April 24, 2012

Andrew G Oosterbaan, Chief
Child Exploitation and Obscenity Section
Criminal Division, United States Department of Justice
Washington DC 20530
Attn: "OMB Number 1123-0009"

Dear Mr. Oosterbaan:

The Free Speech Coalition (FSC) is the trade association for the Adult Entertainment Industry. Our mission is to lead, protect, and support the growth and well-being of the adult entertainment community. We have nearly 1000 members across the United States and in some areas overseas as well. As you are no doubt aware, we have been challenging Section 2257 for some seven years now, and our current constitutional challenge also embraces Section 2257A. We believe that these statutes are deeply flawed as a constitutional matter and that the Department's administrative regulations do not and cannot cure the fundamental constitutional problems with the statutes. Indeed, in many respects they have made the statutes worse. In light of the very limited purpose of the Department's current information collection renewal, however, we point out here (saving all other matters for the ongoing litigation) only that relevant "information gathering" is intrinsically unreasonable when its purpose is to require publishers to demonstrate that their expression is constitutionally protected. That is the *Constitution's* presumption, and no statute or administrative regulation can change that. That said, and expressly reserving all matters for the pending litigation, we submit the following response to Department's current call for comments concerning information gathering under Section 2257A.

The Department is refreshingly candid concerning its inability to estimate the actual impact of the regulations at issue here. It fails altogether, for instance to take account of the fact that some FSC members provide interactive Internet services inder circumstances where the primary producers are also performers, engaging in conduct which would trigger the record-keeping requirements of Section 2257, but for the safe-harbor provisions of Section 2257A. Our membership also includes the secondary producers of these services, who aggregate anywhere from hundreds to tens of thousands of these performances by primary producers annually. These expressive services are operated on a continuous basis, typically offering hundreds of producers' live performances twenty-four hours per day, every day. In order for a these producers to qualify for the Section 2257A safe harbor, the performing primary producers must agree to engage only in activities which are covered by the Section 2257A safe harbor and not in other activities which have always been covered by Section 2257. And for the secondary producers to avail themselves of the safe harbor, they must monitor those performances in order to assure themselves that the performers indeed confine their activities to the qualifying for safe-harbor protection. That task is so time-consuming, expensive, and burdensome that secondary producers simply cannot reliably gain the benefit of the safe harbor. Secondary producers (*i.e.* the aggregators in this case) must not only maintain copies of the performances of sufficient length to identify the performers with

their identity documents but, in order to qualify for the exemption, there must be regular intermittent monitoring so that if the performing primary producer chooses to engage in conduct outside of safe-harbor protection, that specific performance is treated as one which is not exempt. Full time staff must be maintained to monitor these performances, and to record if and when a performance no longer qualifies for safe-harbor protection. Those performing primary producers who exclusively engage in exempt performances must be separately categorized. There are, in fact, thousands of performing primary producers who each year could qualify for the safe-harbor exemption. But since their income comes exclusively through secondary (aggregating) producers for whom it is not economically feasible to monitor and separate out those who do qualify from those who intermittently engage in non-exempt performances, Section 2257A's safe-harbor exemption proves too expensive to be of benefit, and it is, therefore, as a practical matter, altogether unavailable.

This is but one example of why Section 2257A's safe harbor cannot—so long as it is withheld from those generally covered under Section 2257—provide any genuine relief from the enormous burdens of the statutory record-keeping scheme. That a few specially favored producers are spared the full brunt of record keeping does nothing to mitigate the serious regulatory burdens imposed upon the many.

The foregoing considerations demonstrate that the Department has woefully underestimated the regulatory burdens imposed by the current rule. And further reflection readily indicates that the full regulatory burdens arise not only from the record creation, organization, and maintenance requirements, but also from the need to make the required records available for inspections. As we continue to stress in the pending litigation, the inspection scheme is altogether at odds with the requirements of the Fourth Amendment; but even aside from this insurmountable constitutional problem, the Department has deliberately formulated an inspection regime, which—apart from its fatal constitutional problems—is gratuitously burdensome in that it provides only for unannounced inspections. As we have noted in the past, we understand that the Department's law enforcement background may have implanted a deep skepticism about planned, announced, and prearranged records inspections. But we reiterate that such skepticism is entirely out of place here. Even if, as the Department may fear, a producer uses a prior notice that his, her, or its records will be inspected as an occasion to fully and properly organize records which were less well organized and maintained before the producer knew of the inspection, the purposes underlying the statutes (which, for the purposes of these comments only, we here assume are valid) would be fully served and indeed promoted in the end.

The current rule essentially requires all producers to be ready for inspections at all times. For a substantial business operation, this readiness may not amount to much by way of marginal operational costs. But very many production operations subject to these requirements remain very, very small businesses, some perhaps no more than elaborate hobbies. Many producers are individuals whose other life activities (*e.g.* school or work) do not permit them to sit around even for 20 hours per week waiting for inspectors who may not get to them for years. And even for larger business operations, the current rule imposes truly quirky and wholly unnecessary burdens in connection with record availability. The current rule continues to insist, for instance, that however comprehensively a business provides for records inspection during normal business hours, it must also permit unannounced inspection at any time it "is actually conducting business relating

to producing a depiction of actual sexually explicit conduct." 28 C.F.R. § 75.5(c)(1). Thus a U.S. producer maintaining its records in New York City would have to permit inspections there at any time of the day or night (in New York) when it is actually creating a new visual depiction in, for instance, Sydney, Austrailia—15 time zones ahead of New York City. And there is simply no legitimate justification at all for this odd additional regulatory burden. The Department has never articulated any special need to review records for published depictions while a new, as yet unpublished depiction is being created or edited, either at the records location or elsewhere. Even a production company which is open during normal business hours but uses the facility where the records are kept for filming after hours (*e.g.* from 10 p.m. until 2:00 a.m.) should not have to pay record custodians—in addition to production staff—to be present on the chance of an unannounced, absurdly off-hours inspection

Returning to the burdens directly connected with the creation and maintenance of the records themselves, we also reiterate our past suggestion that the Department can and should reduce the regulatory uncertainties (and the burdens and chilling effects of compensating for those uncertainties where the sanctions for record-keeping errors are as high as they are here) by prescribing simple forms which, if honestly and completely filled out (with a supporting photocopy), will satisfy all of the record-keeping obligations imposed under the statutes. The United States does this with the I-9 Immigration Form which all employers must execute with respect to every employee. And the preparation of income tax returns would produce unimaginably more anxiety than it does in this country if the United States merely told its people to read the tax code and the relevant administrative regulations and then report in writing as required. As we have said before, if the record-keeping obligations imposed by the statutes are as mild and as straightforward as their supporters indicate, it should be a fairly simple matter for the Department to prescribe sufficient forms and simple procedures for their execution and maintenance. But even if it requires a bit more work for the Department, the spirit of the paperwork reduction principles surely suggests that the Department undertake this additional burden rather than unnecessarily foisting it upon the regulated. Not only would the publication (Internet availability of government forms is now routine), of prescribed forms reduce the unnecessary and chilling anxiety connected with each producer's designing and implementing its own record-keeping system from scratch, it would eliminate almost all of the need for costly legal advice in connection with setting up and evaluating individual record-keeping systems.

Similar considerations also require the Department to do much more than it has with respect to non-employee record keepers. In 2004, we suggested a system of third-party record keepers. We believed then as we do now that—under proper conditions—a small but thriving competitive market would arise among those who are willing to undertake the task of receiving, organizing, and maintaining records and of making them available to inspectors authorized by the Attorney General. Such third-party record keepers could take advantage of economies of scale which are simply unavailable to small and perhaps even to mid-size producers. They could also take any opportunities to coordinate their record-keeping systems with the Department in order to be sure that the Department's reasonable expectations are met and to minimize any inspection inefficiencies arising from producers' differing and perhaps idiosyncratic responses to the record-keeping requirements. Such a competitive market—particularly in the context of published minimum technical standards for record-keeping systems—would operate to drive down the overall record-keeping costs, at least in theory, to their minimum value.

The Department has understood these possibilities and the potential for reducing the cost of waiting for inspections by providing for non-employee record keepers since 2009. But at least two related factors have almost entirely dashed the promise. First, in permitting non-employee record keepers, the Department said nothing about their qualifications and operations. And even more importantly, the Department very substantially chilled the willingness of almost every producer even to consider the use of non-employee record keeper with its abrupt and unelaborated assertion that use of non-employee record keepers will do nothing to alter a producer's liability under the regulations. 28 C.F.R. § 75.2(h). This suggests that a producer, relying on a reasonable third party, will be responsible for even minor lapses by the third party. Given the very serious consequences involved here, that is just too much of a risk to expect a producer to take. What the Department *should* do, in connection with non-employee record keepers, is what we suggested back in 2004: develop a series of minimum standards—perhaps including a formal certification process—through which the Department can be satisfied that any compliant operation will do what is humanly possible in connection with the required record keeping and, equally important, producers can be assured that that record keeping will be handled responsibly and that minor lapses beyond a producers' reasonable control will not subject them to federal felony prosecutions. Again, this may require additional work on the part of the Department. But the spirit of paperwork and regulatory burden reduction suggests that the Department should bear this burden in order to reduce the burdens upon the regulated. In the absence of any such realistic commitment to non-employee record keeping on behalf of the Department, the promise of burden reduction and cost minimization resulting from a competitive market for third-party record keeping services will remain a distant mirage; and we will have no choice but to point that out whenever and wherever necessary.

Finally, there remains—as always—the question of so-called "secondary producers." We recognize that, from the Department's point of view as a regulator, this picture has changed since we first commented on the subject in 2004. And we continue to stress that the Department's resolution of record-keeping responsibilities for secondary producers prior to the passage of the Adam Walsh Child Protection and Safety Act of 2006, was and remains critical. But since the passage of that Act, the Department has not fully considered the regulatory burdens imposed upon those secondary producers who are covered by Section 2257 and cannot avail themselves of the safe-harbor provisions of Section 2257A. The burdens upon these secondary producers need to be fully and properly considered, although the scope of the instant request for comments seems deliberately to have excluded this subject. Even with respect to secondary producers of expression which is subject to the new provisions enacted as part of the Adam Walsh Act, this Department needs to say more than it has. It needs, in particular, to recognize and to acknowledge the realities of the safe harbor provided by Section 2257A. Under that safe harbor, primary producers need not—under certain specified, but very common, conditions—create or maintain the records otherwise required by the statutes, and they need not affix disclosure statements to their materials because there are no special records for anyone to inspect. There is absolutely no reason to suspect that images falling within this safe harbor will be any less likely to be reproduced by others than materials to which the Section 2257A safe harbor is currently denied. In other words, there will surely be secondary producers of images for which the primary producer created no special records at all because the statutorily sufficient information is commingled with the primary producer's other, routine business records. We assume that the Department does not contemplate that a secondary producer in this position will go back and create the special records required by

the statutes (apart from the Section 2257A safe harbor); that would resurrect the constitutional problem which doomed the very first version of Section 2257. Indeed, under the Section 2257A safe harbor, there is no need and no realistic possibility for any secondary producer to do anything at all—and the Department should say so now. There is no point even in having such secondary producers send a safe-harbor exemption letter to the Department, since it is not their business operations or labor practices which are relevant to the original production of the images which they reproduce. Unless the Section 2257A safe harbor was deliberately designed and intended to benefit only a very few specially favored producers (which would raise very grave and very broad independent constitutional problems), the implications of the safe harbor must apply to all who are involved with images covered by it.

This Department's review will no doubt establish the very great extent to which the extensive statutory record-keeping burdens will be minimized by the use of the safe-harbor provisions contained in Section 2257A. It would, in fact, astonish us if any producer, able to use the safe harbor and not otherwise required to adopt a comprehensive and byzantine special record-keeping system under Section 2257, would forego the safe harbor and keep the elaborate special records instead. So it is especially obvious that the Department can and should further mitigate the record-keeping burdens imposed upon producers of depictions of actual sexually explicit conduct by permitting those who can certify that they are already checking the age of performers and recording performer-specific age information in connection with their compliance with laws or with established business and labor practices to do so. That Section 2257A requires this option for certain producers does not prohibit the Department from implementing a similar optional procedure for others in order to reduce the overall administrative record-keeping burdens to an acceptable level.

Thank you for your consideration in this matter. Feel free to contact us if you have questions or would like additional information, though we are both represented by counsel in relevant litigation.

Sincerely,

Diane Duke
Executive Director