result of the industry comments.

b. The SNPRM Proposed Definition

The FBI's primary goal in developing the proposed definition for the term ''significantly upgraded or otherwise undergoes major modification'' was to create a self-explanatory definition consistent with CALEA's statutory language. The FBI began this process by reexamining the dictionary definitions of the words ''significantly,'' ''upgrade,'' ''major,'' and ''modification.'' [2] The adverb ''significantly'' is defined to mean ''in a significant manner.'' The adjective ''significant'' is defined as ''having or likely to have influence or effect.'' The verb ''upgrade'' means ''to raise or improve the grade of.'' The adjective ''major'' means ''notable or conspicuous in effect or scope.'' The noun ''modification'' means ''the making of a limited change in something.'' Thus, according to the dictionary, the concept of ''significantly upgraded'' would mean ''to have improved the grade of [something] in a manner that has or is likely to have influence or effect'' and the concept ''major modification'' means ''the making of a limited change in something that is notable or conspicuous in effect or scope.'' In essence, the terms ''significant upgrade'' and ''major modification'' are synonyms that do not need separate definitions.

The next step in the definitional process was to determine what components could be derived from the CALEA statutory language and incorporated into these simple dictionary definitions. The search for these components began with the definitions suggested by the telecommunications industry. Four commenters, Ameritech Corporation, the Personal Communications Industry Association, the United States Telephone Association (USTA),[3] and U S WEST, submitted suggested definitions in response to the FBI's NPRM. These four definitions built upon earlier definitions suggested by the industry in response to the ANPRM.

The FBI ultimately concluded that none of the NPRM suggested definitions could be adopted verbatim as the SNPRM proposed definition because each contained a shortcoming that defeated the goal of making the definition self-explanatory. This shortcoming is also found in the NPRM proposed definition which describes the term ''significant upgrade or major modification'' in terms of ''fundamental or substantial changes in network architecture'' or changes that ''fundamentally alter the nature or type of existing telecommunications equipment, facility, or service.'' This shortcoming has the serious disadvantage of substituting two undefined phrases (''fundamental or substantial changes'' or ''fundamentally alter'') in place of another (''significantly upgraded''). Although the FBI did not adopt any of the suggested definitions verbatim, it did incorporate key concepts of these definitions into the SNPRM proposed definition. For example, the fourth, fifth, and sixth components discussed below were all developed from concepts contained in the suggested definitions.

After reexamining the statutory language of CALEA and the NPRM suggested definitions, the FBI determined that there are at least seven components that need to be incorporated into the SNPRM proposed definition of the term ''significantly upgraded or otherwise undergoes major modification.'' [4] The first component is the determination of what can be ''significantly upgraded.'' According to CALEA, the only item capable of being ''significantly upgraded'' is preexistent equipment, that is, equipment, facilities, or services that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and was installed or deployed within the carrier's network on or before January 1, 1995. See 47 U.S.C. 1002(a), 1007(c)(3), 1008(a) & (d). This explanation of preexistent equipment is included within the SNPRM proposed definition.

The second component is the determination of who is responsible for an improvement that amounts to a ''significant upgrade.'' The statutory language is fairly clear that a ''significant upgrade'' can only be performed on preexistent equipment that belongs to a telecommunications carrier. See 47 U.S.C. 1007(c)(3) & 1008(d). For the purposes of the proposed definition, the telecommunications carrier bears the ultimate responsibility for an improvement amounting to a ''significant upgrade'' of its preexistent equipment, regardless of whether the carrier or some other party, for example, a telecommunications equipment manufacturer, actually installed or deployed the improvement in the carrier's network.

The third component is the determination of what sort of action by a telecommunications carrier will amount to a ''significant upgrade'' of preexistent equipment. The FBI decided to move away from the terminology of ''any change'' or ''any fundamental or substantial change'' contained in the NPRM definition and specify the sorts of actions that might amount to a ''significant upgrade.'' The first step toward specificity was determining what aspects of preexistent equipment are most likely to be changed. The FBI concluded that these aspects are the capabilities, features, or services of the

[2] All definitions in this SNPRM, with the exceptions of the terms ''preexistent equipment,'' ''replaced,'' ''replacement equipment,'' and ''significantly upgraded or otherwise undergoes major modification'' were taken from the Merriam Webster's Collegiate Dictionary, Tenth Edition.

[3] USTA is now known as the United States Telecom Association.

[4] Hereafter, the terms ''significantly upgraded'' or ''significant upgraded'' will be used in place of the more lengthy term ''significantly upgraded or otherwise undergoes major modification.''

preexistent equipment. The next step was to determine the manner in which the capabilities, features, or services of preexistent equipment might be ''significantly upgraded.'' The FBI concluded that a carrier could activate, add, or improve a capability, feature or service of its preexistent equipment in a manner that might amount to a ''significant upgrade.'' The main advantage of this third component is that it is self-explanatory. Unlike the terminology in the NPRM definition, it does not create additional questions such as ''what action is considered to be a change'' or ''what is a fundamental or substantial change?'' Another benefit of the actions specified in this component is that they are easily observable and measurable.

The fourth component is really the crux of the proposed definition. It is one of the key narrowing factors that makes a particular upgrade ''significant.'' This component is based upon the public safety approach contained in the NPRM and adhered to in this SNPRM. The FBI has refined the NPRM language to make it more consistent with the CALEA statutory language and to address certain industry comments.

The NPRM proposed definition contained a key factor in determining whether a particular upgrade was ''significant'' for the purposes of the CALEA Cost Recovery Regulations. This factor limited ''significant upgrades'' to only those changes that impede ''law enforcement's ability to conduct lawfully authorized electronic surveillance.'' The proposed definition retains this factor, but changes the focus slightly. According to CALEA Section 103, the focus is not on law enforcement's ability to conduct lawfully authorized electronic surveillance, but rather on a telecommunications carrier's duty to unobtrusively deliver lawfully authorized intercepted communications and reasonably available call-identifying information to law enforcement in accordance with the assistance capability requirements. See 47 U.S.C. 1002(a). This shift in focus has the added advantage of specifying exactly what must be delivered.

Some commenters have suggested that any final definition of ''significant upgrade'' should be limited to those modifications that block or prevent electronic surveillance. The FBI believes that the assistance capability requirements require a telecommunications carrier to deliver intercepted communications and reasonably available call-identifying information in their entirety. Modifications that garble or only allow for the intermittent delivery of lawfully authorized intercepted communications or reasonably available call-identifying information can be just as devastating to a law enforcement investigation as when electronic surveillance is blocked or prevented.

The NPRM definition addressed this concern by concluding that changes which ''impede'' law enforcement's ability to conduct lawfully authorized electronic surveillance would amount to a ''significant upgrade.'' The definition proposed in this SNPRM substitutes the word ''hampers'' in place of ''impedes.'' The verb ''hamper'' means ''to interfere with the operation of'' and includes the concepts of ''hindering'' and ''impeding.'' Thus, the threshold for this component is quite low. If a carrier makes a modification to its preexistent equipment that in any way hampers the unobtrusive delivery of lawfully authorized intercepted communications or reasonably available call-identifying information, the fourth component will be satisfied.

The FBI has incorporated one exception into this component based upon industry comments. In response to the NPRM proposed definition, some commenters suggested that the FBI include an intent element in the final definition. They suggested that a ''significant upgrade'' should only occur when a carrier ''knowingly'' makes a change that impedes law enforcement's ability to conduct lawfully authorized electronic surveillance. The FBI believes that the insertion of a subjective intent element into the definition would essentially render it useless. However, the FBI has concluded that an objective notice standard could be inserted into this component which would have nearly the same effect. There are basically three ways that a carrier can ''learn'' that a modification made to its preexistent equipment is hampering the unobtrusive delivery of lawfully authorized intercepted communications or reasonably available call-identifying information to law enforcement. First, the carrier could discover the problem on its own; second, law enforcement could notify the carrier during its attempt to initiate a lawfully authorized electronic surveillance; or third, law enforcement could notify the carrier during the course of conducting lawfully authorized electronic surveillance. Once the carrier learns of the problem, it can either choose to correct the problem at its own expense in a reasonable period of time, or it can choose to do nothing. If the carrier chooses the first option, it has removed the hindrance and a ''significant upgrade'' has not occurred. Otherwise, there is the possibility that the modification may amount to a ''significant upgrade'' provided that all the other conditions of the proposed definition are met.

The SNPRM proposed definition does not attempt to define the term ''reasonable period of time.'' One example following the proposed definition indicates that 24 hours is a reasonable period of time when a law enforcement agency that is attempting to initiate a lawfully authorized electronic surveillance brings the problem to the carrier's attention. Another example indicates that 72 hours is a reasonable period of time when the carrier detects the problem on its own. These examples are not intended to set minimum or maximum thresholds. The FBI understands that the actual reasonable period of time will have to be negotiated between the carrier and the law enforcement agency. In the case of a pending lawfully authorized electronic surveillance, a court may have to determine what period of time is reasonable if the parties cannot agree.

The fifth component is the determination of ''when'' a ''significant upgrade'' has occurred. The NPRM definition proposed using the October 25, 1998, assistance capability requirements compliance deadline [5] for determining whether a ''significant upgrade'' has occurred. Upon further review, the FBI has decided to abandon any use of the compliance deadline in the SNPRM proposed definition. The FBI made this decision for three reasons.

First, the use of the assistance capability compliance deadline in conjunction with the ''significant upgrade'' concept is somewhat inconsistent with CALEA's statutory scheme. The compliance deadline is an event that only applies to post-equipment, that is equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.[6] Compare 47 U.S.C. 1002(a) & 1001(b) note with 47 U.S.C. 1007(c)(3) & 1008(d). As discussed previously, the concept of ''significant upgrade'' only applies to preexistent equipment. Thus, it would be inappropriate to use the compliance deadline for determining

[5] The FCC extended the assistance capability requirements deadline for J–STD–025 until June 30, 2000.

[6] The only post-equipment not subject to the compliance deadline is that post-equipment for which the FCC has made a determination that compliance is not reasonably achievable and the Attorney General has not agreed to pay the additional reasonable costs of making such equipment compliant with the assistance capability requirements. 47 U.S.C. 1008(b)(2).

when a ''significant upgrade'' has occurred.

Second, the compliance deadline is subject to extension under CALEA Section 107(c), which makes it a moving target. The FBI has designed a flexible deployment plan to assist telecommunications carriers in obtaining Section 107(c) extensions from the FCC in exchange for making modifications to their deployment schedules to account for law enforcement electronic surveillance priorities. Rather than one compliance deadline, the flexible deployment plan will result in numerous, equipment-specific compliance deadlines, which would make the tracking of ''significantly upgraded'' equipment too burdensome for carriers and the FBI.

Third, a careful review of the CALEA statutory language and the industry comments to the NPRM has revealed a much better alternative to using the compliance deadline as the ''when'' component for determining when a ''significant upgrade'' has occurred. This alternative is that preexistent equipment will not be considered to be ''significantly upgraded'' unless the improvement occurred after technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, at the time the improvement was made. This component is derived directly from CALEA's statutory language and is another key narrowing factor in the proposed definition that makes a particular upgrade ''significant.''

The term ''significantly upgraded'' appears only twice in the CALEA statute. The first mention of the term appears in Section 108(c)(3) which provides that an enforcement order cannot be issued against a carrier unless: (1) The Attorney General has agreed to pay the reasonable costs directly associated with bringing the carrier's preexistent equipment into compliance with the assistance capability requirements; or (2) the carrier's preexistent equipment is replaced or ''significantly upgraded.'' The second place that the term ''significantly upgraded'' appears in CALEA is Section 109(d), which provides that preexistent equipment will be ''considered in compliance'' with the assistance capability requirements if the carrier submits a request for payment in accordance with the Cost Recovery Regulations and the Attorney General does not agree to pay the reasonable costs of making the modifications necessary to bring the preexistent equipment into compliance. Such preexistent equipment loses its ''considered to be in compliance'' status if it is replaced or ''significantly upgraded.'' 47 U.S.C. 1008(d).

One feature that Section 108(c)(3) and Section 109(d) share is that before either provision can take effect, technology compliant with the assistance capability requirements must have been reasonably available, or should have been reasonably available, for installation or deployment by a carrier. This feature is explicitly stated in Section 108 and assumed in Section 109.

Section 108 specifically requires that before an enforcement order can be issued, the court must make a finding that compliance with the requirements of CALEA would have been reasonably achievable through the application of available technology if timely action had been taken. 47 U.S.C. 1007(a)(2). The language ''if timely action had been taken'' is the statutory support for the inclusion of the ''or should have been reasonably available'' language contained in the proposed definition.

Section 109(d) is a reimbursement provision that permits the Attorney General to reimburse a carrier for preexistent equipment if the carrier has submitted a request for payment in accordance with the CALEA Cost Recovery Regulations. 47 U.S.C. 1008(d). The assumption that equipment compliant with the assistance capability requirements is available for installation or deployment within a carrier's network is implied within the context of this subsection. If such equipment was not reasonably available to the carrier, it would be difficult for a carrier to estimate the costs necessary to make the appropriate modifications. Consequently, the carrier might not be able to submit a cost estimate submission to the FBI in accordance with the Cost Recovery Regulations.

If the reasonable availability of CALEA-compliant technology is a prerequisite to either Section 108(c)(3) or Section 109(d), common sense would seem to dictate that it must also be a prerequisite to preexistent equipment being ''significantly upgraded.'' Thus, the ''when'' component of the SNPRM definition must be that preexistent equipment will not be considered to be ''significantly upgraded'' unless the improvement occurred after technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, at the time the improvement was made.

The last thing that needs to be explained regarding this component is the meaning of the phrase, ''should have been reasonably available.'' As stated previously, this language is based on the statutory language in Section 108(a)(2) which requires a court to determine whether compliance with the requirements of CALEA is reasonably achievable through the application of available technology or would have been reasonably achievable if timely action had been taken. The FCC determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The FBI considers this determination to be very reasonable since it established a deadline that was more than five years from the date of CALEA's enactment. In general, the FBI intends to use the December 31, 1999, date as the cutoff for determining whether compliant technology should have been reasonably available for the purposes of the proposed definition, unless a carrier can present a very compelling case that certain technology could not have been reasonably available by that date. For this reason, the FBI chose to use the ''should have been reasonably available'' language of the proposed definition rather than inserting the December 31, 1999, cutoff date directly into the text of the definition. The FBI feels that this will allow carriers and law enforcement some degree of flexibility in resolving those rare circumstances where compliant technology could not have been available by the December 31, 1999, cutoff date.

The sixth component of the SNPRM proposed definition consists of the determination of when a particular modification will not be considered a ''significant upgrade.'' The NPRM definition contained an exclusion for modifications made as the result of a federal or state statutory mandate.[7] Based upon comments from the industry and for the sake of completeness, this exclusion has been extended to modifications mandated by federal or state statute, rule, regulation, or administrative order.

The seventh and final component of the SNPRM proposed definition explains the status of preexistent equipment after it has been ''significantly upgraded.'' Several commenters asked for the definition to clarify this point. Consequently, the SNPRM proposed definition explains

[7] Subsection (b) of the NPRM proposed definition inadvertently omitted the word ''state'' when referring to statutory mandates. See 63 FR 23230.

that preexistent equipment which has been ''significantly upgraded'' is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995. Essentially, once preexistent equipment has been ''significantly upgraded,'' it becomes post-equipment.

This conclusion is supported by CALEA's statutory language. CALEA divides the universe of telecommunications equipment, facilities, and services into two subsets: preexistent equipment and post-equipment. There are a couple of major distinctions between the two subsets. A carrier's preexistent equipment is eligible for full reimbursement of the reasonable costs necessary to make the preexistent equipment compliant with the assistance capability requirements. 47 U.S.C. 1008(a). A carrier's post-equipment is only eligible for partial reimbursement if the FCC determines that compliance with the assistance capability requirements is not reasonably achievable for that particular post-equipment. 47 U.S.C. 1008(b). Another important distinction between the two subsets is that post-equipment is generally subject to the compliance deadline for the assistance capability requirements,[8] while preexistent equipment does not need to comply with the deadline. Compare 47 U.S.C. 1002(a) & 1001(b) note with 47 U.S.C. 1007(c)(3) & 1008(d). CALEA makes it clear that once preexistent equipment has been ''significantly upgraded'' it loses the protection and reimbursement status afforded to preexistent equipment. 47 U.S.C. 1007(c)(3) & 1008(d). Since ''significantly upgraded'' equipment no longer belongs to the preexistent equipment subset, it can only belong to the remaining post-equipment subset.

The third step in the developmental process is the combination of these seven components in a manner consistent with the ordinary dictionary meaning of the term ''significantly upgraded or otherwise undergoes major modification.'' The following proposed definition is the result of that effort:

Significantly upgraded or otherwise undergoes major modification means a telecommunications carrier has activated, added, or improved a capability, feature, or service of its preexistent equipment that:

(1) hampers the carrier's ability to unobtrusively deliver lawfully authorized intercepted communications and/or reasonably available call-identifying information to law enforcement in accordance with the assistance capability requirements of 47 U.S.C. '' 1002 (assistance capability requirements), in a manner that the carrier does not correct at its own expense within a reasonable period of time; and

(2) occurs after technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available for installation or deployment by a carrier at the time the improvement was made; and

(3) was not mandated by a federal or state statute, rule, regulation, or administrative order.

Preexistent equipment is equipment, facilities, or services that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and was installed or deployed within the carrier's network on or before January 1, 1995. Preexistent equipment that has been ''significantly upgraded or otherwise undergoes major modification'' is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.

c. Example Summaries

The last step in the developmental process was the creation of examples to help illustrate the practical operation of the definition. The FBI proposes to add 15 examples following the text of the SNPRM proposed definition of ''significantly upgraded or otherwise undergoes major modification.'' The actual language of the examples is provided in the regulatory text section of this SNPRM. This section summarizes the examples.

The first example explains that preexistent equipment is not ''significantly upgraded'' when a carrier makes a modification that affects capacity, because the ''significantly upgraded'' definition is tied to the assistance capability requirements, and has no bearing on capacity requirements.

The second example illustrates the requirement that preexistent equipment must be used by a carrier to provide its customers with the ability to originate, terminate, or direct communications.

The third and fourth examples demonstrate situations where a carrier modifies a portion of its network architecture from circuit-mode to packet-mode switching technology.

The fifth example involves a carrier modifying its preexistent equipment to improve network efficiencies and make existing services easier for customers to use in a manner that did not amount to a ''significant upgrade.''

The sixth example involves a carrier making an improvement to correct Y2K deficiencies that did not amount to a ''significant upgrade.''

The seventh example explains that a modification causing law enforcement to relocate its point of intercept from the local loop to the carrier's central office was not a ''significant upgrade.''

The eighth example illustrates the circumstances under which the activation of a dormant call forwarding feature by a telecommunications carrier amounts to a ''significant upgrade.''

The ninth example illustrates how a generic software upgrade can amount to a ''significant upgrade.''

The tenth example demonstrates a situation where an improvement had no adverse effect on the delivery of intercepted communications to law enforcement, but did result in the intermittent garbling of reasonably available call-identifying information. This hindrance amounted to a ''significant upgrade'' in the absence of the carrier taking action to correct the problem.

The eleventh example illustrates a carrier detecting and then correcting a problem caused by a modification made to its preexistent equipment.

The twelfth example illustrates a carrier correcting a problem caused by a modification made to its preexistent equipment after being notified by law enforcement.

The thirteenth example demonstrates the consequences of a carrier deciding not to correct a problem caused by an earlier modification to its preexistent equipment.

The fourteenth example demonstrates the effect of modifications mandated by federal statutes and regulations.

The final example explains the effect of a ''significant upgrade'' on preexistent equipment.

d. Conclusion

The proposed definition of ''significantly upgraded or otherwise undergoes major modification'' and the 15 examples are consistent with the language and intent of both the statute and the CALEA Cost Recovery Regulations. The proposed definition strikes an appropriate balance between the telecommunications industry's need to introduce new technologies, features, and services, and its obligation under CALEA to unobtrusively deliver intercepted communications and reasonably available call-identifying information to law enforcement.

2. Replaced

The term ''replaced'' can be found in Section 100.11(a)(1) of the CALEA Cost

[8] The only post-equipment not subject to the compliance deadline is that post-equipment for which the FCC has made a determination that compliance is not reasonably achievable and the Attorney General has not agreed to pay the additional reasonable costs of making such equipment compliant with the assistance capability requirements. 47 U.S.C. 1008(b)(2).

Recovery Regulations. Commenters responding to the ANPRM and the NPRM have urged the FBI to define the term ''replaced'' in addition to the term ''significant upgrade.'' Given the importance of this term in determining reimbursement eligibility for equipment, facilities, or services installed or deployed on or before January 1, 1995, the FBI has decided to define the term ''replaced'' in this rulemaking proceeding. This SNPRM proposes to amend Section 100.10 of the CALEA Cost Recovery Regulations by adding a definition for the term ''replaced'' and twelve examples of the definition's operation.

a. Background

The FBI's decision to define the term ''replaced'' is a reversal of the position that it took in the NPRM. In the NPRM, the FBI stated that it did not intend to define the term ''replaced,'' because its meaning is both clear and common. 63 FR 23234. As the FBI revised its definition of the term ''significantly upgraded,'' it became clear that several components of the revised definition could be incorporated into a definition for the term ''replaced.'' After conducting a preliminary analysis, the FBI concluded that defining the term ''replaced'' was in the best interests of the law enforcement community and the telecommunications industry.

In developing the definition of the term ''replaced'' the FBI considered all comments on the subject submitted in response to the ANPRM and NPRM. Since the FBI stated categorically in the NPRM that it had no intention of defining the term, most NPRM commenters did not address the issue, other than to request the FBI reconsider its position.

Four commenters, AirTouch Communications, AT&T Wireless Services, Inc., the Cellular Telephone Industry Association, and the Telecommunications Industry Association, submitted suggested definitions in response to the FBI's ANPRM. Three of the commenters supported language that defined the term ''replaced'' as meaning the installation of equipment, facilities, or services which became commercially available after January 1, 1995, and which are not upgrades or modifications of previously deployed equipment, facilities, or services.[9] The FBI declined to adopt this definition because it does not address all the elements needed to make a determination of whether a telecommunications carrier replaced its preexistent equipment.

The fourth commenter suggested defining ''replaced'' as meaning the total removal and replacement of equipment by an all new system at that location serving the same customers. One problem with this suggested definition is that a replacement occurs only when preexistent equipment is replaced by ''an all new system.'' Since a carrier might choose to substitute new or used equipment in place of its preexistent equipment, this limitation is inappropriate. Otherwise, the FBI believes that the spirit of this suggested definition has been incorporated into the SNPRM proposed definition.

In many respects, the industry comments responding to the ANPRM and NPRM regarding the ''significantly upgraded'' definition were also very useful in developing the ''replaced'' definition. The FBI relied upon these comments and the analytical approach used in the development of the ''significantly upgraded'' definition to create a definition for the term ''replaced'' that is consistent with CALEA's statutory language. The next section describes the process that the FBI used to develop the SNPRM proposed definition.

b. The SNPRM Proposed Definition

The FBI's primary goal in developing the proposed definition for the term ''replaced'' was identical to that for the proposed definition of ''significantly upgraded,'' that is, to create a self-explanatory definition consistent with CALEA's statutory language. The definitional development of the term ''replaced'' followed a route similar to that used for the ''significantly upgraded'' proposed definition. The FBI began the process of developing the proposed definition of the term ''replaced'' by examining its dictionary definition. The verb ''replace'' means ''to take the place of [especially] as a substitute or successor.'' The next step in the definitional process was the determination of what components could be derived from the CALEA statutory language and incorporated into this simple dictionary definition.

The FBI has determined that there are at least seven components that need to be incorporated into the SNPRM proposed definition of the term ''replaced.'' The first component is the determination of what can be ''replaced.'' According to CALEA, the only item capable of being ''replaced'' is preexistent equipment, that is equipment, facilities, or services that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and was installed or deployed within a carrier's network on or before January 1, 1995. See 47 U.S.C. 1002(a), 1007(c)(3), and 1008(a) & (d). This explanation of preexistent equipment is included within the SNPRM proposed definition.

The second component is the determination of what is replacing the preexistent equipment. The FBI has elected to identify this component as ''replacement equipment.'' Like preexistent equipment, replacement equipment must also be used by a telecommunications carrier to provide its customers or subscribers with the ability to originate, terminate, or direct communications. See 47 U.S.C. 1002(a). Unlike preexistent equipment, there is no requirement that the equipment, facilities, or services that make up replacement equipment be installed or deployed in a carrier's network on or before January 1, 1995. Replacement equipment can be either new or used. It is also possible that, in some instances, the replacement equipment might itself be preexistent equipment. Putting these ideas together, the FBI proposes that replacement equipment is equipment, facilities, or services, whether new or used, that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and is installed or deployed within the carrier's network. This explanation of replacement equipment is included within the SNPRM proposed definition.

The third component is the determination of what sort of action will amount to a replacement of preexistent equipment. For this determination, the FBI simply relied upon the dictionary definition of the verb ''replaced.'' Thus, the action needed for a replacement occurs when replacement equipment is substituted in place of preexistent equipment.

The fourth component is the determination of who is responsible for the consequences of substituting replacement equipment in place of preexistent equipment. The statutory language is clear that a replacement can only be performed on a telecommunications carrier's preexistent equipment. See 47 U.S.C. 1007(c)(3) & 1008(d). For the purposes of the proposed definition, the telecommunications carrier bears the ultimate responsibility for a substitution amounting to a replacement of its preexistent equipment, regardless of whether the carrier or some other party, for example, a telecommunications

[9] One of these three commenter's definitions contained a typographical error, mistakenly substituting the word ''before'' where the other commenters had used the word ''after.'' This minor error does not affect the analysis of the suggested definition.

equipment manufacturer, actually installed or deployed the replacement equipment into the carrier's network.

The fifth component is the determination of ''when'' a replacement has occurred. Learning from its analysis of the ''significantly upgraded'' definition, the FBI has determined that preexistent equipment will be considered ''replaced'' only when the substitution occurred after technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, for installation or deployment by the telecommunications carrier at the time the substitution was made. As discussed previously during the detailed analysis of the ''significantly upgraded'' fifth component, this component is required by the statutory language of CALEA. See 47 U.S.C. 1007(c)(3) & 1008(d). Also, the ''should have been reasonably available'' language is based on the statutory language of Section 108(a)(2) which requires a court to determine whether compliance with the requirements of CALEA is reasonably achievable through the application of available technology or would have been reasonably achievable if timely action had been taken.

The last aspect of this component is the FBI's interpretation of the phrase, ''should have been reasonably available.'' As discussed previously, the FCC determined that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. In general, the FBI intends to use this December 31, 1999, date as the cutoff for determining whether compliant technology should have been reasonably available for the purposes of the proposed definition of ''replaced,'' unless a carrier can present a very compelling case that certain technology could not have been reasonably available by that date. For this reason, the FBI chose to use the ''should have been reasonably available'' language of the proposed definition rather than inserting the December 31, 1999, cutoff date directly into the text of the definition. The FBI feels that this will allow carriers and law enforcement some degree of flexibility in resolving those rare circumstances where compliant technology could not have been available by the December 31, 1999, cutoff date.

The sixth component of the SNPRM proposed definition explains the status of preexistent equipment after it has been ''replaced.'' This component is identical to the seventh component of the ''significantly upgraded'' SNPRM proposed definition, and is based upon the reasoning discussed above. Once preexistent equipment has been ''replaced,'' it is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.

The seventh and final component of the SNPRM proposed definition explains the status of replacement equipment after it is substituted in place of preexistent equipment. The status is dependent upon whether the replacement equipment is itself preexistent equipment that has not been ''replaced,'' or simply new or used equipment, facilities, or services installed or deployed in a carrier's network after January 1, 1995. If the replacement equipment is itself preexistent equipment that has not been ''replaced,'' and is substituted in place of other preexistent equipment, the replacement equipment retains its reimbursement eligibility as preexistent equipment. The FBI has included this explanation only for the sake of completeness and recognizes that this provision would rarely, if ever, be triggered by a carrier's actions in the ordinary course of business. This is the only exception to the general rule that replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.

The third step in the developmental process was to combine these seven components in a manner consistent with the ordinary dictionary meaning of the term ''replaced.'' The following proposed definition is the result of that effort:

> Replaced means that a telecommunications carrier substituted replacement equipment in place of preexistent equipment after technology compliant with the assistance capability requirements of 47 U.S.C. 1002 (assistance capability requirements) was reasonably available, or should have been reasonably available, for installation or deployment by a carrier at the time the substitution was made. Replacement equipment is equipment, facilities, or services, whether new or used, that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and is installed or deployed within the carrier's network. Preexistent equipment is equipment, facilities, or services that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and was installed or deployed within the carrier's network on or before January 1, 1995. Preexistent equipment that has been ''replaced'' is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995. When replacement equipment is itself preexistent equipment that has not been ''replaced,'' and is substituted in place of other preexistent equipment, the replacement equipment retains its reimbursement eligibility as preexistent equipment. Otherwise, replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.

c. Example Summaries

The final step in the developmental process was the creation of examples to help illustrate the practical operation of the ''replaced'' definition. The FBI proposes to add twelve examples following the text of the SNPRM proposed definition of ''replaced.'' The actual language of the examples is provided in the regulatory text section of this SNPRM. This section summarizes the examples.

The first example explains that repairs made to preexistent equipment do not amount to a ''replacement'' so long as the preexistent equipment remains in place within the carrier's network.

The second example illustrates the requirement that the preexistent equipment or replacement equipment must be used by a carrier to provide its customers or subscribers with the ability to originate, terminate, or direct communications.

The third example addresses a situation when new equipment is added to a central office, but there is no substitution of replacement equipment in place of preexistent equipment.

The fourth example explains the effect of replacing damaged preexistent equipment.

The fifth and sixth examples explain how the movement of equipment within a carrier's network can affect whether preexistent equipment is considered to be ''replaced.''

The seventh and eighth examples explain the effect of replacing preexistent equipment with other preexistent equipment.

The ninth example explains the effect of a sale of preexistent equipment when the preexistent equipment remains in place.

The tenth example explains the effect of a sale of preexistent equipment when the preexistent equipment is removed and installed in another carrier's network.

The eleventh example illustrates the replacement of analog equipment with digital equipment.

The final example illustrates the replacement of circuit-mode equipment with packet-mode equipment.

d. Conclusion

The proposed definition of ''replaced'' is consistent with the language and intent of both the statute and the CALEA Cost Recovery Regulations. It ensures that the amount of preexistent equipment remains relatively static until technology compliant with the assistance capability requirements is reasonably available, or should have been reasonably available, for installation or deployment by a carrier at the time a substitution is made. The proposed definition strikes an appropriate balance between the telecommunications industry's need to introduce new technologies, features, and services, and its obligation under CALEA to unobtrusively deliver intercepted communications and reasonably available call-identifying information to law enforcement.

F. Discussion of Comments Received in Response to Notice of Proposed Rulemaking

In response to the NPRM, the FBI received comments from ten representatives of the telecommunications industry. All comments have been considered in preparing this SNPRM. In developing the definitions contained in this SNPRM, the FBI has also relied on the input of other governmental agencies and telecommunications industry experts. Significant comments received in response to the NPRM and any significant changes are discussed below.

1. Definition of ''Installed or Deployed''

Several commenters criticized the definition of the term ''installed or deployed'' contained in Section 100.10 of the CALEA Cost Recovery Regulations and asked for a revision of the term. These criticisms have no bearing on this particular rulemaking proceeding. Moreover, the term ''installed or deployed'' as defined by the FBI in the CALEA Cost Recovery Regulations was recently upheld by the United States District Court for the District of Columbia. *USTA* v. *FBI,* No. 98–2010 (D.D.C. August 28, 2000).

2. Definition of ''Replaced''

Some of the commenters who responded to the ANPRM requested that the FBI define the term ''replaced.'' In the NPRM, the FBI indicated that it did not intend to define ''replaced.'' In their comments on the NPRM, some commenters restated that the term ''replaced'' should be defined. Upon further consideration, the FBI has decided to publish a proposed definition of the term in this SNPRM.

3. Federal and State Mandates

Several commenters pointed out that the text of subsections 100.22(a) and (b) of the NPRM proposed definition published in the **Federal Register** was inconsistent with regard to federal and state mandates. See 63 FR 23231 at 23239. Those commenters posited, correctly, that this inconsistency was the result of an editorial oversight. When a telecommunications carrier makes an improvement to its preexistent equipment mandated by a federal or state statute, rule, regulation, or administrative order, the SNPRM proposed definition provides that equipment undergoing such an improvement will not be considered to have been ''significantly upgraded.''

4. Status of ''Significantly Upgraded'' Preexistent Equipment

A couple of commenters stated that the CALEA Cost Recovery Regulations should clarify that preexistent equipment which is ''significantly upgraded'' is still eligible for reimbursement under the ''reasonable achievability'' provisions of Section 109(b). The FBI incorporated this suggestion into the SNPRM proposed definitions of ''replaced'' and ''significantly upgraded.'' If preexistent equipment is replaced or ''significantly upgraded,'' it is the equivalent of post-equipment, that is, equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995. This means that once preexistent equipment has been replaced or ''significantly upgraded'' it is eligible for the same procedural protections afforded to post-equipment, including the possibility of obtaining limited reimbursement under Section 109(b). On the other hand, such preexistent equipment must also comply with all of the requirements that CALEA imposes upon post-equipment.

5. Prohibition on the Development and Deployment of Advanced Technologies

Section 103(b)(1)(B) states that no law enforcement agency may prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communications service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services. Some commenters have asserted that the NPRM proposed definition is inconsistent with this statutory requirement and may impede the development and deployment of new technologies contrary to the intent of CALEA. The FBI disagrees with this assertion.

Nothing in either the NPRM proposed definition or the SNPRM proposed definition of ''significantly upgraded'' prohibits the development or deployment of advanced technologies. The decision to develop new technologies is a matter within the sound business discretion of telecommunications equipment manufacturers. Similarly, a carrier's decisions to deploy new technologies or upgrade preexistent equipment with advanced technologies are matters within its sound business discretion. CALEA envisions that manufacturers will incorporate the assistance capability requirements into their newly developed equipment, regardless of whether that new technology will eventually be used by a carrier to modify or upgrade its preexistent equipment. The purpose of the ''replaced or significantly upgraded, or otherwise undergoes major modification'' language in Section 109(d) is to encourage carriers to incorporate the assistance capability requirements into business decisions regarding new or preexistent equipment.

6. Public Safety Approach Is Inconsistent With CALEA

One commenter asserted that the FBI's public safety approach to defining the term ''significantly upgraded'' is inconsistent with CALEA. Contrary to this assertion, the FBI believes that CALEA is, first and foremost, a public safety statute. The FBI bases this conclusion on the statutory language of the statute and its legislative history. The term ''public safety'' actually appears in the text of CALEA. In fact, the first factor that the FCC must consider in making a reasonably achievable determination is ''the effect on public safety and national security.'' 47 U.S.C. 1008(b)(1)(A). Perhaps the clearest statement that CALEA is a public safety statute can be found in its legislative history which states that the purpose of the law ''is to preserve the government's ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies * * * while protecting the privacy of communications and without impeding the introduction of new technologies, features or services.'' H.R. Rep. No. 103–827, pt. 1, at 9 (1994). The legislative history notes that ''the question of whether companies have any obligation to design their systems such that they do not impede law enforcement interception has never been adjudicated'' and goes on to state that ''the purpose of the legislation is to further define the industry duty to

cooperate and to establish procedures based on public accountability and industry standards-setting.'' Id. at 13–14. Given this language, the FBI believes that defining the term ''significantly upgraded'' in terms of pubic safety is entirely consistent with the intent of CALEA.

7. Meaning of ''Impedes''

Several commenters expressed their concern that the NPRM proposed definition did not adequately explain the meaning of the term ''impedes.'' Some commenters stated that the focus of the term should be on the assistance capability requirements rather than on law enforcement's ability to conduct electronic surveillance. One commenter asserted that the term should only include modifications that ''block'' or ''prevent'' electronic surveillance. Another commenter requested the FBI to provide examples of how electronic surveillance could be impeded. The FBI has addressed these concerns in the SNPRM proposed definition.

The NPRM proposed definition focused on modifications that impede law enforcement's ability to conduct lawfully authorized electronic surveillance. Some commenters stated that the focus of the term ''impedes'' should instead be on how a particular modification affects the assistance capability requirements. The FBI agrees with this statement and has incorporated the concept into the SNPRM proposed definition. The focus of CALEA Section 103 is not so much on law enforcement's ability to conduct lawfully authorized electronic surveillance, but rather on a telecommunications carrier's duty to unobtrusively deliver lawfully authorized intercepted communications and reasonably available call-identifying information to law enforcement in accordance with the assistance capability requirements. See 47 U.S.C. 1002(a). This subtle shift in focus has the added advantage of providing better guidance to carriers about the kinds of hindrances that might amount to a ''significant upgrade.''

The FBI disagrees with the assertion that the word ''impedes'' is limited to those modifications that ''block'' or ''prevent'' electronic surveillance. The verb ''impede'' means ''to interfere with or slow the progress of.'' There are actions short of blocking or preventing that can also interfere with or slow the delivery of intercepted communications or reasonably available call-identifying information to law enforcement. For example, modifications that garble or only allow for the intermittent delivery of intercepted communications or reasonably available call-identifying information to law enforcement can be just as devastating to an investigation as when electronic surveillance is blocked or prevented.

To ensure that the SNPRM proposed definition of ''significantly upgraded'' is not limited to modifications that block or prevent electronic surveillance, the FBI has decided to use the term ''hampers'' in lieu of the word ''impedes.'' The verb ''hamper'' means ''to interfere with the operation of'' and includes the concepts of ''impeding'' and ''hindering.'' In this respect, the term ''hampers'' is broader and slightly more precise than the term ''impedes.'' The term ''hampers'' appropriately establishes a fairly low threshold for improvements or modifications that interfere with the carrier's ability to deliver intercepted communications and reasonably available call-identifying information to law enforcement.

In response to this last concern, six of the 15 examples following the SNPRM proposed definition of ''significantly upgraded or otherwise undergoes major modification'' illustrate hampering and non-hampering modifications. See Examples 5–10.

8. Unintended Impediments

A couple of NPRM commenters suggested that the definition of ''significant upgrade'' should contain a specific intent element. Specifically, one commenter suggested that the word ''knowingly'' be added before the phrase ''impedes law enforcement's ability to conduct lawfully authorized electronic surveillance.'' The FBI recognized the merit of this suggestion, but was wary of injecting a subjective intent element into the definition out of concern that it would make ''significant upgrade'' determinations very difficult. As noted previously, the FBI has included an objective notice standard into the SNPRM proposed definition that allows a telecommunications carrier to correct an unintended impediment at its own expense within a reasonable period of time once the carrier learned that its improvement was hampering the unobtrusive delivery of lawfully authorized intercepted communications and/or reasonably available call-identifying information to law enforcement in accordance with the assistance capability requirements.

9. October 25, 1998, Is an Arbitrary Date

Several commenters argued that the October 25, 1998 date at which the NPRM proposed definition was bifurcated was arbitrary in that CALEA-compliant solutions would not be available by that date, thereby obviating the government's rationale for bifurcating the definition in the first place. The FBI disagrees that the October compliance date was an arbitrary date. The purpose of using the October compliance date was to protect carriers by making sure that CALEA-compliant solutions were available prior to making modifications that would amount to a ''significant upgrade.''

The FBI considered improving the NPRM proposed definition by substituting the words ''capability compliance date'' in place of the date ''October 25, 1998'' to address possible extensions granted by the FCC. However, upon further examination of the CALEA statutory language, the FBI determined that the capability compliance date was really a concept that applied to post-equipment. For the reasons stated earlier, the compliance date concept was dropped from the SNPRM proposed definition. In its place, the FBI inserted a requirement into the proposed definition that a ''significant upgrade'' could not occur unless technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available for installation or deployment at the time a carrier made an improvement to its preexistent equipment. Thus, any industry concerns regarding the capability compliance date have been rendered moot.

10. Availability of CALEA-Complaint Technology

Nearly every commenter asserted that a pre-condition for the occurrence of a ''significant upgrade'' was the availability of CALEA-compliant technology. These commenters argued persuasively that carriers could not be expected to include the CALEA solution along with any ''significant upgrade'' if such a solution did not exist.

In response to these comments and careful review of the CALEA statutory language, the FBI decided to incorporate a requirement into the proposed definition that a ''significant upgrade'' could not occur unless technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available for installation or deployment by a carrier at the time it made an improvement to its preexistent equipment. As discussed above, the FBI intends to rely on the FCC's determination that December 31, 1999, was the date by which manufacturers should have been able to provide telecommunications carriers with CALEA-compliant equipment. The FBI recognizes that there may be some

limited circumstances where a carrier can make a compelling case that certain technology was not reasonably available by the December 31, 1999, date. The language of the SNPRM proposed definition allows carriers and law enforcement some degree of flexibility in resolving these sorts of issues.

11. Change From Analog to Digital Switching

In the NPRM the FBI provided an example of a modification ''about which no argument can be made'' regarding its significance, i.e., a change from analog to digital switching. 63 FR 23234. As it turns out, this example was a poor choice for illustrating a change that ''fundamentally alters the nature or type of the existing telecommunications equipment,'' because the FBI is not aware of any instance where a carrier has made modifications to an analog switch that converted it into a digital switch. Rather, carriers typically ''replace'' analog switches with digital switches. Thus, a change from analog to digital switching cannot typically be a ''significant upgrade'' because it does not involve activation, addition, or improvement to preexistent equipment's capabilities, features, or services.

12. Just Compensation

One commenter claims that the CALEA Cost Recovery Regulations are unfairly restrictive, requiring carriers to incur costs for the benefit of society as a whole without just compensation. As such, this commenter broadly asserts that the Just Compensation Clause of the Fifth Amendment governs the payment of such ''reasonable costs'' and that the final decision on reimbursement should be judicial. The FBI disagrees and asserts that the CALEA Cost Recovery Regulations do not implicate the protections of the Fifth Amendment.

The Fifth Amendment provides that no ''private property shall be taken for public use without just compensation.'' Takings claims can fall into two separate categories: (1) Physical takings which result from physical invasions of a property owner's land; and (2) regulatory takings ''where regulation denies all economically beneficial or productive use of land.'' *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Since the CALEA Cost Recovery Regulations do not authorize a physical intrusion upon private property or authorize others to do so, a physical taking analysis is unnecessary. *See Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1275 (9th Cir. 1986).

An examination of the CALEA Cost Recovery Regulations under a regulatory taking analysis reveals that the operation of the ''significantly upgraded'' definition does not amount to a taking for the purposes of the Fifth Amendment. Regulatory taking cases arise when the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. *Hall*, 833 F.2d at 1275. In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), the Supreme Court articulated three factors to consider in determining whether there has been a regulatory taking. These factors are: (1) The character of the government action, (2) the economic impact of the action upon the property owner; and (3) the extent to which the regulation has interfered with the property owner's distinct investment-backed expectations. In *Penn Central* the Supreme Court applied these factors and held that there was no regulatory taking when New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal, despite the drastic diminution in the value and usefulness of Penn Central's property.

The FBI previously analyzed the *Penn Central* factors and concluded that the NPRM proposed definition did not amount to a regulatory taking.[10] Reapplying these factors to the SNPRM proposed definition of ''significantly upgraded'' yields the same conclusion. First, the FBI's proposed definition of this term in its CALEA Cost Recovery Regulations is an appropriate exercise of its authority under the statute. See 47 U.S.C. 1008(e). The proposed definition does not deny any telecommunications carrier access to its property, nor does it prevent a carrier from using its equipment as it sees fit. The proposed definition merely allows law enforcement and telecommunications carriers the ability to determine when, if ever, certain preexistent equipment becomes post equipment by virtue of having been ''significantly upgraded.''

Second, the economic impact of the proposed definition does not amount to a regulatory taking. Preexistent equipment that has been ''significantly upgraded'' has the same status as post-equipment and may still be eligible for some limited reimbursement should the FCC determine that compliance is not reasonably achievable for that particular preexistent equipment. 47 U.S.C. 1008(b). The decision to upgrade preexistent equipment is a matter within the sound business discretion of a telecommunications carrier. Such a decision will typically require an assessment of the economic impact on the carrier. The decision to proceed with an upgrade would seem to indicate that the carrier determined that the benefits of upgrading outweighed the possible costs, e.g., the loss of preexistent equipment reimbursement eligibility.

Third, the SNPRM proposed definition does not meaningfully interfere with a telecommunications carrier's ''reasonable investment-backed expectations.'' The proposed definition will not deprive a carrier of a reasonable return on its preexistent equipment. A telecommunications carrier is not deprived of the use of its preexistent equipment once it has been ''significantly upgraded.'' Furthermore, a carrier can seek an extension of the capability compliance deadline from the FCC for any of its ''significantly upgraded'' preexistent equipment. 47 U.S.C. 1006(c).

G. Regulatory Evaluation

1. Executive Order 12630 (Takings)

The amendments proposed in the SNPRM will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights.'' 53 FR 8859, March 15, 1988.

2. Executive Order 12866 (Regulatory Planning and Review)

The FBI examined these proposed rules in light of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, September 30, 1993), and has found that it constitutes a significant regulatory action only under section 3(f)(4). The FBI has met all the requirements of Executive Order 12866, Section 6, and this SNPRM has been reviewed by the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB).

3. Executive Order 12875 (Enhancing the Intergovernmental Partnership)

This rulemaking proceeding does not create an unfunded mandate upon a state, local, or tribal government and involves amendments to the statutorily required CALEA Cost Recovery Regulations. Accordingly, the requirements of Section 1(a) of Executive Order 12875 do not apply to this rulemaking proceeding.

[10] Implementation of Section 109 of the Communications Assistance for Law Enforcement Act: Proposed Definition of ''Significant Upgrade or Major Modification'' 63 FR at 23234–23235.

4. Executive Order 12988 (Civil Justice Reform)

This proposed rulemaking proceeding meets applicable standards in Sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 5, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

5. Executive Order 13132 (Federalism)

Executive Order 13132, ''Federalism'' (64 FR 43255, August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the need for such actions. The FBI has examined this SNPRM and determined that it does not preempt state law and does not have a substantial direct effect 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. No further action is required by Executive Order 13132.

6. Regulatory Flexibility Act

As discussed in greater detail above, on April 28, 1998, at 63 FR 23231, the FBI published the NPRM on this subject proposing a definition of ''significant upgrade.'' At that time, the FBI determined that the rule ''may have a significant economic impact upon a substantial number of small telephone companies identified by the SBA.'' Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 603 *et seq.*, the NPRM contained an Initial Regulatory Flexibility Analysis (Initial RFA) on the expected significant economic impact on small entities of the proposed definition. The Initial RFA considered all reasonable regulatory alternatives that would minimize the rule's economic burdens for the affected small entities, while achieving the objectives of the statue. See 63 FR 23236–38. The FBI did not receive any comments regarding the Initial RFA.

This SNPRM contains a Further Regulatory Flexibility Analysis (Further RFA) on the expected economic impact on small entities resulting from the proposed minor technical change, and the addition of definitions and examples for the terms ''replaced'' and ''significantly upgraded.'' The topics that are considered by the Further RFA parallel those that were considered in the Initial RFA. The FBI concludes in this Further RFA that these proposed amendments will not have a significant economic impact on a substantial number of small entities.

If you believe that your business, organization, or governmental jurisdiction qualifies as a small entity and that these proposed amendments would have a significant economic impact on it, please submit your comments explaining why you believe it qualifies and how and to what degree these proposed amendments would economically affect it. The comments must be sent to the Telecommunications Contracts and Audit Unit at the address listed in the **ADDRESSES** section.

7. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. 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 the United States-based companies to compete with foreign-based companies in domestic and export markets.

Also, pursuant to Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), the FBI wants to assist small entities in understanding these proposed amendments so that they can better evaluate their effects on them and participate in this rulemaking proceeding. If these amendments would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

8. Paperwork Reduction Act

This SNPRM proposes to amend the CALEA Cost Recovery Regulations. The reporting and record keeping requirements of the CALEA Cost Recovery Regulations have been assigned OMB Control Number 1110–0022, which expires on April 30, 2003.

9. Unfunded Mandates Reform Act

The FBI has examined these proposed rules in light of the Unfunded Mandates Reform Act and has tentatively concluded that these proposed rules 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 (adjusted annually for inflation) in any one year. Therefore, no actions are required under the Unfunded Mandates Reform Act.

10. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 15 U.S.C. 272 note, directs the FBI to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards, (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the FBI to provide Congress, through OMB, explanations when it decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, the FBI is not considering the use of any voluntary consensus standards.

H. Further Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, the FBI has prepared this Further Regulatory Flexibility Analysis (Further RFA) on the possible significant economic impact on small entities by the rules proposed in this supplemental notice of proposed rulemaking (SNPRM). The FBI concludes that these proposed amendments will not have a significant economic impact on a substantial number of small entities. Written public comments are requested on this Further RFA. Comments must be identified as responses to the Further RFA and must be filed by the deadlines for comments on the SNPRM provided in the **DATES** section. The FBI will send a copy of this SNPRM, including the Further RFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with Section 603(a). In addition, this SNPRM and the Further RFA will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rules

This rulemaking proceeding was initiated to obtain comments concerning the FBI's proposed amendments to the CALEA Cost Recovery Regulations. 28 CFR Part 100. Specifically, these amendments would: (1) Make a minor technical change to harmonize the rule's language with CALEA's statutory language; (2) add a definition and examples for the term ''replaced''; and

(3) add a definition and examples for the term ''significantly upgraded or otherwise undergoes major modification.'' These definitions are needed to determine whether a telecommunications carrier's preexistent equipment remains eligible for CALEA Section 109(a) reimbursement under the CALEA Cost Recovery Regulations. The objective of this SNPRM is to define these terms in a manner that strikes an appropriate balance between the telecommunications industry's need to introduce new technologies, features, and services with a telecommunications carrier's obligation under CALEA to unobtrusively deliver intercepted communications and reasonably available call-identifying information to law enforcement.

2. Legal Basis

The proposed action is authorized under the Communications Assistance for Law Enforcement Act, Public Law 103–414, 108 Stat. 4279 (1994), 47 U.S.C. 1008(e).

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply [11]

The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be data published by the FCC in its Trends in Telephone Service report.[12] In this report, the FCC indicated that there are 4,144 interstate carriers.[13] These carriers include local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

The SBA has defined establishments engaged in providing ''Radiotelephone Communications'' and ''Telephone Communications, Except Radiotelephone'' to be small businesses when they have no more than 1,500 employees.[14] Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are subject to CALEA. We have included small incumbent Local Exchange Carriers (LECs) in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope.[15]

a. Total Number of Telephone Companies Affected

The Census Bureau reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[16] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small Incumbent Local Exchange Carriers (ILECs) because they are not ''independently owned and operated.'' For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by the proposed rules, if adopted.

b. Wireline Carriers and Service Providers

The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[17] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[18] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by the proposed rules, if adopted.

c. Local Exchange Carriers

Neither the FCC nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[19] According to the most recent Telecommunications Industry Revenue data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services.[20] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate

[11] All of the estimates contained in this section of the Further RFA are based upon estimates made by the FCC in its Initial RFA regarding its final rule on assessment and collection of regulatory fees for fiscal year 2000, which was published in the **Federal Register** on July 18, 2000. See 65 FR 44576.

[12] FCC, Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

[13] Id.

[14] 13 CFR 121.201, Standard Industrial Classification (SIC) code 4812.

[15] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small business concern,'' which the RFA incorporates into its own definition of ''small business.'' See 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. 13 CFR 121.102(b). In an abundance of caution, the FBI will include small incumbent LECs in this Further RFA.

[16] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1–123 (1995) (1992 Census).

[17] 1992 Economic Census, U.S. Bureau of the Census, at Firm Size 1–123.

[18] 13 CFR 121.201, SIC code 4812.

[19] 13 CFR 121.201, SIC code 4812.

[20] FCC, Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

that fewer than 1,348 providers of local exchange service are small entities or small ILECs that may be affected by the proposed rules, if adopted.

d. Interexchange Carriers

Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[21] According to the most recent Trends in Telephone Service data, 171 carriers reported that they were engaged in the provision of interexchange services.[22] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 171 small entity IXCs that may be affected by the proposed rules, if adopted.

e. Competitive Access Providers

Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to competitive access providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[23] According to the most recent Trends in Telephone Service data, 212 CAP/Competitive Local Exchange Carriers (CLECs) and 10 other LECs reported that they were engaged in the provision of competitive local exchange services.[24] We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 212 small entity CAPs/CLECs and 10 other LECs that may be affected by the proposed rules, if adopted.

f. Operator Service Providers

Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[25] According to the most recent Trends in Telephone Service data, 24 carriers reported that they were engaged in the provision of operator services.[26] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 24 small entity operator service providers that may be affected by the proposed rules, if adopted.

g. Resellers

Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies.[27] According to the most recent Trends in Telephone Service data, 388 toll and 54 local entities reported that they were engaged in the resale of telephone service.[28] We do not have data specifying that the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 388 small toll resellers and 54 small local resellers that may be affected by the proposed rules, if adopted.

h. Fixed Satellite Transmit/Receive Earth Stations

The FCC estimates that there are approximately 2,679 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. Since the FCC does not request nor collect annual revenue information, we are unable to estimate the number of the earth stations that would constitute a small business under the SBA definition.

i. Fixed Satellite Small Transmit/Receive Earth Stations

The FCC estimates that there are approximately 2,679 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. Since the FCC does not request nor collect annual revenue information, we are unable to estimate the number of fixed satellite small transmit/receive earth stations that would constitute a small business under the SBA definition.

j. Fixed Satellite Very Small Aperture Terminal (VSAT) Systems

These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single ''blanket'' application may be filed for a specified number of small antennas and one or more hub stations. The FCC has processed 377 applications. Since the FCC does not request nor collect annual revenue information, we are unable to estimate the number of VSAT systems that would constitute a small business under the SBA definition.

k. Mobile Satellite Earth Stations

According to the FCC, there are 11 mobile satellite earth station licensees. Since the FCC does not request nor collect annual revenue information, we are unable to estimate the number of mobile satellite earth stations that would constitute a small business under the SBA definition.

l. Radio Determination Satellite Earth Stations

According to the FCC, there are four radio determination satellite earth station licensees. Since the FCC does not request nor collect annual revenue information, we are unable to estimate the number of radio determination satellite earth stations that would constitute a small business under the SBA definition.

m. Space Stations (Geostationary)

The FCC's records reveal that there are 64 geostationary space station licensees. Since the FCC does not request nor collect annual revenue information, we are unable to estimate the number of geostationary space stations that would constitute a small business under the SBA definition.

[21] 13 CFR 121.201, SIC code 4812.

[22] FCC, Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

[23] 13 CFR 121.201, SIC code 4812.

[24] FCC, Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

[25] 13 CFR 121.201, SIC code 4812.

[26] FCC, Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

[27] 13 CFR 121.201, SIC code 4812.

[28] FCC, Common Carrier Bureau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

n. Space Stations (Non-Geostationary)

According to the FCC, there are 12 non-geostationary space station licensees, of which only three systems are operational. Since the FCC does not request or collect annual revenue information, we are unable to estimate the number of non-geostationary space stations that would constitute a small business under the SBA definition.

o. Cellular Licensees

Neither the FCC nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[29]; According to the Census Bureau, only twelve radiotelephone firms from a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[30] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. We note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. Also, according to the most recent Telecommunications Industry Revenue data, 808 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.[31] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 808 small cellular service carriers that may be affected by the proposed rules, if adopted.

p. 220 MHZ Radio Service—Phase I Licensees

The 220 MHZ service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. According to the FCC, there are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHZ band. The FCC has not developed a definition of small entities specifically applicable to such incumbent 220 MHZ Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to Radiotelephone Communications companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[32] According to the Census Bureau, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[33] Therefore, if this general ratio continues in 1999 in the context of Phase I 220 MHZ licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

q. 220 MHZ Radio Service—Phase II Licensees

The Phase II 220 MHZ service is a new service, and is subject to spectrum auctions. In its 220 MHZ Third Report and Order, the FCC adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[34] The FCC has defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, the FCC has defined a ''very small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[35] The SBA has approved these definitions.[36] An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[37] Nine hundred and eight (908) licenses were auctioned in three different-sized geographic areas: three Nationwide licenses, 30 Regional Economic Area Group licenses, and 875 Economic Area (EA) licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: one of the Nationwide licenses, 67% of the Regional licenses, and 54% of the EA licenses. As of January 22, 1999, the FCC announced that it was prepared to grant 654 of the Phase II licenses won at auction.[38]

r. Private and Common Carrier Paging

The FCC has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either: (1) An entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[39] At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent Telecommunications Industry Revenue data, 172 carriers reported that they were engaged in the provision of either paging or ''other mobile'' services, which are placed together in the data.[40] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 172 small paging carriers that may be affected by the proposed rules, if adopted. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

s. Mobile Service Carriers

Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted above in the section concerning paging service carriers, the closest applicable definition under the SBA

[29] 13 CFR 121.201, SIC code 4812.

[30] 1992 Census, Series UC92–S–1, at Table 5.

[31] FCC, Common Carrier Burerau, Industry Analysis Division, Trends in Telephone Service, Table 19.3 (March 2000).

[32] 13 CFR 121.201, SIC code 4812.

[33] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92–S–1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992

[34] 220 MHz Third Report and Order, 12 FCC Rcd 10943, 11068–70, at paras. 291–295 (1997).

[35] 220 MHz Third Report and Order, 12 FCC Rcd 11068–69, para. 291.

[36] *See* Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

[37] See generally Public Notice ''220 MHz Service Auction Closes,'' Report No. WT 98–36 (Wireless Telecom. Bur. Oct. 23, 1998).

[38] Public Notice, ''FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,'' Report No. AUC–18–H, DA No. 99–229 (Wireless Telecom. Bur. Jan. 22, 1999).

[39] 13 CFR 121.201, SIC code 4812.

[40] Trends in Telephone Service, Table 19.3 (February 19, 1999).

rules is that for radiotelephone (wireless) companies, and the most recent Telecommunications Industry Revenue data shows that 172 carriers reported that they were engaged in the provision of either paging or ''other mobile'' services.[41] Consequently, we estimate that there are fewer than 172 small mobile service carriers that may be affected by the proposed rules, if adopted.

t. Broadband Personal Communications Service (PCS)

The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the FCC has held auctions for each block. The FCC defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[42] For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[43] These regulations defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA.[44] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.[45] Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the FCC's auction rules.

u. Narrowband PCS

The FCC has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The FBI does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The FCC anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction; however, such auctions have not yet been scheduled. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this Further RFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

v. Rural Radiotelephone Service

The FCC has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[46] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[47] We will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[48] The FCC estimates that there are approximately 1,000 licensees in the Rural Radiotelephone Service. We estimate that almost all of them qualify as small entities under the SBA's definition.

w. Air-Ground Radiotelephone Service

The FCC has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.[49] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[50] According to the FCC, there are approximately 100 licensees in the Air-Ground Radiotelephone Service. We estimate that almost all of them qualify as small under the SBA definition.

x. Specialized Mobile Radio (SMR)

The FCC awards bidding credits in auctions for geographic area 800 MHZ and 900 MHZ SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years.[51] In the context of 900 MHZ SMR, this regulation defining ''small entity'' has been approved by the SBA; the FCC is seeking similar approval for 800 MHZ SMR. We do not know how many firms provide 800 MHZ or 900 MHZ geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this Further RFA, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. According to the FCC, there are 60 small entities that qualified for geographic area licenses in the 900 MHZ SMR band. The FCC estimates that there are 38 small or very small entities that qualified for the 800 MHZ SMR's.

y. Fixed Microwave Services

Microwave services include common carrier,[52] private-operational fixed,[53] and broadcast auxiliary radio services.[54] At present, the FCC estimates that there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The FCC has not yet defined a small business with respect to microwave services. For purposes of this Further RFA, we will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[55] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

[41] 13 CFR 121.201, SIC code 4812; Trends in Telephone Service, Table 19.3 (February 19, 1999).

[42] See Amendment of Parts 20 and 24 of the FCC's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96–278, WT Docket No. 96–59, paras. 57–60 (released Jun. 24, 1996), 61 FR 33859 (Jul. 1, 1996); see also 47 CFR 24.720(b).

[43] See Amendment of Parts 20 and 24 of the FCC's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96–278, WT Docket No. 96–59, para. 60 (1996), 61 FR 33859 (Jul. 1, 1996).

[44] See, e.g., Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, Fifth Report and Order, 9 FCC Rcd 5532, 5581–84(1994).

[45] FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released Jan. 14 1997).

[46] The service is defined in § 22.99 of the FCC's Rules, 47 CFR 22.99.

[47] BETRS is defined in the FCC's Rules. See 47 CFR 22.757 adn 22.759.

[48] 13 CFR 121.201, SIC code 4812.

[49] The service is defined in the FCC's Rules. See 47 CFR 22.99.

[50] 13 CFR 121.201, SIC code 4812.

[51] 47 CFR 90.814(b)(1)

[52] 47 CFR 101 *et seq.* (formerly, part 21 of the FCC's Rules).

[53] Persons eligible under parts 80 and 90 of the FCC's rules can use Private Operational-Fixed Microwave services. See 47 CFR parts 80 and 90. stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[54] Auxiliary Microwave Service is governed by part 74 of Title 47 of the FCC's Rules. See 47 CFR 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[55] 13 CFR 121.201, SIC code 4812.

z. Offshore Radiotelephone Service

This service operates on several Ultra High Frequency TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[56] The FCC estimates that there approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition for radiotelephone communications.

aa. Wireless Communications Services

This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The FCC defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The FCC auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

ab. Cable Services or Systems

The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually.[57] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.[58]

The FCC has developed its own definition of a small cable system operator for purposes of rate regulation. Under the FCC's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide.[59] Based on the FCC's most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[60] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators.

The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [61] The FCC has determined that there are 66,690,000 subscribers in the United States. Therefore, the FCC found that an operator serving fewer than 666,900 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[62] Based on available data,[63] the FCC found that the number of cable operators serving 669,900 subscribers or less totals 1,450. The FCC does not request or collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000. The FBI is unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

These proposed amendments impose no formal reporting or recordkeeping requirements on small entities. Additionally, these amendments do not impose any other direct compliance requirements on small entities. Carriers seeking reimbursement under the CALEA Cost Recovery Regulations for their preexistent equipment will need to demonstrate that such equipment was not ''replaced'' or ''significantly upgraded.'' [64] Carriers can establish reimbursement eligibility with the records they maintain in the ordinary course of business.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The development of the proposed definitions of ''replaced'' and ''significantly upgraded'' is discussed at length in Section E, Definition Development, of this SNPRM, supra. The FBI considered and rejected as impractical both technical and accounting definitions. Having determined that CALEA's intent was best served by a definition focusing on public safety, the FBI then modified its definition to incorporate industry's suggestions submitted in response to the ANPRM and NPRM.

The FBI has concluded that these proposed amendments will not have a significant economic impact on a substantial number of small entities. These amendments are size-neutral because they involve definitions affecting telecommunications equipment, facilities, and services that are used by all carriers, regardless of their size. These definitions will benefit all telecommunications carriers because they allow carriers to make informed business decisions regarding their equipment, facilities, and services. Moreover, CALEA itself makes ample provisions for the protection of small entities which either ''replace'' or ''significantly upgrade'' their preexistent equipment by allowing these carriers to petition the FCC for relief under CALEA Section 109(b).

The FBI welcomes and encourages comments from concerned small entities on this issue.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

The FBI is not aware of any federal rules that overlap, duplicate, or conflict with the amendments proposed in this SNPRM.

List of Subjects in 28 CFR Part 100

Accounting, Law enforcement, Reporting and record keeping requirements, Telecommunications, Wiretapping and electronic surveillance.

For the reasons set out in the preamble, 28 CFR part 100 is proposed to be amended as set forth below:

[56] This service is governed by subpart I of part 22 of the FCC's Rules. See 47 CFR 22.1001 through 22.1037.

[57] 13 CFR 121.201, SIC code 4812.

[58] 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC code 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[59] 47 CFR 76.901(e). The Fcc developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

[60] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[61] 47 U.S.C. 543(m)(2).

[62] 47 CFR 76.1403(b).

[63] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[64] 28 CFR 100.16.

PART 100—COST RECOVERY REGULATIONS, COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT OF 1994

1. The authority citation for 28 CFR part 100 continues to read as follows:

Authority: 47 U. S. C. 1001–1010; 28 CFR 0.85(o).

2. Section 100.11(a)(1) is revised to read as follows:

§ 100.11 Allowable costs.

(a) * * *

(1) All reasonable plant costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with section 103 of CALEA, until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification;

* * * * *

3. Amend § 100.10 to:

a. Add a definition and examples for the term ''Replaced''; and

b. Add a definition and examples for the term ''Significantly upgraded or otherwise undergoes major modification'' as follows:

§ 100.10 Definitions.

* * * * *

Replaced means that a telecommunications carrier substituted replacement equipment in place of preexistent equipment after technology compliant with the assistance capability requirements of 47 U.S.C. 1002 (assistance capability requirements) was reasonably available, or should have been reasonably available, for installation and deployment by a carrier at the time the substitution was made. Replacement equipment is equipment, facilities, or services, whether new or used, that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and is installed or deployed within the carrier's network. Preexistent equipment is equipment, facilities, or services that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and was installed or deployed within the carrier's network on or before January 1, 1995. Preexistent equipment that has been ''replaced'' is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995. When replacement equipment is itself preexistent equipment that has not been ''replaced,'' and is substituted in place of other preexistent equipment, the replacement equipment retains its reimbursement eligibility as preexistent equipment. Otherwise, replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.

Example 1 (Repair of Preexistent Equipment): On January 2, 1999, a carrier repaired a switch installed or deployed within its network on or before January 1, 1995 (preexistent equipment), by replacing a worn part with a new part of identical make and functionality. The preexistent equipment remained in place and continued to provide the carrier's customers and subscribers with the ability to originate, terminate, or direct communications. The preexistent equipment was not ''replaced'' because it remained in place within the carrier's network. The preexistent equipment retained its reimbursement eligibility as equipment, facilities, or services installed or deployed within the carrier's network on or before January 1, 1995.

Example 2 (Impertinent Equipment): On January 2, 1995, a carrier substituted a backup power generator (new impertinent equipment) in place of an older, less efficient backup power generator which had been installed or deployed within the carrier's network on or before January 1, 1995 (old impertinent equipment). Since neither the new impertinent equipment nor the old impertinent equipment was used by the carrier to provide its customers or subscribers with the ability to originate, terminate, or direct communications, the ''replaced'' definition does not apply to this particular substitution.

Example 3 (Augmentation of Preexistent Equipment): On January 2, 1995, a carrier deployed a switch (new equipment) in a central office that housed a switch installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). Both switches had identical capabilities. The switches were used in tandem to evenly distribute the call load of the carrier's customers. The preexistent equipment was not ''replaced'' because there was no substitution of equipment. The preexistent equipment retained its reimbursement eligibility as equipment installed or deployed on or before January 1, 1995. The new equipment is equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Example 4 (Damaged Equipment): On January 2, 1995, a carrier took a switch from its storage facility (replacement equipment) and substituted it in place of a switch that had been damaged by an electrical fire and was installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). The carrier decided to scrap the preexistent equipment because it was damaged beyond repair. Since the preexistent equipment is no longer installed or deployed within the carrier's network, it is no longer eligible for reimbursement under these cost recovery regulations. The replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Example 5 (Movement of Equipment): On January 2, 1995, a carrier took a switch from its storage facility (replacement equipment) and substituted it in place of a switch that had been installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). The carrier then installed or deployed the preexistent equipment at a different central office to efficiently meet customer and capacity needs. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements of 47 U.S.C. 1002 by December 31, 1999. The preexistent equipment was not ''replaced.'' The preexistent equipment retains its reimbursement eligibility because the substitution occurred before technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, for installation or deployment by the carrier, and it remained within the original carrier's network. The replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Example 6 (Movement of Equipment): On January 2, 2000, a carrier accepted delivery and installation of a switch from a manufacturer (replacement equipment) and substituted it in place of a switch that had been installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). The carrier then installed or deployed the preexistent equipment at a different central office to efficiently meet customer and capacity needs. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements of 47 U.S.C. 1002 by December 31, 1999. The preexistent equipment was ''replaced'' because the substitution occurred after technology compliant with the assistance capability requirements should have been reasonably available for installation or deployment by the carrier. The preexistent equipment has the same status as equipment installed or deployed within the carrier's network after January 1, 1995. The replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Example 7 (Replacement with Preexistent Equipment): On January 2, 2000, a carrier removed a ''blue type'' switch that had been installed or deployed in its network on or before January 1, 1995 (preexistent equipment). The carrier then substituted the ''blue type'' switch (now replacement equipment) in place of a ''green type'' switch that had been installed or deployed on or before January 1, 1995 (preexistent

equipment). The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements of 47 U.S.C. 1002 by December 31, 1999. The ''blue type'' switch was not ''replaced,'' because there was no substitution of replacement equipment in place of the ''blue type'' switch. Since the ''blue type'' switch was preexistent equipment that was not ''replaced,'' but was substituted in place of other preexistent equipment, the ''blue type'' switch retained its reimbursement eligibility as preexistent equipment. The ''green type'' switch was ''replaced'' because the substitution occurred after technology compliant with the assistance capability requirements should have been reasonably available for installation or deployment by the carrier.

Example 8 (Replacement with Preexistent Equipment): On December 30, 1999, a carrier accepted delivery and installation of a ''red type'' switch from a manufacturer (replacement equipment) and substituted it in place of a ''blue type'' switch that had been installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). On January 2, 2000, the carrier substituted the ''blue type'' switch (now replacement equipment) to replace a ''green type'' switch that had been installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements of 47 U.S.C. 1002 by December 31, 1999. The ''blue type'' switch was not ''replaced.'' The ''blue type'' switch retains its reimbursement eligibility because the substitution occurred before technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, for installation or deployment by the carrier, and it remained within the original carrier's network. The ''green type'' switch was ''replaced'' because the substitution occurred after technology compliant with the assistance capability requirements should have been reasonably available for installation or deployment by the carrier. The ''red type'' switch is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Example 9 (Sale of Equipment): On January 2, 2000, Carrier One sold a portion of its network to Carrier Two. Some of the equipment, facilities, or services sold to Carrier Two had been installed or deployed within Carrier One's network on or before January 1, 1995 (preexistent equipment). After the sale, the preexistent equipment remained in place and continued to serve the same customer areas. The preexistent equipment was not ''replaced'' because there was no substitution of replacement equipment in place of the preexistent equipment. The preexistent equipment, now in Carrier Two's network, retains its reimbursement eligibility as equipment, facilities, or services installed or deployed within the carrier's network on or before January 1, 1995.

Example 10 (Sale of Equipment): On January 2, 1995, Carrier One took a switch from its storage facility (replacement equipment) and substituted it in place of a switch installed or deployed within its network on or before January 1, 1995 (preexistent equipment). Carrier One then sold the preexistent equipment to Carrier Two who installed or deployed the preexistent equipment elsewhere within its own network. Since the preexistent equipment did not remain within Carrier One's network, there is no need to determine whether it was ''replaced.'' Carrier One's replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995. The preexistent equipment installed or deployed in Carrier Two's network is the equivalent of equipment installed or deployed within its network after January 1, 1995.

Example 11 (Replacement of Analog Equipment with Digital Equipment): On January 2, 1999, a carrier substituted a digital switch (replacement equipment) in place of an analog switch that had been installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). The carrier then installed or deployed the preexistent equipment at a different central office to efficiently meet customer and capacity needs. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements of 47 U.S.C. 1002 by December 31, 1999. The preexistent equipment was not ''replaced.'' The preexistent equipment retains its reimbursement eligibility because the substitution occurred before technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, for installation or deployment by the carrier, and it remained within the original carrier's network. The replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Example 12 (Replacement of Circuit-Mode Equipment with Packet-Mode Equipment): On January 2, 2000, a carrier substituted a packet-mode switch (replacement equipment) in place of a circuit-mode switch that had been installed or deployed within the carrier's network on or before January 1, 1995 (preexistent equipment). The carrier then installed or deployed the preexistent equipment at a different central office to efficiently meet customer and capacity needs. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements of 47 U.S.C. 1002 by December 31, 1999. The preexistent equipment was ''replaced'' because the substitution occurred after technology compliant with the assistance capability requirements should have been reasonably available for installation or deployment by the carrier. The replacement equipment is the equivalent of equipment, facilities, or services installed or deployed within the carrier's network after January 1, 1995.

Significantly upgraded or otherwise undergoes major modification means:

(1) A telecommunications carrier has activated, added, or improved a capability, feature, or service of its preexistent equipment that:

(i) Hampers the carrier's ability to unobtrusively deliver lawfully authorized intercepted communications and/or reasonably available call-identifying information to law enforcement in accordance with the assistance capability requirements of 47 U.S.C. 1002 (assistance capability requirements), in a manner that the carrier does not correct at its own expense within a reasonable period of time; and

(ii) Occurs after technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available for installation or deployment by a carrier at the time the improvement was made; and

(iii) Was not mandated by a federal or state statute, rule, regulation, or administrative order.

(2) Preexistent equipment is equipment, facilities, or services that a telecommunications carrier can use to provide its customers or subscribers with the ability to originate, terminate, or direct communications and was installed or deployed within the carrier's network on or before January 1, 1995. Preexistent equipment that has been ''significantly upgraded or otherwise undergoes major modification'' is the equivalent of equipment, facilities, or services installed or deployed within a carrier's network after January 1, 1995.

Example 1 (Capacity Modifications): On January 2, 2000, a carrier added hardware and software to some of its preexistent equipment. The additions only improved the preexistent equipment's capacity to handle more calls from its customers and subscribers. The preexistent equipment was not ''significantly upgraded'' because the additions were related to subscriber capacity improvements and did not affect the assistance capability requirements of 47 U.S.C. 1002.

Example 2 (Modifications to Impertinent Equipment): On January 2, 2000, a carrier made modifications to a backup power generator installed or deployed in its network on or before January 1, 1995 (impertinent equipment). These modifications improved

the impertinent equipment's overall efficiency. The impertinent equipment is incapable of providing the carrier's customers or subscribers with the ability to originate, terminate, or direct communications. Thus, the impertinent equipment cannot be ''significantly upgraded.''

Example 3 (Packet-mode Technology Upgrade): On January 2, 1999, a carrier upgraded a portion of its network architecture from circuit-mode to packet-mode switching technology. Some of the upgraded equipment was preexistent equipment. The modifications hampered the carrier's unobtrusive delivery of intercepted communications and reasonably available call-identifying information to law enforcement. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was not ''significantly upgraded'' because the changes were made before technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, for installation or deployment by the carrier.

Example 4 (Packet-mode Technology Upgrade): On January 2, 2000, a carrier upgraded a portion of its network architecture from circuit-mode to packet-mode switching technology. Some of the upgraded equipment was preexistent equipment. The modifications hampered the carrier's unobtrusive delivery of intercepted communications and reasonably available call-identifying information to law enforcement. The carrier failed to correct the problem at its own expense in a reasonable period of time. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was ''significantly upgraded'' because the changes added capabilities that hampered the delivery of intercepted communications and call-identifying information to law enforcement after technology compliant with the assistance capability requirements should have been reasonably available for installation or deployment by the carrier.

Example 5 (Non-Hampering Modifications): On January 2, 2000, a carrier installed a new generic software upgrade to some of its preexistent equipment. The software upgrade improved network efficiencies and made existing services easier for customers to use. The modifications did not add a hindrance to law enforcement's ability to receive intercepted communications and/or reasonably available call-identifying information. The preexistent equipment was not ''significantly upgraded'' because the upgrade did not hamper the unobtrusive delivery of intercepted communications and/or reasonably available call-identifying information to law enforcement.

Example 6 (Non-Hampering Modifications): On January 2, 2000, a carrier made changes to its equipment, facilities, or services in order to correct Y2K deficiencies. Some of the changes affected the carrier's preexistent equipment. There is no indication that the Y2K modifications had any impact on law enforcement surveillance activities. The preexistent equipment was not ''significantly upgraded'' because the change did not hamper the delivery of intercepted communications and/or call-identifying information to law enforcement.

Example 7 (Non-Hampering Modifications): On January 2, 2000, a carrier made changes to its preexistent equipment that required law enforcement authorities to relocate their point of intercept from the local loop to the carrier's central office. The carrier was still able to unobtrusively deliver intercepted communications and/or reasonably available call-identifying information to law enforcement in accordance with the assistance capability requirements. The preexistent equipment was not ''significantly upgraded'' because the change did not hamper the delivery of intercepted communications and/or call-identifying information to law enforcement.

Example 8 (Hampering Modifications): On January 2, 1995, a carrier activated the dormant call forwarding feature which was resident on some of its preexistent equipment. The call forwarding feature added a hindrance to law enforcement's ability to obtain intercepted communications and reasonably available call-identifying information. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was not ''significantly upgraded'' because the feature was activated before technology compliant with the assistance capability requirements was reasonably available, or should have been reasonably available, for installation or deployment by the carrier.

Example 9 (Hampering Modifications): On January 2, 2000, a carrier installed a new generic software upgrade on some of its preexistent equipment. The generic software upgrade added a hindrance to law enforcement's ability to obtain intercepted communications and reasonably available call-identifying information. The carrier failed to correct the additional hindrance caused by the generic software upgrade at its own expense within a reasonable period of time. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was ''significantly upgraded'' because the carrier installed a generic software upgrade that hampered the delivery of intercepted communications and call-identifying information to law enforcement after technology compliant with the assistance capability requirements should have been available for installation or deployment.

Example 10 (Hampering Modifications): On January 2, 2000, a carrier added a modification to its some of its preexistent equipment. Although the modification did not affect the unobtrusive delivery of intercepted communications to law enforcement, it did intermittently garble the reasonably available call-identifying information which was being delivered to law enforcement. The carrier did not correct the problem at its own expense within a reasonable period of time. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was ''significantly upgraded'' because the modifications hampered the delivery of call-identifying information to law enforcement after technology compliant with the assistance capability requirements should have been available for installation and deployment by the carrier and the carrier did not correct the problem at its own expense within a reasonable period of time.

Example 11 (Correction of Hampering Modifications): On January 2, 2000, a carrier added a call forwarding feature to its preexistent equipment. The carrier determined that the changes hampered the delivery of intercepted communications and reasonably available call-identifying information to law enforcement. The carrier corrected the additional hindrance caused by the call forwarding feature at its own expense within 72 hours of noticing the problem. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was not ''significantly upgraded'' because the carrier corrected the problem at its own expense within a reasonable time.

Example 12 (Correction of Hampering Modifications): On January 2, 2000, a carrier added a call forwarding feature to its preexistent equipment. One month later, a local law enforcement agency attempted to activate a lawfully authorized electronic surveillance on the preexistent equipment. The carrier determined that the changes it made to the preexistent equipment hampered the delivery of intercepted communications and reasonably available call-identifying information to law enforcement. The carrier corrected the additional hindrance caused by the call forwarding feature at its own expense within 24 hours of being notified of the problem. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was not

''significantly upgraded'' because the carrier corrected the problem at its own expense within a reasonable period of time.

Example 13 (Failure to Correct Hampering Modifications): On January 2, 2000, a carrier installed a software upgrade on some of its preexistent equipment which improved the functionality of the call forwarding feature. The improved call forwarding feature added a hindrance to law enforcement's ability to obtain intercepted communications and reasonably available call-identifying information. One month later, a local law enforcement agency attempted to activate a lawfully authorized electronic surveillance on the preexistent equipment. The carrier determined that the changes it made to the preexistent equipment hampered the delivery of intercepted communications and reasonably available call-identifying information to law enforcement. The carrier failed to correct the additional hindrance caused by the improved call forwarding feature at its own expense within a reasonable period of time. The Federal Communications Commission determined in its Memorandum Opinion and Order, adopted on September 10, 1998, that manufacturers should be able to produce equipment that will be generally available for carriers to meet the assistance capability requirements by December 31, 1999. The preexistent equipment was ''significantly upgraded'' because the carrier failed to correct the problem at its own expense within a reasonable period of time.

Example 14 (Modifications Mandated by Federal or State Statute or Regulation): On January 2, 2000, a carrier made changes to its preexistent equipment that provided local number portability to its network and were mandated by federal statute and regulations. The preexistent equipment was not ''significantly upgraded'' because the changes were mandated by federal statute and regulations regardless of their effect on law enforcement's ability to intercept communications and reasonably available call-identifying information.

Example 15 (Effect of ''Significant Upgrade'' on Preexistent Equipment): On January 2, 2000, a carrier ''significantly upgraded'' some of its preexistent equipment. The preexistent equipment now has the same status as equipment, facilities, or services installed after January 1, 1995.

* * * * *

Dated: September 26, 2001.

Thomas J. Pickard,

Deputy Director, Federal Bureau of Investigation, Department of Justice.

[FR Doc. 01–24942 Filed 10–4–01; 8:45 am]

BILLING CODE 4410–02–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 904

[SPATS No. AR–036–FOR]

Arkansas Abandoned Mine Land Reclamation Plan and Regulatory Programs

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is announcing receipt of a proposed amendment to the Arkansas abandoned mine land reclamation plan (Arkansas plan) and the Arkansas regulatory program (Arkansas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Arkansas proposes revisions to its abandoned mine land program regulations concerning eligible lands and water, reclamation objectives and priorities, and reclamation project evaluation. Arkansas also proposes to revise its regulatory program regulations concerning procedures for assessment conference and to add revegetation success standards for grazing land and prime farmland. Arkansas intends to revise its program to be consistent with the corresponding Federal regulations.

This document gives the times and locations that the Arkansas plan and Arkansas program and the proposed amendments to the plan and program are available for public inspection, the comment period during which you may submit written comments on the amendment, and the procedures we will follow for the public hearing, if one is requested.

DATES: We will accept written comments until 4:00 p.m., c.d.t., November 5, 2001. If requested, we will hold a public hearing on the amendment on October 30, 2001. We will accept requests to speak at the hearing until 4:00 p.m., c.d.t. on October 22, 2001.

ADDRESSES: You should mail or hand deliver written comments and requests to speak at the hearing to Michael C. Wolfrom, Director, Tulsa Field Office, at the address listed below.

You may review copies of the Arkansas plan and Arkansas program, the amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Tulsa Field Office.

Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547, Telephone: (918) 581–6430.

Arkansas Department of Environmental Quality, Surface Mining and Reclamation Division, 8001 National Drive, Little Rock, Arkansas 72219, Telephone (501) 682–0809.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581–6430. Internet: mwolfrom@osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Arkansas Plan and the Arkansas Program

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act, (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines. On May 2, 1983, the Secretary of the Interior approved the Arkansas plan. You can find background information on the Arkansas plan, including the Secretary's findings, the disposition of comments, and the approval of the plan in the May 2, 1983, **Federal Register** (48 FR 19710). You can find later actions on the Arkansas plan at 30 CFR 904.25 and 904.26.

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these