

**DEPARTMENT OF JUSTICE****28 CFR Part 100**

RIN 1105-AA39

**Implementation of Section 109 of the Communications Assistance for Law Enforcement Act****AGENCY:** Federal Bureau of Investigation, DOJ.**ACTION:** Final rule.

**SUMMARY:** This rule implements section 109 of the Communications Assistance for Law Enforcement Act (CALEA), which requires the Attorney General to establish regulations which set forth the procedures that telecommunications carriers must follow in order to receive reimbursement under Sections 109 and 104 of CALEA. CALEA requires that this rule enable carriers to receive payments in a timely and cost-efficient manner while minimizing the cost to the Federal Government. Specifically, this rule sets forth the means of determining allowable costs, reasonable costs, and disallowed costs. Furthermore, it establishes the requirements carriers must meet in their submission of cost estimates and requests for payment to the Federal Government for the disbursement of CALEA funds. In addition, this rule protects the confidentiality of trade secrets and proprietary information from unnecessary disclosure. Finally, it sets forth the means for alternative dispute resolution.

**EFFECTIVE DATE:** April 21, 1997.

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**SUPPLEMENTARY INFORMATION:****A. General Background**

Recent and continuing advances in telecommunications technology and the introduction of new digitally-based services and features have impaired the ability of federal, state, and local law enforcement agencies to fully and properly conduct various types of court-authorized electronic surveillance. Therefore, on October 25, 1994, the President signed into law the Communications Assistance for Law Enforcement Act (CALEA) [Public Law 103-414, 108 Stat. 4279 (1994) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.)]. This law requires telecommunications carriers, as defined in CALEA, to ensure law enforcement's ability, pursuant to court order or other

lawful authorization, to intercept communications regardless of advances in telecommunications technology.

Under CALEA, certain implementation responsibilities are conferred upon the Attorney General; the Attorney General has, in turn, delegated certain responsibilities set forth in CALEA to the Director, FBI, or his designee, pursuant to 28 CFR 0.85(o). The Director, FBI, has designated the Telecommunications Industry Liaison Unit of the Information Resources Division and the Telecommunications Contracts and Audit Unit of the Finance Division to carry out these responsibilities.

*Definition of "Telecommunications Carrier"*

CALEA defines a "telecommunications carrier" as any "person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire" (section 102(8)(A)), and includes any "person or entity engaged in providing commercial mobile service, (as defined in section 332(d) of the Communications Act of 1934, as amended (47 U.S.C. 332(d)))" (section 102(8)(B)). This definition includes, but is not limited to, local exchange and interchange carriers; competitive access providers; resellers, cable operators, utilities, and shared tenant services providers, to the extent that they offer telecommunications services as common carriers for hire; cellular telephone companies; personal communications services (PCS) providers; satellite-based mobile communications providers; specialized mobile radio services (SMRS) providers and enhanced SMRS providers; and paging service providers.

The Federal Communications Commission (FCC) may determine that a person or entity who is not a common carrier is subject to CALEA if that person or entity provides wire or electronic communication service and the FCC concludes that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of CALEA.

The definition does not include (1) persons or entities insofar as they are engaged in providing information services such as electronic publishing and massaging services; and (2) any class or category of telecommunications carriers that the FCC exempts by rule after consultation with the Attorney General.

*Capability Requirement*

CALEA requires telecommunications carriers to ensure that, within four years of the date of enactment, their systems have the capability to meet the Assistance Capability Requirements as described in Section 103 of CALEA. These requirements are that a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of—

(1) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and electronic communications carried by the carrier within a service area to or from equipment, facilities, or services of a subscriber of such carrier concurrently with their transmission to or from the subscriber's equipment, facility, or service, or at such later time as may be acceptable to the government.

(2) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the carrier—(A) before, during, or immediately after the transmission of a wire or electronic communications (or at such later time as may be acceptable to the government); and (B) in a manner that allows it to be associated with the communication to which it pertains, except that, with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of Title 18, United States Code), such call-identifying information shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number);

(3) delivering intercepted communications and call-identifying information to the government, pursuant to a court order or lawful authorization, in a format such that they may be transmitted by means of equipment, facilities, or services procured by the government to a location other than the premises of the carrier; and

(4) facilitating authorized communication interceptions and access to call-identifying information unobtrusively and with a minimum of interference with any subscriber's telecommunications service and in a manner that protects—(A) the privacy and security of communications and

call-identifying information not authorized to be intercepted; and (B) information regarding the government's interception of communications and access to call-identifying information.

Under section 107(a)(2) of CALEA, a carrier will be deemed to be in compliance if it adheres to publicly available technical requirements or standards adopted by an industry association or standard-setting organization to meet the requirements of section 103 of CALEA.

Telecommunications carriers may also adopt their own solutions. In any case, carriers must meet the requirements set forth in Section 103 of CALEA. If no technical requirements or standards are issued, or if they are challenged as being deficient, upon petition, the FCC has authority to develop them through a rule making.

#### Capacity Requirements

Section 104 of CALEA requires that the Attorney General, after seeking public notice and comment, establish and publish:

(1) notice of the actual number of communications interceptions, pen registers, and trap and trace devices, representing a portion of the maximum capacity that the Attorney General estimates that government agencies authorized to conduct electronic surveillance may conduct and use simultaneously by the date that is 4 years after the date of enactment of CALEA, and

(2) notice of the maximum capacity required to accommodate all of the communication interceptions, pen registers, and trap and trace devices that the Attorney General estimates that government agencies authorized to conduct electronic surveillance may conduct and use simultaneously after the date that is 4 years after the date of enactment of CALEA.

On October 16, 1995 the FBI proposed for comment the Initial Notice of Capacity (60 FR 53643). On November 9, 1995, the comment period for the Initial Notice of Capacity was extended until January 16, 1996. In response to comments received, the FBI restructured its approach and published a Second Notice of Capacity for comment in the Federal Register on January 14, 1997 (62 FR 1902).

Section 104 of CALEA also provides that within 180 days after the publication of the Final Notice of Capacity, a telecommunications carrier must submit to the Attorney General a statement (Carrier Statement) identifying any of the systems or services that do not have the capacity to accommodate simultaneously the

number of interceptions, pen registers, and trap and trace devices set forth in that notice. On April 10, 1996, the FBI published an Initial Notice and Request for Comment in accordance with the Paperwork Reduction Act of 1995 regarding the proposed information collection requirements of the Carrier Statement submission (61 FR 15974). A Second Notice and Request for Comment is forthcoming in the Federal Register. The FBI intends to use these Carrier Statements as one of the criteria upon which it will base its decisions to solicit cooperative agreements to reimburse carriers pursuant to section 104(e), based upon available funding.

#### Industry Implementation

Industry's compliance with the requirements set forth in section 103 of CALEA is affected by a number of interrelated factors, including whether the Attorney General has agreed to pay for needed modifications and whether the equipment, facility, or service was installed or deployed on or before January 1, 1995.

In the case of equipment, facilities, and services installed or deployed after January 1, 1995, compliance is dependent upon whether the necessary modifications are reasonably achievable as determined by the FCC using criteria set forth in CALEA. These criteria are as follows:

(1) The effect on public safety and national security.

(2) The effect on rates for basic residential telephone service.

(3) The need to protect the privacy and security of communications not authorized to be intercepted.

(4) The need to achieve the capability assistance requirements of section 103 of CALEA by cost effective methods.

(5) The effect on the nature and cost of the equipment, facility or service at issue.

(6) The effect on the operation of the equipment, facility, or service at issue.

(7) The policy of the United States to encourage the provision of new technologies and services to the public.

(8) The financial resources of the telecommunications carrier.

(9) The effect on competition in the provision of telecommunications services.

(10) The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995.

(11) Such other factors as the FCC determines are appropriate.

Telecommunications carriers also may petition regulatory authorities to adjust charges, practices, classifications, and regulations to recover costs

expended for making needed modifications to equipment, facilities, or services pursuant to the assistance capability requirements of CALEA section 103. CALEA also includes provisions for exemption, extension of the compliance date, consultation with industry, and systems security. Noncompliance may lead to civil actions by the Attorney General and the imposition of civil fines. In addition, CALEA requires telecommunications transmission and switching equipment manufacturers, as well as providers of the telecommunications support services, to cooperate with telecommunications carriers in achieving the required capabilities and capacities.

Section 109 of CALEA, Payment of Costs of Telecommunications Carriers to Comply with Capability Requirements, authorizes the Attorney General, subject to the availability of appropriations, to agree to pay telecommunications carriers for: (1) all reasonable 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; (2) additional reasonable costs directly associated with making the assistance capability requirements found in section 103 of CALEA reasonably achievable with respect to equipment, facilities, or services installed or deployed January 1, 1995, in accordance with the procedures established in CALEA section 109(b); and (3) reasonable costs directly associated with modifications of any of a carrier's systems or services, as identified in the Carrier Statement required by CALEA section 104(d), which do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the Capacity Notice(s) published in accordance with CALEA section 104.

CALEA section 109(e), Cost Control Regulations, authorizes the Attorney General, after notice and comment, to establish regulations necessary to effectuate timely and cost-efficient payment to telecommunications carriers under CALEA, under 18 U.S.C. chapters 119 and 121, and under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 *et seq.*). CALEA also directs the Attorney General to consult with the FCC prior to the establishment of these regulations.<sup>1</sup>

The regulations must minimize the cost to the Federal Government and

<sup>1</sup> CALEA § 109(e)(2).

permit recovery by telecommunications carriers of the direct costs of developing necessary modifications for CALEA compliance, including: providing the capabilities requested; providing capacities requested, training personnel in the use of such capabilities and capacities; and deploying or installing such capabilities and capacities.

In the case of any modification that may be used for any purpose other than lawfully authorized electric surveillance by a law enforcement agency of a government, CALEA permits the recovery of only the incremental cost of making the modification suitable for such law enforcement purposes.

#### B. Establishment of Cost Recovery Rules and Procedures

##### *Purpose and Intent*

As directed by CALEA section 109(e)(1), the FBI has developed and promulgated this rule to establish the procedures carriers must use to seek reimbursement under sections 109(a), 109(b)(2), and 104(e) of CALEA. Cost recovery payments under section 109(b)(2) of CALEA will be determined pursuant to the procedures set forth in section 109(b)(1) of CALEA and in accordance with this cost recovery rule. To the extent possible, this rule allows carriers to use their existing accounting procedures to record the costs of bringing equipment, facilities, and services into compliance with CALEA.

This rule seeks to ensure that each carrier's practices used in estimating costs for CALEA reimbursement purposes are consistent with the current cost accumulating and reporting procedures utilized by the carrier for the preparation of its financial statements. Further, it establishes that not all amounts reportable in accordance with generally accepted accounting principles will be eligible for reimbursement. Consistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike. Consistent application of internal cost accounting practices will facilitate the preparation of reliable cost estimates and allow comparison with the costs of performance. Such comparisons provide an important basis for financial control over costs and aid in establishing accountability for costs in the manner agreed to by both parties.

This rule also ensures that each cost is allocated only once and on only one basis to a cost group. The criteria for determining the allocation of costs to a cost group should be the same for all similar groupings.

In addition to setting forth the required accounting principles regarding reasonableness and allowability of costs and requirements for consistency in accounting, this rule establishes the reporting and record keeping requirements necessary for reimbursement. By establishing these requirements, the FBI ensures that it will be able to meet the joint mandate of CALEA section 109(e) to (1) make timely and cost-efficient payment to carriers while (2) minimizing the cost to the Federal Government. Throughout the development of this rule, the FBI sought to balance the need to minimize both the regulatory burden placed upon carriers and the expenditure of public funds.

Specific carriers will be selected for reimbursement based upon law enforcement priorities determined by the Attorney General. Several criteria will be used to determine law enforcement priorities. These include, but are not limited to: historical interceptions, features offered, existing surveillance techniques, and product life-cycles of telecommunications equipment, facilities, and services.

##### *Cooperative Agreement Process*

CALEA specifically states that the Attorney General "may agree" to pay carriers in the three circumstances discussed above [§ 109(a), § 109(b)(2), and § 104(e)]. Therefore, the FBI intends to enter into cooperative agreements with carriers to accomplish this reimbursement.<sup>2</sup> This rule will be incorporated in all cooperative agreements executed under sections 109 and 104 of CALEA and entered into between the carriers and the FBI.

The FBI will contact the carriers identifying the equipment, facilities, and services which will require modification, and which are eligible for reimbursement. The FBI will send requests for proposals to these carriers regarding the necessary modifications. These requests for proposals will identify the specific equipment, facilities and/or services which are in need of modification in order to comply with CALEA. They will also include instructions for submitting cost estimates (§ 100.16 of the final rule) and proposed terms and conditions for the

<sup>2</sup>The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301 *et seq.*) states that cooperative agreements are to be used when "the principal purpose of the relationship is to transfer a thing of value to the \* \* \* recipient to carry out a public purpose of support or stimulation authorized by a law of the United States," and "substantial involvement is expected between the executive agency and the \* \* \* recipient when carrying out the activity contemplated in the agreement." (31 U.S.C. 6305).

cooperative agreement. Cost estimate submission is necessary because: (1) carrier networks will require varying levels of modification to achieve compliance; (2) carriers have great latitude in developing and implementing CALEA-compliant solutions; and (3) CALEA's authorization for appropriations is limited to \$500 million.<sup>3</sup> Therefore, the FBI must have a clear idea of how much each modification is expected to cost so that it may weigh the proposed costs of each modification against the anticipated benefits to the public safety prior to entering into each cooperative agreement.

Once a carrier has submitted a cost estimate for the needed modifications, the FBI will enter into negotiations with that carrier to arrive at a cooperative agreement for reimbursement. To the extent possible, each cooperative agreement will be tailored to meet the specific needs of the individual carrier based upon the carrier's solution, existing accounting system, and size. For example, if a carrier's solution requires implementation over several months, the cooperative agreement with that carrier might include provisions for progress or milestone payments. There are several items which will be common to all cooperative agreements, including: the cost recovery rules, the requirements of CALEA (section 103 and/or section 104); and the protection of carrier patent rights. Once the carrier and the FBI reach agreement, a cooperative agreement will be executed and work can commence.

It must be noted that carriers are in no way obligated to expend funds on modifications eligible for reimbursement prior to the execution of a cooperative agreement. However, this in no way alleviates the carriers' responsibilities of compliance with CALEA for equipment, facilities, or services installed or deployed subsequent to January 1, 1995.

##### *Proposed Rule*

In response to CALEA's mandate and in accordance with the Administrative Procedures Act (5 U.S.C. 551 *et seq.*), the FBI published for notice and comment a proposed rule in the Federal Register on May 10, 1996 (61 FR 21396). The proposed rule was developed after consultation with other government entities, including the FCC, the Office of

<sup>3</sup>31 U.S.C. 1341, commonly referred to as the Anti-Deficiency Act, states that an officer or employee of the United States Government may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [31 U.S.C. 1341(a)(1)(A)]."

Management and Budget (OMB), and the General Accounting Office (GAO), and with representatives of the telecommunications industry.

In response to the proposed rule, the FBI received comments from 16 representatives of the telecommunications industry, including wireline and wireless carriers and associations. All comments have been considered in preparing this final rule. In developing this final rule, the FBI has also relied on the input of other governmental agencies, telecommunications industry experts, and the many years of cost accounting and auditing experience of its staff. Significant comments received in response to the proposed rule and any significant changes are discussed below.

### C. Significant Comments or Changes

#### *Comments by Section*

1. Proposed § 100.9 ("General"): Several commenters expressed confusion as to the reimbursement process. Therefore, the FBI has amended this section to clarify the requirement that a cooperative agreement must be executed prior to the incurrence of costs. This section now makes clear that reimbursement is subject to: (1) the availability of funds; (2) the reasonableness of costs; and (3) the execution of a cooperative agreement between the FBI and the carrier. Carriers are in no way obligated to expend funds on modifications that are eligible for reimbursement under sections 109(a), 109(b)(2), and 104(e) prior to the execution of a cooperative agreement.

2. Proposed § 100.10(a) (Definition of "allocable"): One commenter pointed out that "allocable" traditionally means chargeable to one or more cost objectives, rather than to two or more cost objectives. The FBI accepts this comment and the final rule is modified accordingly. In addition, for the purposes of clarity, the FBI has expanded the definition to include the descriptive phrase "and can be distributed to them in reasonable proportion to the benefits received."

3. Proposed § 100.10(e) (Definition of "directly allocable costs"): One commenter pointed out that "allocable" traditionally means chargeable to one or more cost objectives, rather than to two or more cost objectives; therefore, the definition of "directly allocable costs" should reflect this. The FBI accepts this comment and the final rule is modified accordingly. In addition, for the purposes of clarity, the FBI has expanded the definition to include the descriptive phrase "and can be

distributed to them in reasonable proportion to the benefits received."

4. Proposed § 100.10(j) and (k) (Definitions of "plant non-specific costs" and "plant specific costs"): Several commenters expressed concern in connection with the allowability of plant specific and plant non-specific costs in proposed § 110.11(b) ("Allowable costs"; Allowable plant specific costs) and proposed § 100.15(c) ("Disallowed costs"; Plant non-specific costs). In order to effect the changes necessary to clarify these issues, the FBI has removed the definitions of these terms from § 100.10, Definitions, and replaced them with an all encompassing definition of "plant costs." The specifics of which costs are allowed and disallowed with regard to these terms are addressed below in responses 12 and 28.

5. Proposed § 100.10 ("Definitions"): In response to several comments requesting further clarification of terms, the following definitions have been added to this section in the final rule: cooperative agreement; direct supervision; labor costs; network operations costs; and provisioning costs.<sup>4</sup> These definitions have been inserted in the appropriate alphabetical order. It should also be noted that the letter designations have been removed from § 100.10, Definitions, of the final rule at the suggestion of the Federal Register.

6. Proposed § 100.11(a)(1) ("Allowable costs"; Pre January 1, 1995 modifications; Plant specific costs): In conformance with the changes to proposed § 100.10(k), as discussed above in response 4, the term "plant specific costs" has been replaced with the term "plant costs."

7. Proposed § 100.11(a)(1) ("Allowable costs"; Pre January 1, 1995 modifications; General): This subsection establishes the allowability of 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. Several commenters asserted that the January 1, 1995 cut-off date for reimbursable modifications was

inappropriate. In particular, several commenters from the wireless industry noted that the dynamic nature of their industry effectively, and unfairly, excluded them from the cost reimbursement pool under this subsection.

The FBI must comply with CALEA, which mandates this date in section 109(a). It is, therefore, beyond the scope of the FBI's authority to change this date.

8. Proposed § 100.11(a)(1) ("Allowable costs"; Pre January 1, 1995 modifications; Significant upgrade): This subsection establishes the allowability of 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. Half of the commenters requested that the FBI define the phrase "replaced or significantly upgraded or otherwise undergoes major modifications" (hereafter referred to as "significant upgrade or major modification"). These commenters pointed out that eligibility for reimbursement is dependent upon how the FBI interprets "significant upgrade or major modification."

Given the dynamic nature of the telecommunications industry and the potential impact on eligibility for reimbursement, the FBI acknowledges that "significant upgrade and major modification" must be defined. However, this issue affects only those carriers who have made modifications or upgrades to their equipment, facilities, and/or services installed or deployed on or before January 1, 1995. The reimbursement eligibility of any equipment, facility, or service which has undergone no modification or upgrade since January 1, 1995 is not affected by this definition. In addition, "significant upgrade or major modification" does not pertain to cases of reimbursement for capability modifications which have been deemed not reasonably achievable by the FCC under CALEA section 109(b)(2) or to reimbursement for capacity modifications under CALEA section 104(e). Therefore, given that many of the potential reimbursement scenarios allowed by CALEA, and, therefore, by this rule, are not affected by the definition of "significant upgrade and major modification," the FBI has elected, as noted below, to handle this

<sup>4</sup> It should be noted that line costs associated with delivery of intercepted communications to law enforcement are not reimbursable under CALEA. However, it is anticipated that the delivery costs associated with interceptions will continue to be borne by the requesting law enforcement agency.

issue separately in order to expedite the CALEA implementation process. This decision is in both the best interests of the government and of the carriers given that CALEA funds are now available to begin the reimbursement effort.<sup>5</sup> Severing the "significant upgrade and major modification" issue from this rule for separate consideration allows the FBI as soon as possible to begin reimbursing those carriers who have made no modifications or upgrades since January 1, 1995.

On November 19, 1996, the FBI published an Advanced Notice of Proposed Rulemaking (ANPRM) in the Federal Register (61 FR 58799), which solicited the submission of potential definitions of "significant upgrade or major modification" from the telecommunications industry and the general public. This ANPRM was also sent to a large number of associations representing the interests of the various telecommunications carriers, both wireline and wireless. The FBI is currently considering the comments received and anticipates making a determination with regard to this issue in the near future.

9. Proposed § 100.11(a)(2) ("Allowable costs"; Post January 1, 1995 modifications; Plant specific costs): In conformance with the changes to proposed § 100.10(k), as discussed above in response 4, the term "plant specific costs" has been replaced with the term "plant costs."

10. Proposed § 100.11(a)(2) ("Allowable costs"; Post January 1, 1995, modifications; Additional reasonable costs): This subsection establishes the allowability of the additional reasonable plant costs directly associated with making the assistance capability requirements found in section 103 of CALEA reasonably achievable with respect to equipment, facilities, or services installed or deployed after January 1, 1995, in accordance with the procedures established in CALEA section 109(b). Several commenters wanted to know how the FBI planned to define "additional reasonable costs." CALEA section 109(b)(1) places the responsibility of determining whether modifications to equipment, facilities, and services installed or deployed after January 1, 1995, are "reasonably achievable" with the FCC, which will make its rulings based on specific petitions by carriers. At its most basic level, additional reasonable costs means those costs which are above and beyond what the FCC determines to be

"reasonably achievable" in each instance. The specifics of this issue fall within the purview of the FCC's CALEA implementation responsibilities; it would, therefore, be inappropriate for the FBI to address this issue further in this rule.

11. Proposed § 100.11(a)(3) ("Allowable costs"; Capacity modifications; Plant specific costs): In conformance with the changes to proposed § 100.10(k), as discussed above in response 4, the term "plant specific costs" has been replaced with the term "plant costs."

12. Proposed § 100.11(b) ("Allowable costs"; Allowable plant specific costs): Several commenters expressed concern over the use of plant specific and plant non-specific as qualifiers for allowability for reimbursement purposes under CALEA. These commenters pointed out that there could be certain plant non-specific costs which could be allowable.

The FBI is persuaded by these arguments and has amended the final rule as follows.

First, the FBI has removed the definitions of plant specific and plant non-specific costs from § 100.10, Definitions, and has replaced them with an all-encompassing definition of "plant costs." Second, the FBI has amended § 100.11(b) to reflect allowable plant costs, whether plant specific or plant non-specific. Third, the FBI has amended § 100.15(c) to reflect disallowed plant costs, whether plant specific or plant non-specific.

13. Proposed § 100.11(b)(2) ("Allowable costs"; Allowable plant specific costs; first-line supervision): One comment was received from a small wireless carrier which expressed concern over the nature and definition of "first-line supervision." This commenter interpreted this subsection as excluding from eligibility for reimbursement the work of some individuals who, of necessity, perform many different functions in a small business. The FBI has replaced this term with "direct supervision" and has provided a definition of "direct supervision" in § 100.10 of the final rule to clarify this issue.

The FBI also wishes to note that, for the purposes of reimbursement, it is not job title which matters, but rather the nature of the work performed. Therefore, if the Chief Executive Officer (CEO) of a company also happens to be the engineer responsible for network engineering, the time that individual spends coordinating the integration of the CALEA compliant solution into the network will be reimbursable, while the time spent managing the general

business affairs of the company will not be reimbursable.

14. Proposed § 100.11(c) ("Allowable costs"; Incremental costs): Both CALEA<sup>6</sup> and the proposed rule establish that "[i]n the case of any modification that may be used for any purpose other than lawfully authorized electronic surveillance by a government law enforcement agency, . . . only the incremental cost of making the modification suitable for such law enforcement purposes" is recoverable. Some commenters wished to know the methodology the FBI intends to use to determine (1) whether a modification could be used for any other purpose; and (2) the nature and amount of these "incremental costs."

The determination of whether or not a modification could be used for any purpose other than lawfully authorized electronic surveillance by a government law enforcement agency is outside the scope of this accounting rule.

In the case of any modification that may be used for any purpose other than lawfully authorized electronic surveillance by a government law enforcement agency, the carrier may only recover the incremental cost of making the modification suitable for such law enforcement purposes. With regard to the determination of the nature and amount of the "incremental costs," this determination will be dependent on the nature of the proposed solution. Therefore, the nature and amount of any "incremental costs" will be identified and proposed by specific carriers as part of specific cooperative agreements.

15. Proposed § 100.11(d) ("Allowable costs"): In the proposed rule, "direct cost" was used interchangeably with "directly assignable cost" which could potentially create confusion. Therefore, in order to maintain consistency within the document and to clarify the original intent of this subsection, "direct and directly allocable costs" has been amended to read "directly assignable and directly allocable costs."

16. Proposed § 100.12 ("Reasonable costs"; General): In this section, the FBI has set forth the guidelines for determining whether a cost is reasonable for reimbursement purposes. Several commenters requested that the FBI clarify how the "reasonableness" of costs will be determined for the purposes of reimbursement. While the guidelines set forth in § 100.12 may seem somewhat vague and subjective, it must be noted that they are consistent with the standard guidelines used in

<sup>5</sup>Public Law 104-208, Item 28: (16) "Telecommunications Carrier Compliance Fund."

<sup>6</sup>§ 109(e)(2)(B)

government contracting.<sup>7</sup> It is not the Government's intent to "second guess" the carrier's judgement; the Government simply requires that the carrier's decisions involve the use of reasonable and prudent judgement. Stated another way, all the Government requires is that the carrier treat the taxpayers' money with the same prudence and care the carrier would apply to its own corporate funds. Therefore, no change has been made in the final rule.

17. Proposed § 100.12(a)(1) and (a)(2) ("Reasonable costs"; Presumption of reasonableness and burden of proof): These subsections establish that no presumption of reasonableness is attached to the incurrence of costs by a carrier and that the burden of proof that a cost is reasonable for the purposes of CALEA reimbursement rests with the carrier. Some carriers objected to these requirements, arguing that the burden of proof that a cost was not reasonable ought to rest with the Government. These subsections follow standard Government cost principles.<sup>8</sup> Therefore, no change has been made in the final rule.

For purposes of clarity, however, it must be noted that the FBI is not requiring that supplementary documentation necessary to meet the burden of proof be submitted with the initial cost estimate or request for payment; those submissions require only the level of supporting documentation outlined in § 100.16 and § 100.17 of the final rule. It is only when a review of these submissions results in a question regarding a specific cost that the carrier will be required to meet the burden of proof with appropriate supporting documentation.

In addition, the nature and extent of the supporting documentation which might be required will be addressed during the cooperative agreement process to allow flexibility (1) for the various accounting systems in use throughout the industry and (2) for the special needs of small entities as discussed in the *Final Regulatory Flexibility Analysis* below.

18. Proposed § 100.13(a)(3) ("Directly assignable costs"; Burden of proof): This subsection establishes that the burden of proof that a cost is directly assignable to the CALEA implementation effort rests with the carrier. Some carriers objected

to these requirements, arguing that the burden of proof that a cost was not directly assignable to the CALEA implementation effort ought to rest with the Government. This subsection follows standard Government cost principles.<sup>9</sup> Therefore, no change has been made in the final rule.

For purposes of clarity, however, it must be noted that the FBI is not requiring that supplementary documentation necessary to meet the burden of proof be submitted with the initial cost estimate or request for payment; those submissions require only the level of supporting documentation outlined in § 100.16 and § 100.17 of the final rule. It is only when a review of these submissions results in a question regarding a specific cost that the carrier will be required to meet the burden of proof with appropriate supporting documentation.

In addition, the nature and extent of the supporting documentation which might be required will be addressed during the cooperative agreement process to allow flexibility (1) for the various accounting systems in use throughout the industry and (2) for the special needs of small entities as discussed in the *Final Regulatory Flexibility Analysis* below.

19. Proposed § 100.13(b) ("Directly assignable costs"; Minor dollar amounts): The FBI has stricken the reference to minor dollar amounts in this subsection as unnecessary.

20. Proposed § 100.13 ("Directly allocable costs"; General): This section sets forth the requirements for treating costs as directly allocable costs for the purposes of the CALEA reimbursement process. One commenter argued that the definition of and requirements for "directly allocable costs" are largely meaningless in that they appear to be inconsistent with the FAR. The FBI has, as noted above, amended the definition of "directly allocable costs" in proposed § 100.10(e) in the final rule. In addition to this emendation, the FBI wishes to point out that it is not possible for this rule to be completely consistent with the FAR because CALEA specifically disallows costs which the FAR treats as allowable. Furthermore, the treatment of "directly allocable costs" is the direct result of the FBI's intent to allow carriers to use their existing accounting systems to comply with these rules. Therefore, no change has been made in the final rule.

21. Proposed § 100.14(b) ("Directly allocable costs"; Burden of proof): This subsection establishes that burden of proof that a cost is directly allocable (as

defined in this rule) to the CALEA implementation effort rests with the carrier. Some carriers objected to these requirements, arguing that the burden of proof that a cost was not directly allocable to the CALEA implementation effort ought to rest with the Government. This subsection follows standard Government cost principles.<sup>10</sup> Therefore, no change has been made in the final rule.

For purposes of clarity, however, it must be noted that the FBI is not requiring that supplementary documentation necessary to meet the burden of proof be submitted with the initial cost estimate or request for payment; those submissions require only the level of supporting documentation outlined in § 100.16 and § 100.17 of the final rule. It is only when a review of these submissions results in a question regarding specific cost that the carrier will be required to meet the burden of proof with appropriate supporting documentation.

In addition, the nature and extent of the supporting documentation which might be required will be addressed during the cooperative agreement process to allow flexibility (1) for the various accounting systems in use throughout the industry and (2) for the special needs of small entities as discussed in the *Final Regulatory Flexibility Analysis* below.

22. Proposed § 100.14(d)(4) ("Directly allocable costs"; Distribution base): Some commenters objected to this subsection because they interpreted it to mean that the FBI was reserving the right to approve or disapprove of each carrier's entire cost accounting system based on the phrase "has been accepted by the FBI." This was never the intent of the proposed rule, nor is it the intent of the final rule. The FBI intended to ensure the following: (1) that the base for distributing allocable costs is definitized in the cooperative agreement between the carrier and the FBI and (2) that the carrier makes no significant changes [i.e. changes which will affect the level of reimbursement from the government] to this distribution base once it has been agreed to without the written approval of the FBI. Given the apparent misinterpretation on the part of some of the commenters, the FBI has amended the final rule to more clearly reflect this intent.

23. Proposed § 100.14(d)(5)(i) ("Directly allocable costs"; Allocation methodology; cost patterns): One commenter asked whether this subsection required that carriers submit to the FBI evidence of how the carrier

<sup>7</sup> See, for example, the Federal Acquisition Regulation (FAR) 31.201-3 for procurement contracts and OMB Circulars A-122, "Cost Principles for Nonprofit Organizations" and A-21, "Principles for Determining Costs Applicable to Grants, Cooperative Agreements, and Other Agreements with Educational Institutions" for grants and cooperative agreements.

<sup>8</sup> See FAR 31.201-3 for procurement contracts.

<sup>9</sup> Id.

<sup>10</sup> See FAR 31.201-3 for procurement contracts.

allocated common costs on other projects as a mechanism for checking the appropriateness of the proposed allocation methodology for CALEA reimbursement. The FBI is not requiring submission of such evidence; however, such evidence could be used as an example of the carrier's typical practices if a question regarding the allocation methodology arose.

24. Proposed § 100.14(d)(5)(iii) ("Directly allocable costs"; Allocation methodology; site-specific records): One commenter asserted that the requirement of this subsection that carriers maintain CALEA-specific records supporting cost allocations that are site-specific would be burdensome to carriers with multiple switches requiring CALEA modifications.

Given that CALEA restricts reimbursement to directly associated costs only, it will be necessary for carriers to maintain CALEA-specific records. As these records will, of necessity, need to indicate work done on specific equipment, facilities, and services, there is no apparent means of relieving carriers of the requirement to maintain site-specific records. Therefore, no change has been made in the final rule.

25. Proposed § 100.14(d)(6) ("Directly allocable costs"; Base periods): One commenter asserted that it did not use "base periods" for allocating allocable costs. However, whether this commenter calls it a "base period" or not, the commenter does use a fiscal year for financial reporting purposes. Therefore, in the case of this commenter, the "base period" could be the fiscal year. The FBI crafted these rules to allow the carriers as much flexibility as possible in reporting requirements in order to minimize the burden imposed upon them. Hence, the exact definition of the "base period" is left up to each carrier.

26. Proposed § 100.15 ("Disallowed costs"; General): Many commenters questioned the restrictions set forth in this section. All commenters addressing the issue had specific types of costs which they believed should not be disallowed. Of these, most could be subsumed into the areas of General and Administrative (G&A) costs and Plant Non-Specific costs, which are addressed below. In general, the FBI wishes to point out that it is the authority to expend funds found in CALEA which limits reimbursable costs to directly associated costs. The FBI would be in direct violation of law if it were to allow costs which are, either expressly or implicitly, disallowed by CALEA. Therefore, other than as discussed in response 28, below, with regard to the

clarification as to the definitions of plant specific and plant non-specific costs, no costs disallowed in the proposed rule have been removed from this section in the final rule.

27. Proposed § 100.15(a) ("Disallowed costs"; G&A costs): G&A costs are costs which are normally considered indirect (i.e. not directly associated with final cost objectives). The FBI cannot disburse funds to a carrier under CALEA for costs that the carrier would have incurred (e.g. external relations and information management costs) had CALEA not been enacted. However, the FBI recognizes that certain CALEA-specific expenses, which might normally be considered G&A costs, may, in accordance with § 100.11 of these rules, be charged directly to the CALEA implementation effort. Section 100.15, Directly Allocable Costs, was written in order to provide the carriers with the ability to recover these costs.

28. Proposed § 100.15(c) ("Disallowed costs"; Plant non-specific costs): Several commenters expressed concern over the use of plant specific and plant non-specific as qualifiers for allowability for reimbursement purposes under CALEA. These commenters pointed out that there could be certain plant non-specific costs which would be allowable. The FBI is persuaded by these arguments and has amended the final rule as follows:

First, the FBI has removed the definitions of plant specific and plant non-specific costs from § 100.10, Definitions, and has replaced them with an all-encompassing definition of "plants costs." Second, the FBI has amended § 100.11(b) to reflect allowable plants costs, whether plant specific or plant non-specific. Third, the FBI has amended § 100.15(c) to reflect disallowed plant costs, whether plant specific or plant non-specific.

29. Final § 100.15(f) ("Additional costs"; Agreed upon): The FBI has, for the purposes of clarity, changed "agreed upon" to "agreed to by the government and the carrier."

30. Final § 100.15(h), formerly part of Proposed § 100.20 ("Disallowed costs"; Accounting provisions): Some commenters asserted that Proposed § 100.20, Accounting for Unallowable Costs, was unnecessary and burdensome because carriers must fully account for and document allowable expenses.

The original intent of Proposed § 100.20 was to ensure that, should a carrier's accounting system require that unallowable costs be used in any way to calculate the nature and amount of allowable costs (i.e. to determine the level of allocable costs), the unallowable costs were accurately identified as such,

and were properly removed from the calculation of the reimbursement amount. However, the FBI acknowledges that this section appeared confusing and that it could be streamlined. Therefore, Proposed § 100.20, Accounting for Unallowable Costs, has been deleted and the necessary elements have been added as new subsection (h) to Final § 100.15, Disallowed Costs.

31. Proposed § 100.16 and § 100.17 ("Cost estimate submission" and "Request for payment"; General): Many commenters stated that the reporting requirements of these sections are unnecessarily duplicative of each other and generally require too much detail.

Any expenditure of CALEA funds must meet minimal recordkeeping requirements and must be auditable by the Inspector General of the Department of Justice and the Comptroller General of the United States.<sup>11</sup> The rule defines the minimum amount of financial data and supporting documentation that the FBI must retain if it is to reimburse carriers. The FBI has required the least burdensome reporting level possible which still allows it to meet its fiscal accountability requirements.

However, the FBI has also learned from the comments received that certain aspects of these sections describing the requirements could benefit from further explanation and some emendation for the purposes of clarity with regard to the level of detail required to be submitted. These explanations and emendations are addressed by subsection below.

As for the perceived duplicativeness of § 100.16 and § 100.17, the commenters appear to have been confused by the cooperative agreement process, an explanation of which appears above in Section B, Establishment of Cost Recovery Rules and Procedures, subheading "Cooperative Agreement Process." In addition to the explanation of the cooperative agreement process above, the FBI presents the following additional clarification. Estimates are needed because the FBI must have a clear idea of how much each proposed modification is expected to cost so that it may weigh the proposed costs of each modification against the anticipated

<sup>11</sup> 31 U.S.C. 712 authorizes the Comptroller General to investigate all matters related to the receipt, disbursement, and use of public money. 47 U.S.C. 1010(b) (as amended by Public Law 104-316) requires the Inspector General of the Department of Justice to report to Congress on the "reasonableness and cost-effectiveness of the payments made by the Attorney General to telecommunications carriers for modifications necessary to ensure compliance with [CALEA]."

benefits to the public safety.<sup>12</sup> Clearly, the FBI must require that carriers submit sufficient information for cost-benefit analyses to be performed. Furthermore, CALEA specifically requires that the cost recovery regulations prescribed must “seek to minimize the cost to the Federal Government. . . .”<sup>13</sup> The FBI must, therefore, be able to determine that the solution proposed and its associated costs are appropriate and reasonable prior to entering into cooperative agreements for reimbursement with carriers.

The need for supporting documentation at the request for payment stage is required by CALEA. While the FBI does not anticipate any intentional fraud, honest mistakes are sometimes made and the FBI is required to ensure that the Federal Government does not inappropriately expend taxpayer funds on disallowed costs.

In addition, the similarities between the cost estimate and the request for payment remarked upon by several commenters are intended to simplify the reporting and recordkeeping done by carriers and will help ensure that the request for payment can adequately be correlated to the cost estimate for review purposes.

32. Proposed § 100.16 and § 100.17 (“Cost estimate submissions” and “Request for payment”; General; Wireless Carrier Concerns): Comments were received from representatives of the wireless industry which expressed concern that the reporting requirements of § 100.16, Cost Estimate Submission, and § 100.17, Request for Payment, are too burdensome for wireless providers because their accounting systems are not equipped to generate the level of detail wireline providers’ systems are.

As long as such carriers are using accounting systems which generate financial statements which are in accordance with generally accepted accounting principles, the final rule will allow wireless providers to use their current accounting systems to meet these reporting requirements.

33. Proposed § 100.16 and § 100.17 (“Cost estimate submission” and “Request for payment”; General; Small Business Concerns): Several commenters, either classified as small businesses for regulatory purposes or representing the interests of such small businesses, expressed concern that the reporting requirements of these sections would place an undue burden on small

businesses. While this issue is addressed at length in the *Final Regulatory Flexibility Analysis* below, a brief discussion is merited here. The reporting requirements of these sections are flexible enough to allow small carriers to submit cost estimates and requests for payment from the level of detail available to their existing accounting systems. As stated above in comment response 17, and as will be made clear by the responses to specific comments which follow, the FBI only requires the submission of supporting data if a question arises regarding specific items. In addition, a Small Business Compliance Guide, as required by Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II of Public Law 104–121) will be forthcoming from the FBI. This Guide, which will be tailored to the needs of small businesses, will provide detailed instructions for complying with all aspects of this final rule. The FBI has consulted with the Office of Advocacy of the Small Business Administration (SBA) and the Office of Communications Business Opportunities at the FCC regarding this final rule and is committed to imposing the least regulatory burden possible on small businesses and assisting them in achieving CALEA-compliance with respect to this rule.

34. Proposed § 100.16(c) (“Cost estimate submission”; Higher authority): A few commenters pointed out that the reference to a “higher authority” was ambiguous. The FBI accepts this comment and has amended the final rule accordingly.

35. Proposed § 100.16(d)(1) (“Cost estimate submission”; Supporting documentation): Several commenters were concerned about the required submission of what they perceived as an extremely high level of supporting documentation of § 100.16(d)(1). The FBI accepts this comment and has, for the purposes of clarity, removed the descriptive phrase “adequately cross-referenced, suitable for detailed analysis” from this subsection.

36. Proposed § 100.16(d)(2) (“Cost estimate submission”; Cost element breakdown): One commenter was concerned that this subsection’s inclusion of the phrase “and must reflect any specific requirements established by the FBI” gave the FBI too much latitude in requiring additional documentation submission. While this was not the intent of this phrase, the FBI accepts that it could be read in such a manner and has, therefore, stricken it from the final rule.

37. Proposed § 100.16(d)(5)(iii) (“Cost estimate submission”; “Allocable direct

costs”): A few commenters found the phrase “showing trends and budgetary data” both burdensome and requiring further explanation. In the interests of minimizing the reporting burden on carriers and clarifying the requirements, the FBI has streamlined this subsection by removing this phrase and deleting the requirement to “indicate the rates used and provide an appropriate explanation.”

38. Proposed § 100.16(e)(1) (“Cost estimate submission”; Judgmental factors): One commenter requested clarification of the term “judgmental factors.” The FBI has amended the final rule to include an example of such judgmental factors in the text of this subsection.

39. Proposed § 100.16(f) (“Cost estimate submission”; Continuous submission of cost data): A few commenters interpreted this subsection’s requirement that cost data be submitted as it becomes available up until the time of final reimbursement as requiring a continuous submission of data. This was not the FBI’s intent; rather, the FBI sought to ensure that, in the event that information significantly affecting the cost estimate should become available, the carrier would provide that information to the FBI. However, the FBI has determined that this requirement is met by § 100.17(d)(2) of the final rule and has, therefore, amended Proposed § 100.16(d)(2) accordingly.

40. Proposed § 100.17(b)(1) (“Request for Payment”; Supporting documentation): Several commenters were concerned about the required submission of what they perceived as an extremely high level of supporting documentation in § 100.17(b)(1). The FBI accepts this comment and has, for the purposes of clarity, removed the descriptive phrase “adequately cross-referenced, suitable for detailed analysis” from this subsection.

41. Proposed § 100.17(b)(2) (“Request for Payment”; Cost element breakdown): One commenter was concerned that this subsection’s inclusion of the phrase “and must reflect any specific requirements established by the FBI” gave the FBI too much latitude in requiring additional documentation submission. While this was not the intent of this phrase, the FBI accepts that it could be read in such a manner and has, therefore, stricken it from the final rule.

42. Proposed § 100.17(c) (“Request for Payment”; Forward costing factors): The FBI has stricken the reference to forward costing factors in this subsection as unnecessary.

<sup>12</sup> CALEA § 109(c) states that “The Attorney General shall allocate funds appropriated to carry out this title in accordance with law enforcement priorities determined by the Attorney General.”

<sup>13</sup> CALEA § 109(e)(2)

43. Proposed § 100.17(c)(2) ("Request for Payment"; Direct labor): A few commenters found this subsection to be confusing and requiring a potentially overburdensome submission of documentation. The FBI has streamlined this subsection and clarified its document submission requirements such that they impose the least burden possible. Specifically, the FBI has added the phrase "have available for audit in accordance with § 100.18" to the text to better define the documentation requirements. This phrase has also been added to Proposed subsections 100.17(c) (3), (4), and (5) for the same purpose.

44. Proposed § 100.17(d)(1) ("Request for Payment"; Specific identification of cost data): The FBI has amended this subsection to clarify the phrase "by specific identification."

45. Proposed § 100.17(d)(2) ("Request for Payment"; Continuous submission of cost data): A few commenters interpreted this subsection's requirement that cost data be submitted as it becomes available up until the time of final reimbursement as requiring a continuous submission of data. This was not the FBI's intent; rather, the FBI sought to ensure that, in the event that information significantly affecting the cost estimate should become available, that the carrier would provide that information to the FBI. This subsection has been amended to better reflect that intent.

46. Proposed § 100.17(e) ("Request for Payment"; Index): The FBI has streamlined this subsection to minimize the indexing requirements.

47. Proposed § 100.18 ("Audit"; General): One commenter questioned the FBI's right to audit with regard to CALEA reimbursements. The right to audit is implicit in a federal agency's stewardship responsibilities with respect to the disbursement of taxpayer funds. Furthermore, conducting audits of CALEA reimbursements is an important and integral part of the FBI's internal financial controls, which are required under 31 U.S.C. Subtitle III, Financial Management.

48. Proposed § 100.18 ("Audit"; Attorney-Client Privileged Material and Attorney Work Product): Two commenters seemed to interpret this section as granting the FBI the right to examine attorney-client privileged material and attorney work product during the normal course of an audit. This is not the FBI's intent. Audit materials do not include privileged communications or work product as protected by law. It must be noted, however, that the burden proving that the communication or material is

privileged is on the party claiming the privilege.<sup>14</sup>

49. Proposed § 100.18(d) ("Audit"; "Availability"; Reasonable availability): A few commenters found the requirement that a carrier "shall make available at its office at all reasonable times the cost and support material described herein, for examination, audit, or reproduction . . ." to be burdensome given that many carriers store such information offsite. These commenters interpreted this subsection as requiring carrier to store such information on-site, thereby requiring them to alter their existing record keeping regimes.

The FBI agrees that requiring carriers to store such records on-site would be burdensome; however, this was not the intent of Proposed § 100.18(d). The pivotal phrase here is "at all reasonable times." Given the wide range of accounting and record keeping methods in use in the telecommunications industry, the FBI recognizes that "reasonable" might be 24 hours for one carrier or 3-5 business days for another carrier. Therefore, to meet the specific needs of individual carriers, a "reasonable" time frame will be defined as part of the cooperative agreement entered into with each carrier.

50. Proposed § 100.18(d) ("Audit"; "Availability"; Record retention): Several commenters asserted that the five (5) year record retention requirement was too long and inconsistent with other federal regulatory record retention requirements. In the interest of minimizing the regulatory burden on private industry, the FBI accepts this comment. The record retention period in the final rule is amended to three (3) years.

51. Proposed § 100.19 ("Reduction for defective cost data"): A few commenters expressed concern that this section could be interpreted as a penalty clause. This was not the FBI's intent; rather, this section was included to allow for equitable adjustments to an agreed-to amount to reflect actual costs. To clarify this intent, the FBI has expanded § 100.19 to include adjustment procedures for revisions of the agreed-to amount: (1) prior to the incurrence of a cost; (2) subsequent to the incurrence of a cost; and (3) subsequent to the discovery that cost data was defective.

52. Proposed § 100.19(c)(1) ("Reduction for defective cost data";

Sole source supplier): Several commenters, either classified as small businesses for regulatory purposes or representing the interests of such small businesses, expressed concern that holding small businesses responsible for the cost data of their sole source suppliers was unduly burdensome. This issue is addressed at length in the *Final Regulatory Flexibility Analysis* below.

53. Proposed § 100.19(c)(4) ("Reduction for defective cost data"; Interest): A few commenters requested that a subsection be added requiring the Government to pay the carrier interest in the event of an underpayment or late payment by the Government. The FBI originally believed that such payments were mandated by the Prompt Payment Act (31 U.S.C. 3901 *et seq.*, as amended), which requires the payment of interest on the part of the Government and OMB Circular A-125 (Revised), "Prompt Payment," which establishes the procedures for the payment of interest to parties in the event of late payment by the Government. It has since determined, however, that both the Prompt Payment Act and OMB Circular A-125 apply only to procurement contracts. Given this, the FBI does not derive statutory authority to pay interest under the Prompt Payment Act. However, the FBI may contractually bind itself with such provisions. Therefore, the FBI can incorporate such a clause into its cooperative agreements with carriers. Rather than develop duplicate procedures, the FBI intends to incorporate the procedures for the payment of interest on late payment of invoice payments (including progress payments) set forth in OMB Circular A-125 into all cooperative agreements with carriers. Therefore, the FBI has not amended the final rule.

54. Proposed § 100.20 ("Accounting for unallowable costs"): Some commenters asserted that Proposed § 100.20, Accounting for Unallowable Costs, was unnecessary and burdensome because carriers must fully account for and document allowable expenses.

The original intent of Proposed § 100.20 was to ensure that, should a carrier's accounting system require that unallowable costs be used in any way to calculate the nature and amount of allowable costs (i.e. to determine the level of allocable costs), the unallowable costs were accurately identified as such, and were properly removed from the calculation of the reimbursement amount. However, the FBI acknowledges that this section appeared confusing and that it could be streamlined. Therefore, Proposed § 100.20, Accounting for Unallowable

<sup>14</sup> *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675 (D.D.C. 1981). See also *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954) (privilege not applicable to communications with attorney where he has been "employed as an accountant solely and simply" in preparing tax returns).

Costs, has been deleted and the necessary elements have been added as new subsection (h) to Final § 100.15, Disallowed Costs.

55. Proposed § 100.21 (“Confidentiality of trade secrets/proprietary information”): One commenter requested that the FBI amend this section to ensure that company proprietary information is not indiscriminately disclosed to Government employees. While this was not the FBI’s intent, it accepts the comment and has amended the final rule accordingly.

#### General Comments

1. *Capacity Requirements*: Several commenters felt that they could not adequately comment on the proposed cost recovery rules without knowing what the final capacity requirements were. These commenters asserted that they needed to know the estimated costs prior to assessing the proposed rule.

These comments are not accepted. The Cost Recovery Rules are accounting principles addressing allowability and reasonableness which will be applied universally to carriers’ costs, regardless of amount.

2. *Takings*: Two commenters asserted that carrier compliance with CALEA would require the carriers to expend funds or lose profits which would constitute a taking for which the carriers would be entitled to full compensation pursuant to the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States. One commenter asserted that this was so regardless of whether Congress provides funding for CALEA cost reimbursement.

No set formula exists for identifying when Government regulatory action constitutes a “taking” under the Constitution; the Supreme Court has instead generally relied on an ad hoc, factual inquiry into the circumstances of each particular case. The Supreme Court has, however, indicated that the following factors have particular significance: (1) the severity of the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. See *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for So. California*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Connolly v. Pension Benefit Guaranty Corp.* 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986); see also *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

In response to the comments received, the FBI has analyzed these factors and has concluded that CALEA’s requirements do not amount to a compensable taking. First, the FBI does not believe that the economic impact of these CALEA regulations on carriers will rise to the level of a taking requiring compensation. These regulations will not significantly impair the economically beneficial use of the carrier’s property, and the value of such property will not be substantially reduced. If any such reduction does occur, these regulations provide that it may be offset by Congressional funding available to reimburse carriers. Moreover, it has been held that “mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe*, 508 U.S. at 645. Second, these regulations will not interfere with investment-backed expectations of the carriers. Carriers have cooperated with the execution of court-ordered electronic surveillance for some time now. Carriers could, consequently, readily anticipate that such wiretapping would continue and that the mechanisms of such wiretapping would evolve as telecommunications technology advanced. These regulations do not expand law enforcement authority but merely maintain the ability of law enforcement to conduct court-ordered surveillance. Carriers had no reasonable expectation that they would not be required to continue to provide assistance to law enforcement. Finally, the character of the government action involved suggests that these regulations do not involve a compensable taking. In carrying out CALEA, no law enforcement agency will physically invade any carriers’ property or appropriate any carriers’ assets for its own use. The FBI feels that these CALEA regulations substantially advance the Nation’s legitimate interests in preserving public safety and national security. These interests would unquestionably be jeopardized without the ability to conduct court-ordered electronic surveillance. Such wiretaps are critical to saving lives and solving crimes. In sum, the FBI does not believe that the carriers are being forced to bear a burden “which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

3. *Manufacture Date of Equipment*: One commenter seemed to assert that it was the manufacture date of the equipment which determined its eligibility for reimbursement. This comment is non-germane given that

CALEA specifically addresses “equipment, facilities, and services *installed or deployed* on or before January 1, 1995” [§ 109(a), emphasis added], and “equipment, facilit[ies] and service[s] *installed or deployed* after January 1, 1995” [§ 109(b)(1), emphasis added]. Clearly, it is the installation or deployment date rather than the manufacture date which determines eligibility for reimbursement.

4. *Dispute Resolution*: A few commenters requested that the FBI identify a means of dispute resolution should a disagreement occur between a carrier and the FBI regarding the cooperative agreement process. As discussed above, carriers are in no way obligated to expend funds on modifications that are eligible for reimbursement under sections 109 and 104 prior to the execution of a cooperative agreement. Furthermore, should a carrier and the FBI fail to reach agreement as to the terms of the cooperative agreement, that carrier will remain in compliance with CALEA until such time as the equipment, facility or service in question is no longer eligible for reimbursement, either because it has undergone a “significant upgrade or major modification” or because the modification required has been determined to be reasonably achievable by the FCC.<sup>15</sup> Nevertheless, if a dispute does arise which has resulted in an impasse to the negotiations, there may be benefits to both the FBI and the carrier that would warrant additional efforts at resolving the dispute, so that a cooperative agreement could be agreed upon. The FBI is also aware of the Attorney General’s April 6, 1995 Policy on Alternative Dispute Resolution (ADR), as well as Executive Order 12988, and the Congressional endorsement of ADR as found in the recently reauthorized Administrative Dispute Resolution Act of 1996. For all these reasons, the FBI has decided that, where an impasse in the negotiations precludes it from executing a cooperative agreement with a carrier, it will consider using mediation (where the carrier agrees) to achieve, in a timely fashion, a consensual resolution of all outstanding issues through facilitated negotiations. The FBI expects that the costs of mediation would be shared equally by the parties, and that each mediation would be governed by a separate mediation agreement prepared by the FBI and the carrier. Accordingly, § 100.21 “Alternative Dispute Resolution” has been added to the Final Rule.

<sup>15</sup> CALEA § 109(d) and § 109(b)(1).

5. *ESI Document*: Two commenters expressed concern about the FBI's Electronic Surveillance Interface (ESI) document. The commenters asserted their belief that the requirements in the ESI exceeded those of CALEA. The ESI document is not a requirements document, rather it is law enforcement's recommendation for the delivery interface between carrier systems and the law enforcement collection equipment. It relates only to the delivery of intercepted communications. It does not dictate interception solutions. The ESI document is merely a contribution to the standard setting process by law enforcement. The FBI coordinated the development of the ESI document with the law enforcement community and the Department of Justice to ensure that the recommendations were consistent with the scope and intent of CALEA and with existing electronic surveillance laws. As such, all costs directly associated with this approach will be eligible for reimbursement.

6. *Safe Harbor*. Two commenters requested a blanket statement that all costs associated with meeting a "safe harbor" standard as described in CALEA § 107(a)(2) are reimbursable. Once an industry standard has been established in accordance with CALEA § 107, the costs associated with the implementation of that standard will be reviewed for allowability and reasonableness under this rule.

#### D. Applicable Administrative Procedures and Executive Orders

##### *Executive Order 12612*

This final rule will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

##### *Executive Order 12866*

The FBI has completed its examination of this final rule in light of Executive Order 12866 and has found that it constitutes a significant regulatory action only under section 3(f)(4). In accordance with section 6 of Executive Order 12866, the FBI has submitted this rule, and the proposed rule which preceded it to the Office of Information and Regulatory Affairs (OIRA), OMB, for review, and has met all of the requirements of this section.

#### *Unfunded Mandates Reform Act of 1995*

The FBI has completed its examination of this final rule in light of the Unfunded Mandates Reform Act of 1995 and has determined, after consultation with OIRA, that it does not impose an unfunded mandate as defined in that Act.

#### *Paperwork Reduction Act of 1995*

In accordance with the Paperwork Reduction Act of 1995, public comment has twice been solicited on the reporting and recordkeeping requirements of this final rule (61 FR 21396 and 61 FR 58592). As noted above, all comments have been considered in preparing this final rule, and significant comments received have been discussed above in Section C of the Supplementary Information. These reporting and recordkeeping requirements have been assigned OMB Control Number 1110-0022 which expires on September 30, 1998.

#### Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, a summary of the Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the NPRM. The FBI's Final Regulatory Flexibility Analysis (FRFA) conforms with the RFA as amended by the Contract with America Advancement Act of 1996 (CWAAA), Public Law 104-121, 110 Stat. 847 (1996).<sup>16</sup>

#### *A. Need for and Objectives of this Final Rule*

This rule implements section 109 of the Communications Assistance for Law Enforcement Act (CALEA) which requires the Attorney General to establish regulations which set forth the procedures telecommunications carriers must follow in order to receive reimbursement under sections 109 and 104 of CALEA. CALEA requires that this rule enable carriers to recover costs in a timely and cost-efficient manner while minimizing the cost to the Federal Government. Specifically, this rule sets forth the means of determining allowable costs, reasonable costs, and disallowed costs. Furthermore, it establishes the requirements carriers must meet in their submission of cost estimates and requests for payment to the Federal Government for the disbursement of CALEA funds. Finally, this rule protects the confidentiality of trade secrets and proprietary

<sup>16</sup> Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. 601 *et seq.*

information from unnecessary disclosure. The FBI seeks to subject all carriers to the same regulatory policy, while allowing carriers to use their existing accounting systems in the reimbursement process. Pursuant to the goal of imposing the least burden on carriers while also fulfilling the obligation to adhere to Government fiscal accountability requirements, this rule specifies reporting objectives rather than specifying the manner in which these records must be kept.

#### *B. Description and Estimates of the Number of Small Entities Affected by this Final Rule*

The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the regulating agency has developed or adopted one or more definitions that are appropriate to its activities and are approved by the Small Business Administration.<sup>17</sup> Under the Small Business Act, a "small business concern" is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.<sup>18</sup> The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.<sup>19</sup> The total number of small telephone companies falling within both of those SIC categories in general is discussed first. The number of small businesses within the two subcategories an attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used by the FCC follows.

##### 1. Telephone Companies (SIC 481)

*Total Number of Telephone Companies Affected*. The rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by the SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein,

<sup>17</sup> See 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. 632).

<sup>18</sup> 15 U.S.C. 632. See, e.g., Brown Transport Truckload, Inv. V. Southern Wipers, Inc., 176 B.R. 82 (N.D. Ga. 1994).

<sup>19</sup> 13 CFR 121.201.

for at least one year.<sup>20</sup> 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, PCS providers, covered SMRS providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."<sup>21</sup> 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 seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by this rule.

*Wireless Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than 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.<sup>22</sup> According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.<sup>23</sup> 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. Although it seems certain that some of these carriers are not independently owned and operated, the FBI is 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, the FBI estimates that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by this rule.

*Local Exchange Carriers.* Neither the FCC nor the SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications

companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with the Telecommunications Relay Service (TRS). According to the FCC's most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.<sup>24</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is 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, the FBI estimates that there are fewer than 1,347 small incumbent LECs that may be affected by this rule.

*Interexchange Carriers and Resellers.* 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 SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.

The most reliable source of information regarding the number of IXCs only nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with TRS. According to the FCC's most recent data, 97 companies reported that they were engaged in the provision of interexchange services.<sup>25</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have fewer than 1,500 employees, the FBI is unable at this time to estimate with greater precision the number of IXCs only that would qualify as small business concerns under the SBA's definition. Consequently, the FBI estimates that there are fewer than 97 small entity IXCs only that may be affected by this rule.

Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers only nationwide of which the FBI is aware appears to be the data that the FCC collects annually

in connection with the TRS. According to the FCC's most recent data, 206 companies reported that they were engaged in the resale of telephone services.<sup>26</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is unable at this time to estimate with greater precision the number of resellers only that would qualify as small business concerns under the SBA's definition. Consequently, the FBI estimates that there are fewer than 206 small entity resellers only that may be affected by this rule.

However, the FCC does have more recent data which combines IXCs and resellers. According to the FCC's most recent combined data, 583 companies were determined to be either IXCs or resellers.<sup>27</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is unable at this time to estimate with greater precision the combined number of IXCs and resellers that would qualify as small business concerns under the SBA's definition.

Consequently, the FBI estimates that there are fewer than 583 small entity IXCs and resellers that may be affected by this rule.

*Competitive Access Providers.* Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with the TRS. According to the FCC's most recent data, 30 companies reported that they were engaged in the provision of competitive access services.<sup>28</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's

<sup>26</sup> Id.

<sup>27</sup> Federal Communications Commission, CCB, Industrial Analysis Division, Long Distance Market Shares, 2nd Quarter, 1996, (September, 1996).

<sup>28</sup> Federal Communications Commission, CCB, Industrial Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (TRS Worksheet).

<sup>20</sup> United States Department of Commerce, Bureau of Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

<sup>21</sup> 15 U.S.C. 632(a)(1).

<sup>22</sup> 1992 Census, supra, at Firm Size 1-123.

<sup>23</sup> 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>24</sup> Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (TRS Worksheet).

<sup>25</sup> Id.

definition. Consequently, the FBI estimates that there are fewer than 30 small entity CAPs that may be affected by this rule.

*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 SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with the TRS. According to the FCC's most recent data, 29 companies reported that they were engaged in the provisions of operator services.<sup>29</sup> Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, the FBI is 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, the FBI estimates that there are fewer than 29 small entity operator service providers that may be affected by this rule.

*Pay Telephone Operators.* Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with the TRS. According to the FCC's most recent data, 197 companies reported that they were engaged in the provision of pay telephone services.<sup>30</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, the FBI estimates that there are fewer than 197 small entity pay telephone operators that may be affected by this rule.

*Wireless (Radiotelephone) Carriers.* The SBA has developed a definition of small entities of radiotelephone (wireless) companies. The Census

Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.<sup>31</sup> According to the SBA's definition a small business radiotelephone company is one employing fewer than 1,500 persons.<sup>32</sup> The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated, the FBI is unable at this time to estimate with greater precision the number of radiotelephone carriers and services providers that would qualify as small business concerns under the SBA's definition. Consequently, the FBI estimates that there are fewer than 1,164 small entity radiotelephone companies that may be affected by this rule.

*Cellular Service Carriers.* Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with the TRS. According to the FCC's most recent data, 789 companies reported that they were engaged in the provision of cellular services.<sup>33</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is 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, the FBI estimates that there are fewer than 789 small entity cellular service carriers that may be affected by this rule.

*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. The closest applicable definition under SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which the FBI is aware appears to be the data that the FCC collects annually in connection with the TRS. According to

the FCC's most recent data, 117 companies reported that they were engaged in the provision of mobile services.<sup>34</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the FBI is unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, the FBI estimates that there are fewer than 117 small entity mobile service carriers that may be affected by this rule.

*Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the FCC has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than \$40 million in the three previous calendar years. The FCC's definition of a "small entity" in the context of broadband PCS auctions has been approved by the SBA.<sup>35</sup> The FCC has auctioned broadband PCS licenses in Blocks A, B, and C. Neither the FCC nor the FBI has sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, the FBI concludes that the number of broadband PCS licensees affected by this rule includes, at a minimum, 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small business currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which began on August 26, 1996. Eligibility for the 483 F Block licenses is limited to entrepreneurs with average gross revenues of less than \$125 million.<sup>36</sup> The FBI cannot estimate the number of licenses that will be won by small entities under the FCC's definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone

<sup>34</sup> Id.

<sup>35</sup> See 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).

<sup>36</sup> Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, GN Docket No. 90314, FCC 96-278 (rel. June 24, 1996).

<sup>31</sup> 1992 Census, supra, at Firm Size 1-123.

<sup>32</sup> 13 C.F.R. 121.201, SIC Code 4812.

<sup>33</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

companies have fewer than 1,000 employees<sup>37</sup> and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, the FBI assumes, for the purposes of this FRFA, that all of the licensees in the D, E, and F Block Broadband PCS auctions may be awarded to small entities which may be affected by this rule.

**SMRS Licensees.** Pursuant to 47 C.F.R. § 90.814(b)(1), the FCC had defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMRS licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMRA has been approved by the SBA.<sup>38</sup> This rule may apply to SMRS providers in the 800 MHz and 900 MHz band that either hold geographic area licenses or have obtained extended implementation authorizations. The FBI does not know how many firms provide 800 MHz or 900 MHz geographic area SMRS service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. The FBI assumes, for purpose of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by this rule.

The FCC recently held auctions for geographic area licenses in the 900 MHz SMRS bands. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, the FBI concludes that the number of geographic area SMRS licensees affected by this rule includes these 60 small entities. No auctions have been held for the 800 MHz geographic area SMRS licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMRS auction. However, the FCC has not yet determined how many licenses will be awarded for the lower 230 channels in

the 800 MHz geographic area SMRS auction. There is no basis moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, the FBI assumes, for purposes of this FRFA, that all of the licenses may be awarded to small entities who may be affected by this rule.

**Commercial Paging and Commercial 220 MHz Radio Services.** Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to providers of paging services. The closest applicable definition under SBA rules is for radiotelephone (wireless) companies.<sup>39</sup> With respect to commercial 220 MHz services, the FCC has proposed a two-tiered definition of small business for purposes of auctions: (1) for EA licensees,<sup>40</sup> a firm with average annual gross revenues of not more than \$6 million for the preceding three years and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than \$15 million for the preceding 3 years.<sup>41</sup> Since this definition has not yet been approved by the SBA, the FBI will use the SBA's definition applicable to radiotelephone companies. The FBI notes that while there are incumbents in this service, they are not commercial providers and will not, therefore, be affected by this rule. Since there have been no auctions for either service as of yet and the parameters of the industry have not been fully defined, any estimate of the number of small businesses who will seek to bid in the future auctions is not yet determined. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees,<sup>42</sup> and that no

reliable estimate of the number of prospective licensees can be made, the FBI assumes, for the purposes of its evaluations and conclusion in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

**Interconnected Business Services.** Neither the FCC nor the SBA has developed a definition of small entities specifically applicable to providers of for-profit interconnected business services. The closest applicable definition under SBA rules is for radiotelephone (wireless) companies.<sup>43</sup> The size data provided by the SBA does not enable the FBI to make a meaningful estimate of the number of for-profit interconnected business service providers which are small entities because it combines all radiotelephone companies with 500 or more employees.<sup>44</sup> The Census Bureau reports that only 12 out of a total of 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees.<sup>45</sup> However, the FCC does not know how many of the 1,178 firms were for-profit interconnected business service companies. Although there are in excess of 13,000 for-profit interconnected business service licenses, the FCC is unable to determine the number of for-profit interconnected business service licensees because a single licensee may own several licenses.<sup>46</sup> Given these facts, the FBI assumes, for purposes of this FRFA, that all of the current inter-connected business service licensees are small entities, as that term is defined by the SBA.

## 2. Cable System Operators (SIC 4841)

The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually. 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

<sup>39</sup> 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>40</sup> EA licensees refer to the 60 channels in the 172 geographic economic areas as defined by the Bureau of Economic Analysis, Department of Commerce. See In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making, GN Docket 93-252, 10 FCC Rcd 188 (1995).

<sup>41</sup> See In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making, GN Docket 93-252, 10 FCC Rcd 188 (1995).

<sup>42</sup> See 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, SIC Code 4812 (issued May 1995).

<sup>43</sup> 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>44</sup> U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

<sup>45</sup> 1992 Census, supra, at Firm Size 1-123.

<sup>46</sup> Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 96-6, 11 FCC Rcd 8965, 9025 (1996).

<sup>37</sup> 1992 Census, Table 5, Employment Size of Firms: 1992, SIC Code.

<sup>38</sup> See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMRS Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

Bureau, there were 1,323 such cable and other pay television services generating less and \$11 million in revenue that were in operation for at least one year at the end of 1992.<sup>47</sup>

The FCC has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the FCC's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>48</sup> Based on the FCC's most recent information, the FBI estimates that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.<sup>49</sup> 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. In addition, it is unlikely that many of the "small cable companies" will be engaging in activities as "telecommunications carriers" as defined by CALEA. Consequently, the FBI estimates that there are significantly fewer than 1,439 small entity cable system operators that may be affected by this rule.

The Communications Act of 1934, as amended, 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 1 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."<sup>50</sup> There were 63,196,310 basic cable subscribers at the end of 1995, and 1,450 cable system operators serving fewer than one percent (631,960) of subscribers.<sup>51</sup> Although it seems certain that some of these 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 of small cable system operator in the Communications Act of 1934.

*C. Reporting, Recordkeeping, and Other Compliance Requirements and Steps Taken to Minimize the Significant Economic Impact of This Report and Order on Small Entities, Including the Significant Alternatives Considered and Rejected*

*Structure of the Analysis.* In this section of the FRFA, the FBI analyzes the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities as a result of this rule.<sup>52</sup> As a part of this discussion, the FBI mentions some of the types of skills that will be needed to meet the new requirements. The FBI also describes the steps taken to minimize the economic impact of this rule on small entities, including the significant alternatives considered and rejected.<sup>53</sup>

The FBI provides this information to provide context for its analysis in this FRFA. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to this rule, the rule shall be controlling.

1. Reporting, Recordkeeping, and Other Compliance Requirements

This rule requires carriers to submit cost estimates and requests for payment to the FBI to receive reimbursement with CALEA funds. To meet the reporting requirements for these submissions, carriers must submit quantitative cost data, such as labor rates, estimates, and invoices for equipment or services procured from subcontractors. This data is necessary to evaluate cooperative agreement proposals and subsequent requests for reimbursement under CALEA, and will be used to determine whether agreement prices are fair and reasonable.

No forms are prescribed for these submissions; rather, in order to allow carriers to use their existing accounting systems, the rule simply prescribes the types of information and the headings for submissions. Carriers may then determine the best means of meeting the required submission of data in the way least burdensome for their staffs. The FBI anticipates that small carriers will have the least difficulty meeting the requirements because their accounting systems are less likely to require complex calculations or extensive explanations of such calculations.

The FBI estimates that there are fewer than 3,497 small carriers, as discussed above, which could be affected by this rule over a 5 year period. Given the difficulty in determining with any accuracy the number of small carriers,

for purposes of the Paperwork Reduction Act of 1995, the FBI has calculated its estimate of the reporting and recordkeeping requirements on a per switch basis. There are approximately 23,000 switches which may require modification at some point during the 5 year CALEA implementation period. Therefore, given this 5 year time span, the total maximum number of annual responses from all carriers is estimated at 4,600. However, the very nature of small carriers ensures that the number of switches affect per year which are owned and operated by small carriers will be significantly less than 4,600. Based on the collection of similar data under the Federal Acquisition Regulation (FAR) and on the nature of the telecommunications industry, the time to read and prepare the required information for one switch is estimated at 4 hours. Therefore, an extremely small carrier with only one switch might have only 4 burden hours imposed whereas a larger carrier with 50 switches might have 200 burden hours imposed.

The recordkeeping necessitated by this rule is, for the most part, the same as that the carriers would do in the normal course of business. The only exception might be in the case of carriers which do not maintain site-specific records. These carriers would be required to maintain CALEA-specific records for audit purposes. This requirement is as much for the carrier's protection as for the needs of the Government, given that the development and maintenance of such records assure that the carrier will be able to provide the required information with the least disruption of its business should its acceptance and use of appropriated funds be audited by the Comptroller General.<sup>54</sup> Finally, given that carriers are using their existing accounting systems, the accounting and financial management skills of their current personnel are all that is required by this rule.

2. Steps taken to Minimize Burdens on Small Entities

First, the guiding principle in the development of this rule was to allow the maximum range of compliance options to carriers dependent upon their own accounting systems. The rule was crafted such that it requires the minimum level of data submission possible which still allows the FBI to

<sup>47</sup> 1992 Census, supra, at Firm Size 1-123.

<sup>48</sup> 47 CFR § 76.901(e). The Commission 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 and Reconsideration, 10 FCC Red 7393.

<sup>49</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>50</sup> 47 U.S.C. 543(m)(2).

<sup>51</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>52</sup> See 5 U.S.C. § 604(a)(4).

<sup>53</sup> See 5 U.S.C. § 604(a)(5).

<sup>54</sup> 31 U.S.C. 701 et seq. specifically, 31 U.S.C. 712 authorizes the Comptroller General to investigate all matters related to the receipt, disbursement, and use of public money.

meet its good stewardship responsibilities with respect to taxpayer funds. Furthermore, the dual mandate of CALEA requiring this rule to permit timely and cost-effective payment to carriers of costs directly associated with the compliance effort while minimizing the costs to the Government has limited the FBI's ability to be flexible in some areas such as the determination of allowable costs.

Within this framework, the FBI has sought industry input at all stages of the rulemaking process. Initially, the FBI met with carriers and associations, such as NECA and PCIA, in order to explain the requirements of CALEA § 109 and to solicit questions and comments from the industry.<sup>55</sup> Using the industry input from these meetings, the FBI drafted the initial versions of the proposed rule. As each draft was completed, the FBI incorporated its outline and sections of actual text into the presentations the FBI continued to make to the industry. At this stage, the FBI met with representatives of both wireline and wireless carriers.<sup>56</sup> In addition, the FBI presented to the Electronic Communications Service Provider (ECSP) committee both the outline of the draft proposed rule and an explanation of how such concepts as allowability and reasonableness of costs were being treated. In addition to carrier representatives, ECSP membership includes representatives of various associations, including CTIA, NECA, PCIA, and USTA. Again the FBI solicited comments and issued an open invitation to meet with anyone who wished to discuss the cost recovery rules further.<sup>57</sup> Once the proposed rule was published, the FBI met again with the ECSP committee and with a variety of individual carriers and associations to provide supplemental explanations of the proposed rule and to once again solicit comments and extend the invitation to discuss the rule further.<sup>58</sup> Finally, the FBI has maintained an on-going dialogue with the telecommunications industry with regard to the CALEA cost recovery rules, both through meetings and in the responses to comments in the Supplementary Information of this document.

In addition to industry input, the FBI solicited advice from a number of other government entities including the

Department of Justice, the FCC, the General Accounting Office, and the Office of Management and Budget. With specific regard to the needs of small carriers, the FBI has also actively sought the assistance of both the Office of Advocacy at the SBA and the Office of Communications Business Opportunities at the FCC.

In addition the FBI is currently drafting a Small Business Compliance Guide (Guide) in accordance with SBREFA. This Guide will be provided to the SBA and the various associations representing the interests of small entities in telecommunications industry. It will also be available upon request from the FBI, and FBI small business liaison able to assist small carriers with the compliance process will also be identified in the Guide.

### 3. Significant Alternatives Considered and Rejected

The FBI considered and rejected a number of alternatives prior to drafting its proposed rule. Initially, the FBI considered whether a new regulation was actually necessary. That some procedures were required was obvious from the mandate of CALEA 109(e) which directs the Attorney General to "establish regulations necessary to effectuate timely and cost-effective payment to telecommunications carriers" to reimburse carriers for certain compliance costs. However, it seemed possible that some existing regulations might be used for this purpose.

First, the FBI considered using the FAR as a vehicle for carrying out reimbursement. However, it became readily apparent that this approach was nonproductive. The FAR was designed for Federal procurement actions in which the contractor not only recovers direct and indirect costs, but also makes a profit. CALEA specifically restricts reimbursement to costs directly associated with the modifications performed for CALEA compliance. In addition, the FAR could require that contractors maintain and use accounting systems which are compliant with the Cost Accounting Standards as set forth in 48 CFR 30, "Cost Accounting Standards" (Part 30). Given that many of the telecommunications carriers, particularly those classified as small entities, could be required to implement entirely new accounting systems to meet this requirement,<sup>59</sup> the FBI determined

that using the FAR would impose far too great a burden. In addition, using the FAR could also violate the Paperwork Reduction Act of 1995 by requiring some carriers already subject to FCC reporting requirements to maintain duplicate records. Therefore, the FBI rejected this alternative.

Second, the FBI considered using the FCC's accounting regulations found in 47 CFR 32, "Uniform System of Accounts for Telecommunications Companies" (Part 32) as a vehicle for carrying out reimbursement. However, it became readily apparent that this approach was also non-productive. While large wireline carriers dealt with these regulations on a regular basis, many small wireline carriers were exempt from detailed reporting requirements. Furthermore, wireless carriers, a large number of which are classified as small entities, had never been bound by these regulations. Given that many of these small wireline and wireless carriers would be required to implement entirely new accounting systems to meet this requirement, the FBI determined that using Part 32 of the FCC's regulations would impose far too great a burden. Therefore, the FBI rejected this alternative.

The FBI could identify no other existing regulations which might provide viable alternatives. Ultimately, the FBI determined that it was necessary to develop new regulations which were both industry and CALEA specific; this rule is the result of that development effort.

In developing this rule, the FBI explored two options which might ease the regulatory burden on small entities. The FBI considered using a tiered system similar to those the FCC uses. The FBI also considered allowing small carriers to seek waivers of certain reporting requirements. However, this rule was crafted to permit reimbursement for the maximum amount allowable under CALEA and requires the minimum level of data submission possible that allows (1) The FBI to meet its good stewardship responsibilities with respect to taxpayer funds; and (2) the carriers to meet the requirements of an audit by the Comptroller General. In addition, the flexibility of the cooperative agreement process and the minimal nature of the reporting requirements obviate the need for any issuance of waivers. Therefore, the FBI determined that no special

administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States Government in excess of \$500,000. \* \* \*

<sup>55</sup> January through September, 1995.

<sup>56</sup> October, 1995 through April, 1996.

<sup>57</sup> ECSP meeting held at Telecommunications Industry Liaison Unit's facility on November 15, 1995.

<sup>58</sup> May through July, 1996. ECSP meeting held at the Telecommunications Industry Liaison Unit's facility on June 26, 1996.

<sup>59</sup> 48 CFR 9901.306 states that "Cost Accounting Standards promulgated by the [Cost Accounting Standards Board] shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and

exemptions or waivers for small carriers were viable.

#### *D. Issues Raised and Alternatives Suggested in Response to the IRFA*

No comments were submitted specifically in response to the IRFA. In general comments on the proposed rule, however, some commenters raised issues that might affect small entities. Some commenters also proposed alternatives which they believed might ease the burden on small carriers.

##### 1. Issues Raised

*Reporting and Recordkeeping Requirements.* Several commenters either classified as small entities for regulatory purposes or representing such small entities were concerned about what they perceived to be the excessive reporting and recordkeeping requirements of § 100.16 and § 100.17 of the proposed rule. These comments have been addressed at length both in the discussion of general comments received (Section C., Significant Comments and Changes) and in the discussion of reporting and recordkeeping requirements in this FRFA (Section C., 1. Reporting, Recordkeeping, and Other Compliance Requirements) above. In Section C., Significant Comments and Changes, small entities are specifically referred to comment responses 30 through 45, with emphasis on response 32. The FBI has considerably clarified and streamlined the reporting and recordkeeping requirements and believes that this final rule reflects the least burdensome reporting and recordkeeping requirements possible with regard to small entities.

*Definition of "First-Line Supervision".* One small wireless carrier expressed concern over the nature and definition of "first-line supervision" as that phrase was used in proposed § 100.11(b)(2) ("Allowable costs"; Allowable plant specific costs; first-line supervision). This commenter interpreted this subsection as excluding from eligibility for reimbursement the work of some individuals who, of necessity, perform many different functions in a small business. This was not the FBI's intent. For the purposes of reimbursement, it is not job title which matters, but rather the nature of the work performed. Therefore, if the CEO of a company also happens to be the engineer responsible for network engineering, the time that individual spends coordinating the integration of the CALEA compliant solution into the network will be reimbursable, while the time spent managing the general business affairs of the company will not be reimbursable.

In addition to this explanation, the FBI has changed the term "first-line supervision" to the more commonly used "direct supervision" and has provided a definition of "direct supervision" in § 100.10 of the final rule to clarify this issue in the rule.

*Burden of Proof.* A few commenters either classified as small entities for regulatory purposes or representing such small entities were concerned about the burden of proof requirements in proposed § 100.12(a)(1), § 100.12(a)(2), § 100.13(a)(3), and § 100.14(b). These subsections establish that no presumption of reasonableness is attached to the incurrence of costs by a carrier and that burden of proof that a cost is reasonable for the purposes of CALEA reimbursement rests with the carrier. The commenters believed that the burden of proof might be too onerous for small entities, particularly with respect to supporting documentation submission. These comments have been specifically addressed in the discussion of general comments received (Section C., Significant Comments and Changes) and generally addressed in the discussion of reporting and recordkeeping requirements in this FRFA (Section C., 1. Reporting, Recordkeeping, and Other Compliance Requirements) above. In Section C., Significant Comments and Changes, small entities are specifically referred to comment responses 17, 18, and 21.

It must be noted that small entities will be required to submit supplementary documentation meeting the burden of proof only if a question arises regarding a specific cost on a cost estimate or request for payment. In addition, the specifics of what constitutes adequate documentation to meet the burden of proof will be definitized during the cooperative agreement process. The FBI is cognizant of the special needs of small carriers and will make every effort to work with small carriers to tailor the burden of proof requirements to meet their needs during the cooperative agreement process. Furthermore, the FBI anticipates that small carriers will have the least difficulty meeting the requirements because their accounting systems are less likely to entail complex calculations and, therefore, less likely to require extensive supporting explanations of such calculations.

*Carrier Responsibility for Sole-Source Suppliers.* Several commenters, either classified as small entities for regulatory purposes or representing the interests of such small entities, expressed concern that holding small carriers responsible for the cost data of their sole-source sup-

pliers [proposed § 100.19(c)(1)] was unduly burdensome. Specifically, these commenters asserted that small entities have little control over their sole-source suppliers because of the nature of their networks and their inability to make bulk purchases. The FBI is cognizant of this situation and is prepared to make accommodations for such situations during the cooperative agreement process with small carriers. However, this provision exists to ensure that all carriers make a good faith effort to seek the most cost-effective solutions for their networks. The FBI requires only that small carriers negotiate prices with their sole-source suppliers for CALEA-related work in the same manner that these small carriers would negotiate if the work were solely to benefit their businesses. Therefore, the FBI cannot relieve small carriers of this responsibility.

##### 2. Alternatives Suggested

*Tiered System.* One association representing the interests of small carriers suggested that the FBI institute a tiered system, similar to the FCC's, for the reporting requirements of this rule. In developing this rule, the FBI did consider using a tiered system as a means of easing the burden on small entities. However, this rule permits reimbursement for the maximum amount allowable under CALEA and requires the minimum level of data submission possible that allows (1) The FBI to meet its good stewardship responsibilities with respect to taxpayer funds; and (2) the carriers to meet the requirements of an audit by the Comptroller General. Therefore, the FBI determined that no exemptions based upon carrier size were feasible and that no tiered system could be implemented. Therefore, this proposed alternative was rejected.

*FCC Collaboration/Rulemaking.* One commenter, which was not a small entity, suggested that the FBI and DOJ collaborate with the FCC to determine the best mechanism for ensuring compliance with CALEA. The commenter asserted that this would yield greater input from industry, allow for coordination and consistent application of telecommunications law and policy, and allow the FBI to use FCC developed rules and procedures permitting the use of established industry cost allocation manuals.

First, the FBI did consult with the FCC in the development of these rules. Specifically, the FBI consulted with the FCC in order to ensure consistent application of telecommunications law and policy in the development of this rule. The FBI also drew on the FCC's

considerable knowledge of the telecommunications industry during the development of this rule. Second, the FBI strove for the maximum industry input, not only by publishing the proposed notice in the Federal Register requesting comment, but also by meeting with industry representatives and associations during the development process and, concurrent with publication, directly soliciting input by all parties which had requested that they be included on the proposed rule distribution list. Furthermore, the FBI made every effort to distribute the proposed rule to the various industry-related associations in order to reach the broadest commenter possible. Thus, the FBI is confident that it did receive input from the industry. Lastly, using industry established cost allocation manuals, which establish fully distributed cost methodologies, is not a viable option under CALEA's mandate to reimburse only for directly associated costs. Therefore, this proposed alternative was rejected.

**Keep Cost System.** One commenter, which was not a small entity, suggested that the FBI allow carriers to use their existing keep cost system. This system, which is used by many large carriers, is a cost accumulation system that allows the user to identify costs to specific accumulation points. These rules do not preclude the use of carriers existing systems to the extent that the system can exclude or specifically identify costs that are not allowable under CALEA. However, if the FBI were to prescribe this type of system, many carriers, especially those classified as small entities, could be forced to alter their existing accounting systems. Therefore, this proposed alternative was rejected.

**Rural Utility Services Loan Proposal Forms.** One association representing the interest of small carriers suggested that the FBI use the existing Rural Utility Services loan proposal form for cost data submission given that it already exists and that small carriers understand the form. The FBI reviewed the form and its underlying requirements and found that some of the information required is similar. However, the form itself requires unnecessary details and information not applicable to CALEA. Use of this form could, therefore, cause confusion within the industry as to what is required under CALEA. Additionally, not all small carriers are familiar with this form. Therefore, this potential alternative was rejected.

**Separate Rules for the Wireless Industry.** One association representing the interests of wireless carriers suggested that the FBI implement

separate rules for wireless carriers because their accounting systems were different from those prescribed for wireline carriers. However, as long as wireless carriers are using accounting systems which generate financial statements which are in accordance with generally accepted accounting principles, the final rule will allow wireless providers to use their current accounting systems to meet requirements of this rule. Therefore, this potential alternative was rejected.

#### *E. Conclusion*

The FBI believes this rule is fair to small entities and is committed to assisting them in complying with it. The FBI intends to maintain an on-going dialogue with the Office of Advocacy at the SBA and with representatives of small carriers, both wireline and wireless, with regard to the development of the Small Business Compliance Guide. In addition, the FBI is in the process of identifying a small business liaison for CALEA reimbursement issues to ensure that small carriers are provided with the information and assistance they need to comply with this rule in the least burdensome manner possible.

Finally, small carriers are reminded that they are in no way obligated to expend funds on modifications eligible for reimbursement pursuant to CALEA sections 109(a), 109(b)(2) and 104(e) prior to the execution of a cooperative agreement. Therefore, in the event they are selected for reimbursement, they will have both the direct assistance of the FBI's contracting officer and the opportunity to tailor the cooperative agreement to meet their special needs.

#### List of Subjects in 28 CFR Part 100

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

For the reasons set out in the preamble, 28 CFR chapter I is amended by adding part 100 to read as follows:

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

##### Sec.

- 100.9 General.
- 100.10 Definitions.
- 100.11 Allowable costs.
- 100.12 Reasonable costs.
- 100.13 Directly assignable costs.
- 100.14 Directly allocable costs.
- 100.15 Disallowed costs.
- 100.16 Cost estimate submission.
- 100.17 Request for payment.

- 100.18 Audit.
  - 100.19 Adjustments to agreement estimate.
  - 100.20 Confidentiality of trade secrets/proprietary information.
  - 100.21 Alternative dispute resolution.
- Authority: 47 U.S.C. 1001–1010; 28 CFR 0.85(o).

#### **§ 100.9 General.**

These Cost Recovery Regulations were developed to define allowable costs and establish reimbursement procedures in accordance with section 109(e) of Communications Assistance for Law Enforcement Act (CALEA) (Public Law 103–414, 108 Stat. 4279, 47 U.S.C. 1001–1010). Reimbursement of costs is subject to the availability of funds, the reasonableness of costs, and an agreement by the Attorney General or designee to reimburse costs prior to the carrier's incurrence of said costs.

#### **§ 100.10 Definitions.**

*Allocable* means chargeable to one or more cost objectives and can be distributed to them in reasonable proportion to the benefits received.

*Business unit* means any segment of an organization for which cost data are routinely accumulated by the carrier for tracking and measurement purposes.

*Cooperative agreement* means the legal instrument reflecting a relationship between the government and a party when—

(1) The principal purpose of the relationship is to reimburse the carrier to carry out a public purpose of support or stimulation authorized by a law of the United States; and

(2) Substantial involvement is expected between the government and carrier when carrying out the activity contemplated in the agreement.

*Cost element* means a distinct component or category of costs (e.g. materials, direct labor, allocable direct costs, subcontracting costs, other costs) which is assigned to a cost objective.

*Cost objective* means a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

*Cost pool* means groupings of incurred costs identified with two or more cost objectives, but not identified specifically with any final cost objective.

*Direct supervision* means immediate or first-level supervision.

*Directly allocable cost* means any cost that is directly chargeable to one or more cost objectives and can be distributed to them in reasonable proportion to the benefits received.

*Directly assignable cost* means any cost that can be wholly attributed to a cost objective.

*Directly associated cost* means any directly assignable cost or directly allocable cost which is generated solely as a result of incurring another cost, and which would not have been incurred had the said cost not been incurred.

*Final cost objective* means a cost objective that has allocated to it, both assignable and allocable costs and, in the carrier's accumulation system, is one of the final accumulation points.

*Installed or deployed* means that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers.

*Labor cost* means the sum of the payroll cost, payroll taxes, and directly associated benefits.

*Network operations costs* means all directly associated costs related to the ongoing management and maintenance of a telecommunications carrier's network.

*Plant costs* means the directly associated costs related to the modifications of specific kinds of telecommunications plants, such as switches, intelligent peripherals and other network elements. These costs shall include the costs of inspecting, testing and reporting on the condition of telecommunications plant to determine the need for replacements, rearranges and changes; rearranging and changing the location of plant not retired; inspecting after modifications have been made; the costs of modifying equipment records, such as administering trunking and circuit layout work; modifying operating procedures; property held for future telecommunications use; provisioning costs; network operations costs; and receiving training to perform plant work. Also included are the costs of direct supervision and office support of this work.

*Provisioning costs* means all costs directly associated with the resources expended within a telecommunications carrier's network to provide a connection and/or service to an end user of the telecommunications service.

*Trade secrets/proprietary information* means information which is in the possession of a carrier but not generally available to the public, which that carrier desires to protect against unrestricted disclosure or competitive use, and which is clearly identified as such at the time of its disclosure to the government.

*Unit cost* means the directly associated cost of a single unit of a good or service which is included in a cost element.

#### § 100.11 Allowable costs.

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

(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;

(2) Additional reasonable plant costs directly associated with making the assistance capability requirements found in section 103 of CALEA reasonably achievable with respect to equipment, facilities, or services installed or deployed after January 1, 1995, in accordance with the procedures established in CALEA section 109(b); and

(3) Reasonable plant costs directly associated with modifications to any of a carrier's systems or services, as identified in the Carrier Statement required by CALEA section 104(d), that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the Capacity Notice(s) published in accordance with CALEA section 104.

(b) Allowable plant costs shall include:

(1) The costs of installation, inspection, and testing of the telecommunications plant, and inspection after modifications have been made; and

(2) The costs of direct supervision and office support for this work for plant costs.

(c) In the case of any modification that may be used for any purpose other than lawfully authorized electronic surveillance by a government law enforcement agency, this part permits recovery of only the incremental cost of making the modification suitable for such law enforcement purposes.

(d) Reasonable costs that are directly associated with the modifications performed by a carrier as described in § 100.11(a) are recoverable. These allowable costs are limited to directly assignable and directly allocable costs incurred by the business units whose efforts are expended on the implementation of CALEA requirements.

#### § 100.12 Reasonable costs.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that

which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with the carrier or its separate divisions that may not be subject to effective competitive restraints.

(1) No presumption of reasonableness shall be attached to the incurrence of costs by a carrier.

(2) The burden of proof shall be upon the carrier to justify that such cost is reasonable under this part.

(b) Reasonableness depends upon considerations and circumstances, including, but not limited to:

(1) Whether a cost is of the type generally recognized as ordinary and necessary for the conduct of the carrier's business or the performance of this obligation; or

(2) Whether it is a generally accepted sound business practice, arm's-length bargaining or the result of Federal or State laws and/or regulations.

(c) It is the carrier's responsibility to inform the Government of any deviation from the carrier's established practices.

#### § 100.13 Directly assignable costs.

(a) A cost is directly assignable to the CALEA compliance effort if it is a plant cost incurred specifically to meet the requirements of CALEA sections 103 and 104.

(1) A cost which has been incurred for the same purpose, in like circumstances, and which has been included in any allocable cost pool to be assigned to any final cost objective other than the CALEA compliance effort, shall not be assigned to the CALEA compliance effort (or any portion thereof).

(2) Costs identified specifically with the work performed are directly assignable costs to be charged directly to the CALEA compliance effort. All costs specifically identified with other projects, business units, or cost objectives of the carrier shall not be charged to the CALEA compliance effort, directly or indirectly.

(3) The burden of proof shall be upon the carrier to justify that such cost is an assignable cost under this part.

(b) For reasons of practicality, any directly assignable cost may be treated as a directly allocable cost if the accounting treatment is consistently applied within the carrier's accounting system and the application produces substantially the same results as treating the cost as a directly assignable cost.

#### § 100.14 Directly allocable costs.

(a) A cost is directly allocable to the CALEA compliance effort:

(1) If it is a plant cost incurred specifically to meet the requirements of CALEA sections 103 and 104; or

(2) If it benefits both the CALEA compliance effort and other work, and can be distributed to them in reasonable proportion to the benefits received.

(b) The burden of proof shall be upon the carrier to justify that such cost is an allocable cost under this part.

(c) An allocable cost shall not be assigned to the CALEA compliance effort if other costs incurred for the same purpose in like circumstances have been included as a direct cost of that, or any other, cost objective.

(d) The accumulation of allocable costs shall be as follows:

(1) Allocable costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs.

(i) Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the multiple cost objectives.

(ii) Similarly, the particular case may require subdivision of these groupings (e.g., building occupancy costs might be separable from those of personnel administration within the engineering group).

(2) Such allocation necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the multiple cost objectives.

(3) When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(4) Once a methodology for determining an appropriate base for distributing allocable costs has been agreed to, it shall not be modified without written approval of the FBI, if that modification affects the level of reimbursement from the government. All items properly includable in an allocable cost base should bear a pro rata share of allocable costs irrespective of their acceptance as reimbursable under this part.

(5) The carrier's method of allocating allocable costs shall be in accordance with the accounting principles used by the carrier in the preparation of their externally audited financial statements and consistently applied, to the extent that the expenses are allowable under these regulations. The method may require further examination when:

(i) Substantial differences occur between the cost patterns of work under CALEA compliance effort and the carrier's other work;

(ii) Significant changes occur in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the carrier's products, or other relevant circumstances; or

(iii) Allocable cost groupings developed for a carrier's primary location are applied to off-site locations. Separate cost groupings for costs allocable to off-site locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the multiple cost objectives.

(6) The base period for allocating allocable costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period. The base period for allocating allocable costs will normally be the carrier's fiscal year. A shorter period may be appropriate when performance involves only a minor portion of the fiscal year, or when it is general practice to use a shorter period. When the compliance effort is performed over an extended period, as many base periods shall be used as are required to accurately represent the period of performance.

#### § 100.15 Disallowed costs.

(a) General and Administrative (G&A) costs are disallowed. G&A costs include, but are not limited to, any management, financial, and other expenditures which are incurred by or allocated to a business unit as a whole. These include, but are not limited to:

(1) Accounting and Finance, External Relations, Human Resources, Information Management, Legal, Procurement; and

(2) Other general administrative activities such as library services, food services, archives, and general security investigation services.

(b) Customer Service costs are disallowed. These costs include, but are not limited to, any Marketing, Sales, Product Management, and Advertising expenses.

(c) Plant costs that are not directly associated with the modifications identified in § 100.11 are disallowed. These include, but are not limited to, repairing materials for reuse, performing routine work to prevent trouble; expenses related to property held for future telecommunications use; provisioning costs; network operations

costs; and depreciation and amortization expenses.

(d) Costs that have already been recovered from any governmental or nongovernmental entity are disallowed.

(e) Costs that cannot be either directly assigned or directly allocated are disallowed.

(f) Additional costs that are incurred due to the carrier's failure to complete the CALEA compliance effort in the time frame agreed to by the government and the carrier are disallowed.

(g) Costs associated with modifications of any equipment, facility or service installed or deployed after January 1, 1995 which are deemed reasonably achievable by the Federal Communications Commission under section 109(b) of CALEA are disallowed.

(h) To ensure that the Government does not reimburse carriers for disallowed costs, the following provisions are included:

(1) Costs that are expressly disallowed or mutually agreed to be disallowed, including mutually agreed to be disallowed directly associated costs, shall be excluded from any billing, claim, or proposal applicable to reimbursement under CALEA. When a disallowed cost is incurred, its directly associated costs are also disallowed.

(2) Disallowed costs involved in determining rates used for standard costs, or for allocable cost proposals or billing, need be identified only at the time rates are proposed, established, revised, or adjusted. These requirements may be satisfied by any form of cost identification which is adequate for purposes of cost determination and verification.

#### § 100.16 Cost estimate submission.

(a) The carrier shall provide sufficient cost data at the time of proposal submission to allow adequate analysis and evaluation of the estimated costs. The FBI reserves the right to request additional cost data from carriers in order to ensure compliance with this part.

(b) The requirement for submission of cost data is met if, as determined by the FBI, all cost data reasonably available to the carrier are either submitted or identified in writing by the date of agreement on the costs.

(c) If cost data and information to explain the estimating process are required by the FBI and the carrier refuses to provide necessary data, or the FBI determines that the data provided are so deficient as to preclude adequate analysis and evaluation, the FBI will attempt to obtain the data and/or elicit corrective action.

(d) Instructions for submission of the cost data for the estimate are as follows:

(1) The carrier shall submit to the FBI estimated costs by line item with supporting information.

(2) A cost element breakdown as described in § 100.16(h) shall be attached for each proposed line item.

(3) Supporting breakdowns shall be furnished for each cost element, consistent with the carrier's cost accounting system.

(4) When more than one line item is proposed, summary total amounts covering all line items shall be furnished for each cost element.

(5) Depending on the carrier's accounting system, the carrier shall provide breakdowns for the following categories of cost elements, as applicable:

(i) *Materials*. Provide a consolidated cost summary of individual material quantities included in the various tasks, orders, or agreement line items being proposed and the basis upon which they were developed (vendor quotes, invoice prices, etc.). Include raw materials, parts, software, components, and assemblies. For all items proposed, identify the item, source, quantity, and cost.

(ii) *Direct labor*. Provide a time-phased (e.g., monthly, quarterly) breakdown of labor hours, rates, and costs by appropriate category, and furnish the methodologies used in developing estimates.

(iii) *Allocable direct costs*. Indicate how allocable costs are computed and applied, including cost breakdowns that provide a basis for evaluating the reasonableness of proposed rates.

(iv) *Subcontracting costs*. For any subcontractor costs submitted for reimbursement, the carrier is responsible for ensuring that documentation requirements set forth herein are passed on to any and all subcontractors utilized in the carrier's efforts to meet CALEA requirements.

(v) *Other costs*. List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services) and provide bases for costs.

(e) As part of the specific information required, the carrier shall submit with its cost estimate and clearly identify as such, costs that are verifiable and factual. In addition, the carrier shall submit information reasonably required to explain its estimating process, including:

(1) The judgmental factors applied, such as trends or budgetary data, and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(2) The nature and amount of any contingencies included in the proposed estimate.

(f) There is a clear distinction between submitting cost data and merely making available books, records, and other documents without identification. The requirement for submission of cost data is met when all accurate cost data reasonably available to the carrier have been submitted, either actually or by specific identification, to the FBI.

(g) In submitting its estimate, the carrier must include an index, appropriately referenced, of all the cost data and information accompanying or identified in the estimate. In addition, any future additions and/or revisions, up to the date of agreement on the costs, must be annotated in a supplemental index.

(h) Headings for submission are as follows:

(1) Total Project Cost: Summary  
(i) Cost Elements (Enter appropriate cost elements.)

(ii) Proposed Cost Estimate—Total Cost (Enter those necessary and reasonable costs that in the carrier's judgment will properly be incurred in efficient completion of CALEA requirements. When any of the costs in this have already been incurred (e.g., under a letter contract), describe them on an attached supporting schedule.)

(iii) Proposed Cost Estimate—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

(2) Total Project Costs: Detail (at Switch Level or Project Level, as appropriate)

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Proposed Cost Estimate—Total Cost (Enter those necessary and reasonable costs that in the carrier's judgment will properly be incurred in efficient completion of CALEA requirements. When any of the costs in this have already been incurred (e.g., under a letter contract), describe them on an attached supporting schedule.)

(iii) Proposed Cost Estimate—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

#### § 100.17 Request for payment.

(a) The carrier shall provide sufficient supporting documentation at the time of submission of request for payment to allow adequate analysis and evaluation

of the incurred costs. The FBI reserves the right to request additional cost data from carriers in order to ensure compliance with this part.

(b) Instructions for submission of the supporting documentation for the request for payment are as follows:

(1) The carrier shall submit to the FBI incurred costs by line item with supporting information.

(2) A cost element breakdown as described in § 100.17(f) shall be attached for each agreed upon line item.

(3) Supporting breakdowns shall be furnished for each cost element, consistent with the carrier's cost accounting system.

(c) When more than one line item has been agreed upon, summary total amounts covering all line items shall be furnished for each cost element.

Depending on the carrier's accounting system, breakdowns shall be provided to the FBI for the following categories of cost elements, as applicable:

(1) *Materials*. Provide a consolidated cost summary of individual material quantities included in the various tasks, orders, or agreement line items and the basis upon which they were determined (vendor invoices, time sheets, payroll records, etc.). Include raw materials, parts, software, components, and assemblies. For all reimbursable items, identify the item, source, quantity, and cost.

(2) *Direct labor*. Provide a breakdown of labor hours, rates, and cost by appropriate category, and furnish the methodologies used in identifying these costs. Have available for audit, in accordance with § 100.18, time sheet and labor rate calculation justification for all direct labor charged to the agreement.

(3) *Allocable direct costs*. Indicate how allocable costs are computed and applied, including cost breakdowns, comparing estimates to actual data as a basis for evaluating the reasonableness of actual costs.

(4) *Subcontracting costs*. For any subcontractor costs submitted for reimbursement, along with a copy of the invoice, the carrier must have available for audit in accordance with § 100.18, documentation that costs incurred are just and reasonable.

(5) *Other costs*. List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services) and have available for audit in accordance with § 100.18, documentation that costs incurred are just and reasonable.

(d) There is a clear distinction between submitting cost data and merely making available books, records,

and other documents without identification.

(1) The requirement for submission of cost data is met when all accurate cost data reasonably available to the carrier have been submitted, either actually or by specific identification of the data that are available for review in the carrier's files, to the FBI.

(2) Should later information which affects the level of reimbursement come into the carrier's possession, it must be promptly submitted to the FBI.

(3) The requirement for submission of cost data continues up to the time of final reimbursement.

(e) In submitting its invoice, the carrier must include an index, which cross references the actual cost data submitted with the cost estimate.

(f) Headings for submission are as follows:

(1) Total Project Cost: Summary

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Actual Costs Incurred—Total Cost (Enter those necessary and reasonable costs that were incurred in the efficient completion of CALEA requirements.)

(iii) Actual Costs Incurred—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

(2) Total Project Costs: Detail (at Switch Level or Project Level, as appropriate.)

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Actual Costs Incurred—Total Cost (Enter those necessary and reasonable costs that were incurred in the efficient completion of CALEA requirements.)

(iii) Actual Costs Incurred—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

#### § 100.18 Audit.

(a) *General.* In order to evaluate the accuracy, completeness, and timeliness of the cost data, the FBI or other representatives of the Government shall have the right to examine and audit all of the carrier's supporting materials.

(1) These materials include, but are not limited to books, records, documents, and other data, regardless of form (e.g., machine readable media such as disk, tape) or type (e.g., data bases, applications software, data base management software, utilities), including computations and projections related to proposing, negotiating,

costing, or performing CALEA compliance efforts or modifications.

(2) The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost data submitted, along with the computations and projections used.

(b) *Audits of request for payment.* The carrier shall maintain and the FBI or representatives of the Government shall have the right to examine and audit supporting materials.

(1) These materials include, but are not limited to, books, records, documents, and other evidence and accounting procedures and practices, regardless of form (e.g., machine readable media such as disk, tape) or type (e.g., data bases, applications software, data base management software, utilities), sufficient to reflect properly all costs claimed to have been incurred, or anticipated to be incurred, in performing the CALEA compliance effort.

(2) This right of examination shall include inspection at all reasonable times of the carrier's plants, or parts of them, engaged in performing the effort.

(c) *Reports.* If the carrier is required to furnish cost, funding, or performance reports, the FBI or representatives of the Government shall have the right to examine and audit books, records, other documents, and supporting materials, for the purpose of evaluating the effectiveness of the carrier's policies and procedures to produce data compatible with the objectives of these reports and the data reported.

(d) *Availability.* The carrier shall make available at its office at all reasonable times the costs and support material described herein, for examination, audit, or reproduction, until three (3) years after final reimbursement payment. In addition,

(1) If the CALEA compliance effort is completely or partially terminated, the records relating to the work terminated shall be made available for three (3) years after any resulting final termination settlement; and

(2) Records relating to appeals, litigation or the settlement of claims arising under or relating to the CALEA compliance effort shall be made available until such appeals, litigation, or claims are disposed of.

(e) *Subcontractors.* The carrier shall ensure that all terms and conditions herein are incorporated in any agreement with a subcontractor that may be utilized by the carrier to perform any or all portions of the agreement.

#### § 100.19 Adjustments to agreement estimate.

(a) Adjustments prior to the incurrence of a cost.

(1) In accordance with § 100.17(d)(2), the carrier shall notify the FBI when any change affecting the level of reimbursement occurs.

(2) Upon such notification, if the adjustment results in an increase in the estimated reimbursement, the FBI will review the submission and determine if

(i) Funds are available;

(ii) The adjustment is justified and necessary to accomplish the goals of the agreement; and

(iii) It is in the best interest of the government to approve the expenditure.

(3) The FBI will provide the decision as to the acceptability of any increase to the carrier in writing.

(b) Adjustments after the incurrence of a cost. Any cost incurred that exceeds the provision in § 100.16(e)(2) will be reviewed by the FBI to determine reasonability, allowability, and if it is in the best interest of the government to approve the expenditure for reimbursement.

(c) Reduction for defective cost data.

(1) The cost shall be reduced accordingly and the agreement shall be modified to reflect the reduction if any cost estimate negotiated in connection with the CALEA compliance effort, or any cost reimbursable under the effort is increased because:

(i) The carrier or a subcontractor furnished cost data to the government that were not complete, accurate, and current;

(ii) A subcontractor or prospective subcontractor furnished the cost data to the carrier that were not complete, accurate, and current; or

(iii) Any of these parties furnished data of any description that were not accurate.

(2) Any reduction in the negotiated cost under § 100.19(c)(1) due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount by which either the actual subcontract or the actual cost to the carrier, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the carrier, provided that the actual subcontract cost was not itself affected by defective cost data.

(3) If the FBI determines under § 100.19(c)(1) that a cost reduction should be made, the carrier shall not raise the following matters as a defense:

(i) The carrier or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the costs of the agreement would not

have been modified even if accurate, complete, and current cost data had been submitted;

(ii) The FBI should have known that the cost data at issue were defective even though the carrier or subcontractor took no affirmative action to bring the character of the data to the attention of the FBI;

(iii) The carrier or subcontractor did not submit accurate cost data. Except as prohibited, an offset in an amount determined appropriate by the FBI based upon the facts shall be allowed against the cost reimbursement of an agreement amount reduction if the carrier certifies to the FBI that, to the best of the carrier's knowledge and belief, the carrier is entitled to the offset in the amount requested and the carrier proves that the cost data were available before the date of agreement on the cost of the agreement (or cost of the modification) and that the data were not submitted before such date. An offset shall not be allowed if the understated data were known by the carrier to be understated when the agreement was signed; or the Government proves that the facts demonstrate that the agreement amount would not have increased even if the available data had been submitted before the date of agreement on cost; or

(4) In the event of an overpayment, the carrier shall be liable to and shall pay the United States at that time such overpayment as was made, with simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the carrier to the date the Government is repaid by the carrier at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2).

**§ 100.20 Confidentiality of trade secrets/proprietary information.**

With respect to any information provided to the FBI under this part that is identified as company proprietary information, it shall be treated as privileged and confidential and only shared within the government on a need-to-know basis. It shall not be disclosed outside the government for any reason inclusive of Freedom of Information requests, without the prior written approval of the company. Information provided will be used exclusively for the implementation of CALEA. This restriction does not limit the government's right to use the information provided if obtained from any other source without limitation.

**§ 100.21 Alternative dispute resolution.**

(a) If an impasse arises in negotiations between the FBI and the carrier which

precludes the execution of a cooperative agreement, the FBI will consider using mediation with the goal of achieving, in a timely fashion, a consensual resolution of all outstanding issues through facilitated negotiations.

(b) Should the carrier agree to mediation, the costs of that mediation process shall be shared equally by the FBI and the carrier.

(c) Each mediation shall be governed by a separate mediation agreement prepared by the FBI and the carrier.

Dated: February 25, 1997.

Louis Freeh,

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

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[NE 020-1020; FRL-5708-7]

**Approval and Promulgation of Implementation Plans; State of Nebraska**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** With this document, the EPA is approving the Omaha lead emission control plan submitted by the state of Nebraska on August 28, 1996. This plan was submitted by the state to satisfy certain requirements under the Clean Air Act (the Act) to reduce lead emissions sufficient to bring portions of the Omaha area into attainment with the lead National Ambient Air Quality Standard (NAAQS).

**DATES:** This rule is effective on April 21, 1997.

**ADDRESSES:** Copies of the documents relevant to this action are available for public inspection during normal business hours at the: Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101; and the EPA Air & Radiation Docket and Information Center, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Joshua A. Tapp at (913) 551-7606.

**SUPPLEMENTARY INFORMATION:**

I. Background and Purpose

A. Introduction

On January 6, 1992, the EPA designated portions of Omaha surrounding the Asarco, Incorporated

primary lead refinery as nonattainment for the lead NAAQS. Specifically, the boundaries for the nonattainment area are: Avenue H and the Iowa-Nebraska border on the north, the Missouri River on the east, Eleventh Street on the west, and Jones Street on the south. Pursuant to the designation, the Act required the state of Nebraska to submit an attainment plan by July 6, 1993, which would bring the area into attainment by January 6, 1997.

On August 28, 1996, the state submitted a plan to the EPA which consists of Compliance Order (Case Number) 1520 and associated work practices. This plan meets the minimum requirements of sections 110 and 172 of the Act and in the "Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (58 FR 67748). The rationale regarding the EPA's approval of this plan can be found in the December 4, 1996, Federal Register document (61 FR 64304) proposing the EPA's action on Nebraska's plan and in the technical support document (TSD) for this action.

B. Response to Comments

The EPA received comments from only one commentator. On January 3, 1997, the state of Nebraska submitted the following two comments. The state identified a typographical error made by the EPA in its December 4, 1996, proposal in subsection III.f., "Contingency Measures." Specifically, the EPA's discussion of Nebraska's prohibition on causing a violation of the lead ambient air quality standard should have referenced paragraph 19 of Compliance Order (Case Number) 1520, instead of paragraph 20.

The EPA agrees with this comment and wishes to make one additional correction. The EPA's discussion of street sweeping and production cuts in the same subsection should have referenced paragraph 18 of Compliance Order (Case Number) 1520, instead of paragraph 19.

The EPA has determined that the proposal notice adequately described the issues associated with the substance of the referenced paragraphs. Therefore, despite the incorrect references to paragraph numbers in the proposal, the EPA has determined that the proposal gives adequate notice of the rationale for the EPA's proposed action on the two paragraphs of the Compliance Order referenced above.

In its second comment, the state disagrees with the EPA's proposed nonaction on the provisions pertaining to the direct enforcement of the lead NAAQS contained in paragraph 19 of