The Federal regulations at 30 CFR Part 943, codifying decisions concerning the Texas program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. In the oversight of the Texas program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Texas of only such provisions.

VI. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. however, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No evironmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 28, 1996.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 943—TEXAS

1. The authority citation for Part 943 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 943.15 is amended by adding paragraph (n) to read as follows:

§ 943.15 Approval of regulatory program amendments.

* * * * *

(n) The amendment submitted by Texas to OSM by letter dated August 30, 1995, and the definition of ''violation notice'' submitted by Texas to OSM by letter dated September 18, 1995, are approved effective June 18, 1996.

3. Section 943.16 is amended by removing paragraphs (r), (t), and (u) and by revising paragraph (k) to read as follows:

§ 943.16 Required program amendments.

* * * * *

(k) By October 19, 1992, Texas shall submit to OSM a proposed amendment for the definitions at TCMR 770.101 to replace the definitions for ''applicant,'' ''application,'' ''complete application,'' ''general area,'' ''principal shareholder,'' and ''property to be mined,'' or otherwise demonstrate that these definitions are not necessary for the Texas program to be no less effective than the Federal regulations.

* * * * *

[FR Doc. 96–15145 Filed 6–17–96; 8:45 am]

BILLING CODE 4310–05–M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 93–2B]

Digital Audio Recording Devices and Media; Verification of Statements of Account

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim regulation.

SUMMARY: The Audio Home Recording Act of 1992 requires the Register of Copyrights to issue regulations that provide for the verification of the information contained in digital audio recording technology (DART) Statements of Account filed with the Office. The Copyright Office is adopting Interim Regulations that establish procedures for requesting verification, the scope of the verification, and the allocation of costs. The regulations are intended to ensure that proper payments have been made to copyright owners.

DATES: This interim regulation is effective June 18, 1996. Comments must be submitted on or before September 16, 1996. Reply comments must be

submitted on or before October 16, 1996.

ADDRESSES: If sent by mail, fifteen copies of written comments should be addressed to Marilyn J. Kretsinger, Acting General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366. If by hand, fifteen copies should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM–407, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024, or Tanya Sandros. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

I. Background

The Audio Home Recording Act (AHRA) requires manufacturing and importing parties that distribute digital audio recording devices or media in the United States to file Statements of Account with, and make royalty payments to, the Copyright Office. It also requires the Register of Copyrights to issue regulations to protect the confidentiality of the information contained in Statements of Account, to provide for the disclosure, in confidence, of Statements to interested copyright parties, and to provide for the verification of Statements of Account. 17 U.S.C. 1003(c)(2).

We published a Notice of Proposed Rulemaking on May 7, 1993. 58 FR 27251 (May 7, 1993). The Notice contained a proposed regulation concerning access to, and confidentiality of, Statements of Account and asked for public comment on that proposal and also on the form and content of a regulation governing audit and verification procedures.

In separate proceedings, we issued interim regulations governing the filing of Notices of Initial Distribution, 57 FR 55464 (November 25, 1992), and establishing requirements governing the filing dates, frequency of filing, and content of Statements of Account and the primary auditor's report that must be filed by persons subject to the statutory obligation. 59 FR 4586 (February 1, 1994). In a separate proceeding, we published interim regulations governing access to and confidentiality of Statements of Account. 60 FR 25995 (May 16, 1995).

II. Verification of Statements of Account

In the Notice of Proposed Rulemaking (NPRM), 58 FR 27251 (1993), we did not propose the actual language of a verification regulation. Instead, we noted that the Senate version of AHRA, S. 1623,[1] contained detailed provisions regarding audit and verification which were eliminated from the bill as passed, but which we indicated we were inclined to use as the framework for the regulations. We therefore solicited public comments and detailed proposals for the form and content of a verification regulation based on S. 1623. In addition, we asked ten specific questions.

The Office received eleven comments, including direct, reply, and surreply comments, from four parties. Comments were received from (1) the American Institute of Certified Public Accountants (AICPA); (2) the American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., Copyright Management, Inc., the National Music Publishers' Association, Inc., SESAC, Inc., and the Songwriters Guild of America (The Copyright Parties); (3) the Alliance of Artists and Recording Companies (AARC); and (4) the Electronic Industries Association (EIA).

The comments revealed that while there was general agreement on a number of issues, there were sharp differences among the parties on certain key issues, especially, the scope of the verification procedure, the possible role of an arbitrating accountant or the Copyright Office in resolving disputes, and the standards to measure the independence of the verifying auditor. The Office believes these issues need to be resolved through another round of comments. However, the Office believes that interim regulations need to be adopted to allow for the verification of the Annual Statements of Accounts that have already been received.[2] Therefore, in order to go forward, the Copyright Office has had to take a certain approach, but these interim regulations represent only the Office's initial position, and are not intended necessarily to indicate the Office's final conclusions. Comments on the specific regulatory language and the issues they raise are particularly solicited.

What follows is a discussion of the comments and a description of the interim regulations adopted by the Office.

III. Period for Invoking a Verification Procedure

The first issue is one of timing: when should the Annual Statements of Account be available for a verification procedure and for how long? How often should the Annual Statements be audited?

S. 1623 did not provide for a time limit for initiating a verification procedure, but did state that no filer should be audited more than once a year.

EIA said it would accept a two or three year time limit following the filing of the Annual Statement of Account for verification. EIA, comments at 28. The Copyright Parties supported a rule stating that the verification procedure should not be conducted more than three years after the filing date of the Annual Statement of Account. Copyright Parties, reply at 25. AICPA supported a deadline beyond which verification procedures could not be conducted, and in its reply comments supported the three-year rule advanced by the Copyright Parties. AICPA, comments at 5, reply at 6.

AICPA recommends that only one verification audit should be permitted per Statement of Account. AICPA, comments at 5. EIA states there should be no more than one verification audit per year per Statement of Account. EIA, comments at 27. The Copyright Parties urge the adoption of regulations that permit interested parties to consolidate the verification procedure for several Annual Statements. The Copyright Parties agree that no manufacturer or importer should be audited more than once in a calendar or fiscal year and the Annual Statements should be verified no more than once. Copyright Parties, comments at 29, reply at 24.

While there was general agreement among the commentators supporting a time limit, because of the procedure for selecting a verifying auditor discussed below, we are measuring the time limit somewhat differently from the measurements proposed in the comments.

First, within three months of the filing deadline of the Annual Statement of Account, no verification procedure may be invoked. This will give the Licensing Division time to review the Annual Statement and resolve any discrepancies.

Second, after the three months, any interested copyright party will have until the third year anniversary of the filing deadline of the Annual Statement to notify the Copyright Office, the filer

[1] S. 1623, 102d Cong., 1st Sess. (1991).

[2] The first Annual DART Statement of Account was filed with the Office March 1, 1994. Since we are proposing that a verification procedure of an Annual Statement of Account can be invoked no later than three years after the filing deadline, it is important to provide interim regulations even while the verification procedure is being further refined.

and the primary auditor of his or her intent to invoke a verification procedure. The notice of one party will preserve the right of all interested copyright parties to participate in a verification procedure. While EIA's and the Copyright Parties' comments contemplated that the verification procedure itself would have to commence within three years of the filing of the Annual Statement of Account, the Office believes that this is not workable, because too many events, such as the Office publishing a notice in the Federal Register, and the subsequent coordination and selection of the verifying auditor, are beyond the petitioning party's sole control. The interested copyright party could not know how much time before the end of the three years he or she needed to allow to assure that the verification procedure began within three years of the filing deadline. Therefore, the Office has moved the tolling of the deadline from the time the verification procedure commences to the time when notice is filed by the interested copyright party that he or she wants to begin a verification procedure.

The interim regulations provide that there can be no more than one verification procedure a year of any manufacturing or importing party, but the verification procedure may include more than one Annual Statement of Account.

IV. Selection of Verifying Auditor

Assuming that one or more copyright parties wants to invoke a verification procedure, how do they coordinate the selection of the verifying auditor? S. 1623 provided that the Register of Copyrights should establish a procedure by which interested copyright parties will coordinate the engagement of a verifying auditor to perform the verification procedure.

EIA commented that all parties would be best served by a formal procedure by which interested copyright parties provide public notice of their intent to invoke a verification procedure, permit other interested copyright parties to express an interest, and then jointly select a verifying auditor. EIA, comments at 29. The Copyright Parties recommended that we establish procedures by which interested copyright parties may coordinate the engagement of a verifying auditor to ensure that no manufacturing or importing party is audited more than once per year. Copyright Parties, comments at 10–11.

The Office believes that it is the responsibility of the copyright parties to select the verifying auditor and coordinate the verification procedure. The Office can only play a limited role in this process, acting to notify the copyright parties that a verification procedure is contemplated and who is proposing the procedure.

The Office will perform that role by publishing a notice in the Federal Register when it has been informed by an interested copyright party that he or she is interested in invoking a verification procedure. The notice will include whom to contact so that all interested copyright parties who want to be involved may coordinate their selection of the auditor. The party, or, if more than one, the joint interested parties will select the verifying auditor and will notify, within two months of the publication of the original Federal Register notice, the filer of the Annual Statement of Account, the primary auditor and the Register of Copyrights whether or not they wish to start a verification procedure.[3]

V. Notice and Length of Verification Procedure

The NPRM also asked what would be reasonable notice before commencing a verification procedure, and how long the verification procedure should take.

EIA recommended that at least 30 days notice should be required and the manufacturer, importer, or primary auditor should be able to postpone the verification up to 60 days. EIA, comments at 6The Copyright Parties stated that 60 days is a reasonable notice before the verification procedure commences. The Copyright Parties observed that the duration of a verification procedure will vary from case to case, and that the duration is as much in the control of the manufacturer or importer as of the interested copyright parties or their verifying auditor. Copyright Parties, comments at 21–22. AICPA had no comment on the length of time required for notice of a verification procedure. It did suggest that the length of time to perform the procedure should be 90 to 120 days. AICPA, comments at 3.

The Office's interim regulations state that after the joint interested parties notify the filer of their intent to conduct a verification procedure, the verification procedure can begin one month later, or up to two months later if the filer or the primary auditor asks for a postponement. The Office agrees with the comments of the Copyright Parties that the duration of the verification procedure can vary from case to case and, therefore, the Office has not adopted any rules concerning how long the verification procedure should take.

VI. Scope of Verification Procedure

The scope of the verification procedure has been one of the most contentious issues faced by the Office in drafting regulations to implement the AHRA. The Office is required to balance the need of the manufacturing and importing parties to avoid the disruption of their business and the exposure of confidential information, with the need of the interested copyright parties to be assured that sufficient royalties are deposited for distribution. EIA, comments at 2; Copyright Owners, comments at 2.

Section 1011(e)(1)(D) of S. 1623 provided that the goal of verification should be limited to examining the accuracy of information contained in the Statements of Account filed by manufacturing and importing parties, and that the procedure to achieve this goal should be no broader than is reasonably necessary in accordance with generally accepted auditing standards (GAAS). All parties to this proceeding agreed with these two principles, but nevertheless disagreed on how much review was needed to verify the information in the Statements of Accounts.

Of the four commenting parties, EIA advocated the narrowest scope of review. The Copyright Parties advocated the widest scope of review. AICPA and AARC took positions somewhere in between.

EIA said that the scope of the verification procedure should be a review by the verifying auditor of the audit performed by the primary auditor. This review would encompass an evaluation of the primary auditor's audit procedures, examination of the primary auditor's work papers, and consideration of the primary auditor's conclusions. In the event the verifying auditor believes the audit was not properly performed, or that additional procedures are needed, he or she would consult with the primary auditor. If the two auditors are unable to agree, they would submit the matter to a neutral, independent accountant selected by both parties to arbitrate the dispute. The role of this third party accountant would be strictly to determine whether the primary auditor complied with GAAS in performing the work and to determine, and possibly perform, the additional procedures needed to correct noted deficiencies. EIA, comments at 5.

[3] The interested copyright parties may, after consultation with each other, decide not to conduct a verification procedure. In that case, they will not select a verifying auditor, but will, instead, notify the filer, the primary auditor and the Register of Copyrights that they do not intend to proceed.

EIA opposes any regulation that would provide for or permit a verifying auditor to conduct a duplicative full scope audit or to have unfettered access to the books and records of a filer that has already been audited by a primary auditor. Such an approach, in EIA's view, would impose unreasonable burden and expense, and would be a prescription for misunderstanding, controversy, and the unanticipated disclosure of confidential information. Furthermore, such an approach would not provide additional assurance beyond the assurance provided by EIA's proposed procedure. EIA, comments at 6.

The Copyright Parties believe that the Copyright Office should allow for the possibility of a full scale audit without specific limitations on audit tests and procedures to be performed. The Copyright Parties assert that the verification procedure should include ''the examination of evidence supporting the amounts and disclosure in the Statement of Account, an assessment of the accounting principles used by the manufacturer or importer in preparing the statement, and an evaluation of the overall presentation of the statement.'' Copyright Parties, comments at 27.

The Copyright Parties state that the limited review of working papers proposed by EIA does not contribute to effective enforcement of royalty obligations under AHRA. Instead, they want the ability to use an independent verifying auditor to determine whether the Statement of Account fairly presents, in all material respects, the royalty obligations of a particular filer. Copyright Parties, reply at 18. However, the Copyright Parties supported a regulation that would promote initial reliance on the working papers and related documents generated in the course of the primary audit to avoid duplication of effort, and to concentrate the verifying auditor's focus on the additional work he or she considers necessary under the circumstances. Copyright Parties, surreply at 13–14.

AICPA commented that consideration should be given to using ''agreed-upon procedures'' which all users of the report would agree to so that the verifying auditor does not duplicate the effort of the first auditor. AICPA noted that ''agreed-upon procedures'' are generally less in scope than an audit under generally accepted auditing standards, and the verifying auditor would not express an opinion on the fair presentation of the information. He or she would report the procedures performed and any findings. Further, users of the report, namely, the Copyright Office and the interested copyright parties, must agree upon the procedures that the verifying auditor would perform. AICPA, comments at 4.

While disagreeing with the Copyright Parties about the wisdom of a full scale verifying audit, AICPA also did not believe that the suggested procedures and approach of the EIA were appropriate. AICPA argued that the procedures to be performed must be more than the EIA suggested review of the working papers of the initial audit. The procedures should be objective procedures that test the amounts reported by the manufacturer or importer. The EIA proposal would require the auditor to formulate an opinion that the audit was properly conducted based upon a review of the working papers. This proposal is more in the nature of a quality review of the primary auditor's work than an audit of the royalty schedule, and in AICPA's view, not an appropriate ''agreed-upon procedures'' engagement. AICPA, reply at 2.

AARC took a similar position to AICPA in finding problems with both EIA's and the Copyright Parties' positions. AARC commented that while it agrees with the EIA that a full scope audit by a verifying auditor may be inappropriate, AARC believes that the approach suggested by EIA does not go far enough. AARC argues that the interested copyright parties must have the ability to direct their own verifying auditor in the conduct of a verification procedure. At the same time, while AARC is generally in agreement with the intent of the approach suggested by the Copyright Parties, AARC believes the scope of verification sought in their initial comments may be unnecessarily broad in order to achieve the intended results.

AARC believes that what is more appropriate is a ''compliance'' type audit; a type customarily used within the music industry to determine the proper payment of music publishers and/or artist royalties. When preparing royalty accountings, the manufacturers and distributors will have to set up a system that will provide information to their accounting department. The basis of this information will be their manufacturing, inventory, sales and shipping records. AARC asserts that the verifying auditor retained by the interested copyright parties should be able, at minimum, to test these accounting records and the underlying documents. AARC, reply at 2–3.

With access to the documents described above, AARC does not believe it would be necessary for the verifying auditor to have access to the manufacturer's or importer's general ledgers as proposed by the Copyright Parties, so long as the primary auditor's opinion indicates that the royalty accountings tie into the general books of account. AARC, reply at 4.

VII. Discussion of Scope of Verification

Clearly, the most contentious issue in this rulemaking is the very scope of the verification audit which, in turn dictates the need to access particular business records to perform the verification procedure. The Copyright Parties want the potential for a full scale audit. EIA wants the verifying auditor simply to review the primary auditor's work. AICPA recommends ''agreed-upon procedures,'' agreed to by the Copyright Parties and the verifying auditor which is something more than just a review of the primary auditor's work but something less than full access to all records. AARC recommends a ''compliance'' audit where the filer is told in advance what business records to segregate.

The Office has decided to adopt a procedure for these interim regulations whereby the verifying auditor first reviews the primary auditor's work papers. If, in the verifying auditor's opinion, according to generally accepted auditing standards (GAAS), he or she needs access to the business records of the filer, the verifying auditor, after consulting with the primary auditor, shall be able to have access to those records as well.[4]

The Office believes that two independent accountants—the verifying auditor and the primary auditor—acting in good faith, are the best judge of what additional information is needed from the filer.

However, we highlight this provision in our interim regulations as one in which we particularly solicit comments from the parties. If the parties believe that the question of the scope of the verification should not rest with the independent accountants, they should so notify the Office in their comments. Moreover, the Office asks the parties whether they could agree upon which business records the filer should make available, in addition to the primary auditor's work papers, that would assure the accuracy of the Annual Statement of Account but at the same time would not create an overly extensive demand on the filer.

[4] The consultation with the primary auditor is not intended to give the primary auditor any veto over the decision of the verifying auditor to require additional records. It is only intended as a means to get additional advice on what records may or may not be needed.

VIII. Independence of the Verifying Auditor

AICPA states that GAAS requires that a verifying auditor be independent. AICPA recommends that if there is a question about an auditor's independence, it should be referred to the AICPA Professional Ethics Division and/or the State Board of Accountancy. AICPA, comments at 3.

The Copyright Parties believe the Office should require that the verifying auditor be independent within the meaning of AICPA's Code of Professional Conduct. In addition, the Copyright Parties recommend that we establish a procedure to accept petitions from parties wishing to challenge the use of a particular auditor. Such petition should explain why the verifying auditor should not be used and should provide specific facts to support the petition. Where the Office considers that the petition raises a question as to whether the verifying auditor is independent, the matter should be referred to the proper professional authorities. Copyright Owners, comments at 17–19.

EIA believes that the Office need not become involved in the question of a verifying auditor's independence, but it opposes sending the question to the AICPA Professional Ethics Division and/or the appropriate State Board because ''(1) these bodies have not applied a financial dependence standard and (2) they apply the traditional independence standard most often in a disciplinary context, where generally the presumptions and burdens favor the accused accountant.'' EIA, reply at 13. It suggested that an independent arbitrating accountant, chosen by the primary auditor and the verifying auditor, should help determine the independence of the verifying auditor. EIA, comments at 30–32, reply at 13.

The Office agrees that it should not become involved in deciding whether a verifying auditor is independent, and any disputes involving the independence of an auditor should be referred to the AICPA or State Boards of Accountancy. EIA's opposition, notwithstanding, the Office considers that referring the matter to AICPA or State Boards is preferable to referring it to an independent arbitrating accountant. *See,* discussion at X, below. If there is a challenge to the verifying auditor's independence, the interim regulations nonetheless call for the verification procedure to continue while the question of the auditor's independence is being resolved.

The Office considered two specific proposals concerning a verifying auditor's independence, but ultimately decided not to adopt them in the interim regulations. They were that the auditing firm retained to perform the verification procedure does not receive more than 15% of its gross revenues from services performed for the interested copyright parties, and that the auditor is not performing the verification procedure for a contingent fee. These proposals were supported by EIA but opposed by AICPA. EIA, comments at Appendix 2, at 18; AICPA, reply at 5. The Office solicits comments on whether these two specific proposals should be added to the definition of an independent verifying auditor. The Office also is aware that its current regulations on the primary auditor found in § 201.28 do not discuss the primary auditor's independence beyond stating that the primary audit shall be performed according to GAAS. The Office solicits comments on whether any additional provisions should be adopted to assure the primary auditor's independence.

IX. Work Papers of the Verifying Auditor

Section 1011(e)(2) of S. 1623 provided that the certification and results of all verification procedures shall be filed with the Register of Copyrights. In our Notice we asked if we should require the filing of the verifying auditor's work papers along with the results of a verification procedure.

AICPA filed a strong objection to any requirement to file work papers in addition to the results of the verification procedure. It states that the auditor's report, not the work papers, provides the auditor's opinion as to the fairness of the presentation of figures on the Statement of Account and the primary auditor's report. The work papers are considered the personal property of the independent auditor. AICPA, comments at 4.

EIA believes that work papers will contain extremely confidential information and should not be filed in the Office. EIA, comments at 2.

The Copyright Parties believe that only the auditor's report must be filed with the Office. They propose that all work papers be deposited only if the verification procedure results in a dispute. Copyright Parties, comments at 24–25.

In our interim regulations, therefore, the auditor's report to the Copyright Office will contain only the auditor's conclusions. If the verifying auditor concludes that there was any failure of the primary auditor to conduct properly the primary audit or obtain a reliable result, or that there was any error in the Annual Statement of Account, the supporting documentation will be included in an appendix to the report and distributed to the interested copyright parties, the filer, and the primary auditor only. It will not be included in the report sent to the Copyright Office.

X. Disputes Regarding Conduct of Verification Procedure

AICPA had no comment on whether the Copyright Office has a role in the event there is a dispute in the conduct or the result of the verification procedure. It recommended requiring arbitration of disputes. AICPA, comment at 4. EIA said the Office should not be burdened with the task of resolving disputes. Disputes would best be handled between the primary auditor and the verifying auditor. If such discussions do not resolve the dispute, the auditors should mutually select a neutral arbitrating accountant who will examine all work papers and decide if additional procedures are required. EIA, comments at 22. The Copyright Parties also stated that ''there is no statutory role for the Office in resolving disputes arising from the conduct of a verification procedure or the primary audit.'' They said that, in practice, disputes will be resolved through negotiation. Copyright Parties, comments at 23.

From the Office's viewpoint, there are three key points in the verification procedure when a dispute could take place. One, the filer could refuse to produce business records the verifying auditor considers necessary. Two, the filer could object that the verifying auditor is not independent. Three, the verifying auditor could file a report that there was a failure of the primary auditor to conduct the primary audit properly or to obtain a reliable result, or there was an error in the Annual Statement of Account.

At this point, the Office has decided not to institute binding arbitration in these interim regulations. The Office solicits comments on how such disputes should be resolved. If the commentators believe binding arbitration should be established, the Office solicits comments on how it would work, and whether the Office has the authority to require it.

XI. Cost of Verification Procedure

Sec. 1011(f) of S. 1623 specified that in the case of a verification procedure that ''leads ultimately to recovery of an annual royalty payment of 5 percent or more of the annual payment made, the

importing or manufacturing party shall provide reimbursement of the reasonable cost'' of such procedure.

In all other cases, ''any recovery of royalty underpayments as a result of the audit shall be used first to provide reimbursement for the reasonable costs of such audit,'' and ''any remaining recovery shall be deposited with the Register.''

EIA did not object to the cost allocation scheme proposed in S. 1623, provided that the verification procedure is limited to an ''agreed-upon procedures'' audit and there is arbitration between the primary and verification auditors in case of dispute to avoid duplication of audit work. EIA, comments at 30, and Appendix 2, at 16. The Copyright Parties recommended that the interested copyright parties who initiate the engagement of a verifying auditor should bear the cost of the verification procedure, but such cost should be reimbursable under the system proposed in S. 1623. Copyright Parties, comments at 28. AICPA recommended that the cost of the verification procedure should be borne by the copyright party(s) that engage the verification auditor, but was silent on the 5% provision in S. 1623. AICPA, comments at 5.

The interim regulation is based upon the system detailed in S. 1623, described above, with which the Copyright Parties and EIA agree.

XII. Miscellaneous—Retention of Report; Use of the Word ''Verification''

AICPA had no comment on the length of time verification procedure reports should be retained by the Office. EIA and the Copyright Parties proposed that they be retained for three years. EIA, comments at 28; Copyright Parties, comments at 13. AICPA supported EIA's and the Copyright Parties' three-year proposal in its reply comments. AICPA, reply at 6. The Office has adopted the proposed three-year retention, but seeks more comments on how it should work. Should it apply equally to positive as well as negative verification procedure reports? Should it include follow-up reports if the filer and the verifying auditor come to subsequent agreements addressing the concerns of a negative report? May the Office, in its discretion, retain the report more than three years?

Last, AICPA commented that the word ''verification'' is a misnomer because it implies a full scale audit while the scope of the verifying auditor's work might be well less than that. AICPA recommends that the procedure to be followed by the verifying auditor be called a ''second audit'' or a ''special audit.'' We have chosen to call it a ''verification procedure,'' because the word ''verification'' was used in the AHRA, but we have given it its own special definition in § 201.30(b)(5), so that it will not carry the implication of a full scale audit.

List of Subjects in 37 CFR Part 201

Copyright; Digital audio recording products.

Interim Regulations

In consideration of the foregoing, the Copyright Office is amending part 201 of 37 CFR, chapter II in the manner set forth below:

PART 201—GENERAL PROVISIONS [AMENDED]

1. The authority citation for part 201 is revised to read as follows:

Authority: 17 U.S.C. 702; 17 U.S.C. 1003.

2. Section 201.30 is added to read as follows:

§ 201.30 Verification of Statements of Account.

(a) *General.* This section prescribes rules pertaining to the verification of information contained in the Statements of Account by interested copyright parties pursuant to section 1003(c) of title 17 of the United States Code.

(b) *Definitions.*

(1) *Annual Statement of Account, generally accepted auditing standards (GAAS),* and *primary auditor* have the same meaning as the definition in § 201.28 of this part.

(2) *Filer* is a manufacturer or importer of digital devices or media who is required by 17 U.S.C. 1003 to file with the Copyright Office Quarterly and Annual Statements of Account and a primary auditor's report on the Annual Statement of Account.

(3) *Interested copyright party* has the same meaning as the definition in § 201.29 of this part.

(4) *Verifying auditor* is the person retained by interested copyright parties to perform a verification procedure. He or she is independent and qualified as defined in paragraphs (j)(2) and (j)(3) of this section.

(5) *Verification procedure* is the process followed by the verifying auditor to verify the information reported on an Annual Statement of Account.

(c) *Purpose of Verification.* The purpose of verification is to determine whether there was any failure of the primary auditor to conduct the primary audit properly or to obtain a reliable result, or whether there was any error in the Annual Statement of Account.

(d) *Timing of Verification Procedure.*

(1) *Requesting a verification procedure.* No sooner than three months nor later than three years after the filing deadline of the Annual Statement of Account to be verified, any interested copyright party shall notify the Register of Copyrights of its interest in instituting a verification procedure. Such notification of interest shall also be served at the same time on the filer and the primary auditor identified in the Annual Statement of Account. Such notification shall include the year of the Annual Statement of Account to be verified, the name of the filer, information on how other interested copyright parties may contact the party interested in the verification including name, address, telephone number, facsimile number and electronic mail address, if any, and a statement establishing the party filing the notification as an interested copyright party. The notification of interest may apply to more than one Annual Statement of Account and more than one filer.

(2) *Coordination and selection of verifying auditor.* The Copyright Office will publish in the Federal Register notice of having received a notification of interest to institute a verification procedure. Interested copyright parties have one month from the date of publication of the Federal Register notice to notify the party interested in instituting the verification procedure of their intent to join with it and to participate in the selection of the verifying auditor. Any dispute about the selection of the verifying auditor shall be resolved by the parties themselves.

(3) *Notification of the filer and primary auditor.* As soon as the verifying auditor has been selected, and in no case later than two months after the publication in the Federal Register of the notice described in paragraph (d)(2) of this section, the joint interested copyright parties shall notify the Register of Copyrights, the filer, and the primary auditor identified in the Annual Statement of Account to be verified, that they intend or do not intend to initiate a verification procedure.

(4) *Commencement of the verification procedure.* The verification procedure shall begin no sooner than one month after notice of intent to initiate a verification procedure was given to the filer and the primary auditor by the joint interested copyright parties. The joint interested copyright parties shall grant the filer or the primary auditor a postponement of the beginning of the verification procedure of up to one additional month if either one requests

it. Verification procedures shall be conducted at reasonable times during normal business hours.

(5) *Anti-duplication rules.* A filer shall be subject to no more than one verification procedure per calendar year. An Annual Statement of Account shall be subject to a verification procedure only once.

(e) *Scope of verification.* The verifying auditor shall limit his or her examination to verifying the information required in the Annual Statement of Account. To the extent possible, the verifying auditor shall inspect the information contained in the primary auditor's report and the primary auditor's working papers. If the verifying auditor believes that access to the records, files, or other materials in the control of the filer is required according to GAAS, he or she may, after consultation with the primary auditor, require the production of these documents as well. The verifying auditor and the primary auditor shall act in good faith using reasonable professional judgment, with the intention of reaching a reasonable accommodation as to the necessity and scope of examination of any additional documents, but the decision to require the production of additional documents is solely that of the verifying auditor.

(f) *Verification Report.* Upon concluding the verification procedure, the verifying auditor shall render a report enumerating in reasonable detail the procedures performed by the verifying auditor and his or her findings. Such findings shall state whether there was any failure of the primary auditor to conduct properly the primary audit or obtain a reliable result, and whether there was any error in the Annual Statement of Account, itemized by amount and by the filer's elected fiscal year. If there was such failure or error, the report shall specify all evidence from which the verifying auditor reached such conclusions. Such evidence shall be listed and identified in an appendix to the report in sufficient detail to enable a third party to reasonably understand or interpret the evidence on which the verifying auditor based his or her conclusion. If there was no such failure or error, the report shall so state.

(g) *Distribution of Report.* Copies of the verifying auditor's report shall be subject to the confidentiality provisions of § 201.29 and shall be distributed as follows:

(1) One copy, excluding the appendix, if applicable, shall be filed with the Register of Copyrights.

(2) One copy, with the appendix, if applicable, shall be submitted to each of the interested copyright parties who retained the services of the verifying auditor and who are authorized to receive such information according to § 201.29.

(3) One copy, with the appendix, if applicable, shall be submitted to the filer of the Annual Statement of Account.

(4) One copy, with the appendix, if applicable, shall be submitted to the primary auditor.

(h) *Retention of Report.* The Register of Copyrights will retain his or her copy of the verifying auditor's report for three years following the date the copy of the verifying auditor's report is filed.

(i) *Costs of Verification.* The joint interested copyright parties who requested the verification procedure shall pay the fees of the verifying auditor and the primary auditor for their work performed in connection with the verification procedure, except, if the verification procedure results in a judicial determination or the filer's agreement that royalty payments were understated on the Annual Statement of Account, then,

(1) if the amount is less than five percent (5%) of the amount stated on the Annual Statement of Account, that amount shall first be used to pay the fees of the verifying auditor and the primary auditor, and any remaining amount plus any applicable interest on the total amount shall be deposited, allocated by the filer's elected fiscal year, with the Register of Copyrights, or

(2) if the amount is equal to or greater than five percent (5%) of the amount stated on the Annual Statement of Account, the filer shall pay the fees of the verifying auditor and the primary auditor, and, in addition, shall deposit the amount found to be due plus any applicable interest on the total amount, allocated by the filer's elected fiscal year, with the Register of Copyrights.

(j) *Independence and qualifications of verifying auditor.*

(1) The verifying auditor shall be qualified and independent as defined in this section. If the filer has reason to believe that the verifying auditor is not qualified or independent, it shall raise the matter with the joint interested copyright parties before the commencement of the verification procedure, and if the matter is not resolved, it may raise the issue with the American Institute of Certified Public Accountants' Professional Ethics Division and/or the verifying auditor's State Board of Accountancy while the verification procedure is being performed.

(2) A verifying auditor shall be considered qualified if he or she is a certified public accountant or works under the supervision of a certified public accounting firm.

(3) A verifying auditor shall be considered independent if:

(i) he or she is independent as that term is used in the Code of Professional Conduct of the American Institute of Certified Public Accountants, including the Principles, Rules and Interpretations of such Code applicable generally to attest engagements (collectively, the ''AICPA Code''); and (ii) he or she is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.

Dated: June 6, 1996.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD–FRL–5521–5]

RIN 2060–AD98

National Emission Standards for Hazardous Air Pollutants for Shipbuilding and Ship Repair (Surface Coating) Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: On December 15, 1995, the EPA issued national emission standards for hazardous air pollutants (NESHAP) under Section 112 of the Clean Air Act as amended in 1990 for shipbuilding and ship repair (surface coating) operations. The NESHAP requires existing and new major sources to control emissions using the maximum achievable control technology to control hazardous air pollutants. This action revises the compliance date for sources subject to this standard and revises the date for submittal of implementation plans. Specifically, this action extends the June 13, 1996 deadline for submittal of an implementation plan to December 16, 1996. The compliance date is extended from December 16, 1996 to December 16, 1997. This action is being taken because the EPA has learned that sufficient time was not provided to