

DEPARTMENT OF JUSTICE**Federal Bureau of Investigation****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: Proposed rule.

SUMMARY: This rule establishes the procedures whereby telecommunications carriers can recover the costs associated with complying with the Communications Assistance for Law Enforcement Act (CALEA), which requires telecommunications carriers to ensure law enforcement's ability, pursuant to court order or other lawful authorization, to intercept communications notwithstanding advanced telecommunications technologies.

DATES: Written comments must be received on or before July 9, 1996.

ADDRESSES: Comments should be submitted in triplicate to the Telecommunications Contracts and Audit Unit, Federal Bureau of Investigation, P.O. Box 221286, Chantilly, VA 22022-1286, Attention: CALEA FR Representative, telephone number (703) 814-4900.

FOR FURTHER INFORMATION CONTACT: Walter V. Meslar, Unit Chief, Telecommunications Contracts and Audit Unit, Federal Bureau of Investigation, P.O. Box 221286, Chantilly, VA 22022-1286, telephone number (703) 814-4900.

SUPPLEMENTARY INFORMATION: Recent and continuing advances in telecommunications technology and the introduction of new digitally-based services and features have, in some instances, 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, 47 U.S.C. 1001-1010). 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 notwithstanding advanced telecommunications technologies.

Under CALEA, certain implementation responsibilities are

conferred upon the Attorney General; the Attorney General has, in turn, delegated responsibilities set forth in CALEA to the Director, FBI, or his designee, pursuant to 28 CFR 0.85(o). The Director, FBI, has designated personnel in the Engineering Section of the Information Resources Division and the Property Procurement and Management Section 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 Communication 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 interexchange 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 messaging services; and (2) any class or category of telecommunications carriers that the FCC exempts by rule after consultation with the Attorney General.

Capability Requirements

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, feature descriptions, or standards adopted by an industry association or standard-setting organization relevant to CALEA. Telecommunications carriers may also develop 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 required to accommodate all of the communication interceptions, pen registers, and trap and trace devices that the Attorney General estimates that the government agencies authorized to conduct electronic surveillance may conduct and use simultaneously by the date 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 the 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 those notices (60 FR 53643), and on November 9, 1995 the comment period was extended until January 16, 1996.

Section 104 of CALEA also provides that within 180 days after the publication of the final notice of capacity requirements, a telecommunications carrier shall submit to the Attorney General a 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. The FBI intends to use those statements as a basis from which to solicit cooperative agreements to reimburse carriers for reasonable costs of modifications performed to comply with CALEA capability and capacity requirements, based on 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 is required to, and 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 dependant 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, it requires telecommunications transmission and switching equipment manufacturers, as well as providers of telecommunications support services, to cooperate with telecommunications

carriers in achieving the required capacities and capabilities.

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 after 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 directs the Attorney General to consult with the FCC prior to the establishment of regulations that will allow for cost recovery by telecommunications carriers of reasonable costs incurred for compliance.

Regulations shall minimize the cost to the Federal Government and permit recovery by telecommunications carriers of the direct costs of developing necessary modifications for CALEA compliance, including providing the capabilities requested, providing capacities requested, the costs of training personnel in the use of such capabilities and capacities, and the direct costs of deploying or installing such capabilities and capacities.

In the case of any modification that may be used for any purpose other than lawfully authorized electronic 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.

Establishment of Cost Recovery Rules and Procedures

The regulations proposed herein are intended to ensure that each carrier's practices used in estimating costs are consistent with the current cost accumulating and reporting procedures utilized by the carrier for the preparation of its financial statements. Further, these regulations establish that not all expenses 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 cost in the manner agreed to by both parties.

These regulations also ensure 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.

The following proposed cost recovery rules will be incorporated in any cooperative agreement established under section 109 of CALEA and entered into between the carriers and the FBI. Subsequent to the submission to the FBI of the Carrier Statements, as required under section 104(d) of CALEA, the FBI will directly solicit cooperative agreements from the carriers based upon available funding. A separate Federal Register notice concerning carrier statements will be published soon. These rules were developed to establish the procedures whereby carriers may seek reimbursement under section 109(a) and 104(e) of CALEA. Cost recovery under section 109(b)(2) of CALEA will be determined pursuant to the procedures set forth in section 109(b)(1) of CALEA in accordance with these cost recovery rules as promulgated. To the extent possible, these rules will allow carriers to utilize their existing accounting procedures to record the costs of bringing equipment, facilities, and services into compliance with CALEA.

Applicable Administrative Procedures and Executive Orders

Regulatory Flexibility Act

As required by section 603 of the Regulatory Flexibility Act, the FBI has prepared this Initial Regulatory Flexibility Analysis (IRFA) section to ascertain the expected impact on small entities of the regulations proposed in this document. The FBI is obligated to implement the mandate of Congress as set out in CALEA. Therefore, these regulations were developed to establish the mechanism whereby telecommunications carriers can recover the costs associated with complying with CALEA. The FBI seek to subject all carriers to the same regulatory policy (proposed herein), while allowing carriers to utilize 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, the proposed regulations specify reporting objectives rather than specifying the manner in which these records must be kept. The FBI estimates that approximately three thousand (3,000) telecommunications carriers may be affected by these rules. While most carriers are not large in terms of capitalization, most are dominant within their markets, so they are not considered "small" for the purposes of the Regulatory Flexibility Act. Although it is not anticipated that any small carriers will be adversely affected, these proposed rules have been written to allow any such carriers to seek reimbursement in an equitable manner. Therefore, these regulations seek to allow these carriers to use their current recordkeeping procedures, along with the existing skill levels on their staffs. As mandated by section 603(c) of the Regulatory Flexibility Act, consideration was given to alternative forms of compliance requirements for the small entities affected by these proposed rules. However, the FBI determined that these alternatives were not viable in that they would require the carriers to alter their internal accounting methodologies, would not take into account carrier individuality with respect to directly allocable costs or would violate CALEA's mandate to reimburse carriers' reasonable costs, while maintaining Government fiscal accountability requirements. This Proposed Rule solicits comments on both the proposed regulations and their possible impact on small entities. The FBI will send a copy of these proposed rules, including this IRFA, to the Chief

Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Public Law 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* There are no federal rules that overlap, duplicate or conflict with these rules.

Executive Order 12612

These regulations will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 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 examined these proposed regulations in light of Executive Order 12866 and has found that they constitute a significant regulatory action under sections 3(f)(1) and 3(f)(4). Pursuant to Executive Order 12866, 28 CFR part 100 is the draft text of the regulatory actions that are required under CALEA. These proposed regulations promulgate procedures whereby carriers may seek reimbursement for their efforts to assist law enforcement in preserving electronic surveillance capabilities as mandated by CALEA, which authorizes appropriations of \$500 million for carrier reimbursement. These regulations have been developed in order to effect the least burden on the administrative staffs of both the carriers and the Government while maintaining the Government's obligation to adhere to its fiscal accountability requirements. In order to accomplish this goal, the proposed regulations specify reporting objectives rather than specifying the manner in which these records must be kept. As mandated by Executive Order 12866, consideration was given to potentially effective and feasible alternatives to the proposed regulations. However, the FBI determined that alternative requirements were not viable in that they would require the carriers to alter their internal accounting methodologies, would not take into account carrier individuality with respect to directly allocable costs and violate CALEA's mandate to maintain Government fiscal accountability standards in the reimbursement process.

Unfunded Mandates Reform Act of 1995

As required by Title II of the Unfunded Mandates Reform Act of 1995, this section assesses the effects of

the proposed regulations on State, local and tribal governments and the private sector. These regulations are required under section 109(e) of CALEA. No unfunded mandate is imposed upon State, and local or tribal governments by these regulations. Therefore, sections 203 and 204 of the Unfunded Mandates Reform Act do not apply to these proposed rules. However, the FBI has determined that these proposed rules are subject to sections 201, 202, and 205 of the Unfunded Mandates Reform Act. While the telecommunications industry is primarily affected by these proposed rules, all reasonable costs, as shall be defined in 28 CFR part 100, incurred by the private sector will be subject to reimbursement from the \$500 million authorized to be appropriated by Congress under CALEA section 110. Furthermore, CALEA sections 109 and 104 specifically establish the conditions whereby a telecommunications carrier may be deemed in compliance with regard to the equipment, facilities or services covered in these proposed regulations should the Government not agree to reimburse the carrier for the compliance effort. Accurate estimates of the effects on the national economy of this part, which is proposed so that carriers may seek reimbursement for their efforts to assist law enforcement in preserving electronic surveillance capabilities as mandated by CALEA, are not feasible. As mandated by section 205 of the Unfunded Mandates Reform Act, consideration was given to potentially effective and feasible alternates to the proposed rules. However, the FBI determined that alternative requirements were not viable in that they would require the carriers to alter their internal accounting methodologies, would not take into account carrier individuality with respect to directly allocable costs and violated CALEA's mandate to maintain Government fiscal accountability standards in the reimbursement process.

Information Collection Under Review

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days from the date listed at the top of this page in the Federal Register. This process is conducted in accordance with the Paperwork Reduction Act of 1995.

This collection covers:

(1) Type of Information Collection: NEW COLLECTION: Quantitative and qualitative data necessary to evaluate cooperative agreement proposals and subsequent requests for reimbursement.

(2) The title of the information collection: "Telecommunications Carrier Reimbursement Cost Estimate" and "Telecommunications Carrier Reimbursement Request for Payment."

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collections: No form number; sponsored by the FBI, United States Department of Justice.

(4) Who will be asked or required to respond, as well as a brief abstract: BUSINESS OR OTHER FOR PROFIT: Telecommunications carriers will respond. This data collection will be necessary to evaluate cooperative agreement proposals and subsequent requests for reimbursement under CALEA. This information will be used to determine whether agreement prices are fair and reasonable and to make recommendations to agreement officers for approval or disapproval of the carrier's request.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The FBI estimates that approximately three thousand (3,000) telecommunications carriers, with approximately twenty-three thousand (23,000) unique switches, that, over a five (5) year period, may be affected by these rules. The time required to read and prepare information for one switch is estimated at four (4) hours per response.

By publication of this notice, written comments and suggestions from the public and affected agencies concerning the proposed collection of information was requested. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology (i.g., permitting electronic submission of responses).

Comments or suggestions regarding the items contained in this information collections request should be directed to

Mr. Porter F. Dunn,
Telecommunications Contracts and Audit Unit, Federal Bureau of Investigation, P.O. Box 221286, Chantilly, VA 22022-1286, telephone number (703) 814-4902.

List of Subjects in 28 CFR Part 100

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

Dated: May 6, 1996.

Louis Freeh,

Director, Federal Bureau of Investigation,
Department of Justice.

For the reasons set out in the preamble, 28 CFR part 100 is proposed to be added 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 Reduction for defective cost data.
- 100.20 Accounting for unallowable costs.
- 100.21 Confidentiality of trade secrets/
proprietary information.

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, 47 U.S.C. 1001-1010). Reimbursement of costs is subject to the availability of funds and agreement, prior to the incurrence of costs, by the Attorney General or designee to reimburse costs.

§ 100.10 Definitions.

(a) *Allocable* means chargeable to two or more costs objectives.

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

(c) *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, capitalization projects, etc.

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

(e) *Directly allocable costs* means any costs that are directly chargeable to two or more cost objectives.

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

(g) *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.

(h) *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.

(i) *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.

(j) *Plant nonspecific costs* means costs related to property held for future telecommunications use, along with the associated provisioning expenses, network operations expenses, and depreciation and amortization expenses. These costs shall also include the costs of supervising and office support of these activities.

(k) *Plant specific costs* means costs related to specific kinds of telecommunications plants. These costs shall include the costs of inspecting, testing and reporting on the condition of telecommunications plant to determine the need for repairs, replacements, rearranges and changes; performing routine work to prevent trouble except replacing items of plant other than retirement units; rearranging and changing the location of plant not retired; repairing material for reuse; restoring the condition of plant damaged by storms, floods, fire, or other casualties (other than the cost of replacing retirement units); inspecting after repairs have been made; and receiving training to perform these kinds of work. Also included are the costs of direct supervision (immediate or first-level) and office support of this work.

(l) *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.

§ 100.11 Allowable costs.

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

(1) All reasonable plant specific 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 specific 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 specific 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 specific 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 first-line supervision and office support for this work for plant specific expenses.

(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 direct 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) An allowable directly assignable cost is any plant specific cost that can be definitively linked with the performance of bringing equipment, facilities or services into compliance with CALEA as described in § 100.11(a).

(1) A direct 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 that or any other final cost objective shall not be assigned to the CALEA compliance effort (or any portion thereof).

(2) Costs identified specifically with the work performed are direct 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 as direct costs 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 a direct cost under this part.

(b) For reasons of practicality, any directly assignable cost of minor dollar amount 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 if:

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

(2) 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 groupings with due consideration of the reason 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 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 accepted by the FBI, it shall not be modified without written approval of the FBI. 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

CALERA 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 location 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 appropriated 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 and which are for the general management and administration of the 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 nonspecific costs are disallowed. These include, but are not limited to, expenses related to property held for future telecommunications use, provisioning expenses, network operations expenses, and depreciation and amortization expenses. Any plant nonspecific supervision and office support costs are also disallowed.

(d) Cost 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 agreed upon time frame 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.

§ 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 time of agreement.

(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 secure the data and/or elicit corrective action. If the carrier persists in refusing to provide the needed data or to take corrective action, the FBI will refer the action to higher authority, including details of the attempts made to resolve the matter, and a statement of noncompliance with CALEA will be issued.

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

(1) The carrier shall submit to the FBI estimated and/or incurred costs by line item with supporting information, adequately cross-referenced, suitable for detailed analysis.

(2) A cost element breakdown as described in § 100.16(h) shall be attached for each proposed line item and must reflect any specific requirements established by the FBI.

(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, and showing trends and budgetary data, to provide a basis for evaluating the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

(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 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. As later information comes into the carrier's possession, it must be promptly

submitted to the FBI. The requirement for submission of cost data continues up to the time of final reimbursement.

(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 support 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. Attach separate pages as necessary.).

(2) Total Project Costs: Detail (at Switch Level, Research & Development, 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 element.).

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.).

§ 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, adequately cross-referenced, suitable for detailed analysis.

(2) A cost element breakdown § 100.17(f) shall be attached for each agreed upon line item and must reflect any specific requirements established by the FBI.

(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. If agreement has been reached with FBI representatives on use of forward costing rates/factors, identify the agreement, include a copy, and describe its nature. 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 time sheets and labor rate justification for all direct labor charged to this agreement. Include a breakdown of labor hours, rates, and cost by appropriate category, and furnish the methodologies used in identifying these costs.

(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 provide 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 provide documentation of these costs.

(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, to the FBI.

(2) As later information comes 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, appropriately referenced, of all the cost data and information accompanying or identified in the estimate. With any future additions and/or revisions to an estimate, the carrier must provide a supplemental index, up to the date of the agreement on the costs.

(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. Attach separate pages as necessary.).

(2) Total Project Costs: Detail (at Switch Level, Research & Development, 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. Attach separate pages as necessary.).

§ 100.18 Audit.

(a) *General.* In order to evaluate the accuracy, completeness, and currency 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 based 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 five (5) 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 five (5) 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 this agreement.

§ 100.19 Reduction for defective cost data.

(a) 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, or any data modification is increased by any significant amount because:

(1) The carrier or a subcontractor furnished cost data that were not complete, accurate, and current;

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

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

(b) Any reduction in the negotiated cost under § 100.19(a) 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.

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

(1) 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;

(2) 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;

(3) 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 Accounting for unallowable costs.

To ensure that the Government does not reimburse carriers for unallowable costs, the following provisions are included:

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

(b) The detail and depth of records required as backup support for cost estimates, billings, or claims shall be those which are adequate to establish and maintain visibility of identified unallowable costs, including their directly associated costs. Unallowable 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.

§ 100.21 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. 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.

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POSTAL SERVICE

39 CFR Part 233

Addition of Commercial Espionage to Mail Cover Regulations

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: This proposed rule will amend the United States Postal Service's mail cover regulations to add commercial espionage by foreign sources as a criminal activity for which national security mail covers may be authorized. This change is effected by expanding the definition of "protection of the national security" found at 39 CFR 233.3(c)(9) to include commercial espionage.

DATES: Comments must be received on or before June 10, 1996.

ADDRESSES: Written comments should be mailed or delivered to Counsel, Postal Inspection Service, 475 L'Enfant Plaza SW, Room 3411, Washington, DC 20260-2181.

FOR FURTHER INFORMATION CONTACT: Henry J. Bauman, Counsel, Postal Inspection Service, (202) 268-4415.

SUPPLEMENTARY INFORMATION: Postal Service regulations on mail covers are published in Title 39 of the Code of Federal Regulations (CFR) at § 233. Paragraph (c)(9) of § 233.3 currently defines "protection of the national security" as "actual or potential threats to the security of the United States of America by a foreign power or its agents." This definition will be expanded to include commercial espionage.

Commercial espionage by foreign sources has become an increasing threat to the economic well-being and ability of the United States to compete in the international market. For the purposes of this proposed revision, "commercial espionage" is defined as either "economic espionage" or "industrial espionage." According to the Federal Bureau of Investigation (FBI) white paper, FBI Strategy to Address the Problem of Economic Espionage and Industrial Espionage (Washington, DC: FBI Headquarters, undated), "economic espionage" is "government-directed, sponsored, or coordinated intelligence activity, which may or may not constitute violation of the law, conducted for the purpose of enhancing that country's or another country's economic competitiveness by the use of the information by the foreign government or by providing it to a foreign business entity thereby giving that entity a competitive advantage in the marketplace." "Industrial

espionage" is defined by the FBI as "individual or private business entity sponsorship or coordination of intelligence activity conducted for the purpose of enhancing a private business and its competitive advantage in the marketplace, which is a violation of law."

Revising the Postal Service's national security mail cover regulations to include commercial espionage will enhance the ability of law enforcement to protect national security.

List of Subjects in 39 CFR Part 233

Administrative practice and procedures, Banks and banking, Credit, Crime, Law Enforcement, Postal Service, Privacy, Seizure and forfeiture.

Accordingly, 39 CFR 233 is proposed to be amended as set forth below.

PART 233—INSPECTION SERVICE/ INSPECTOR GENERAL AUTHORITY

1. The authority citation for part 233 continues to read as follows:

Authority: 39 U.S.C. 101, 401, 402, 403, 404, 406, 410, 411, 3005(e)(1); 12 U.S.C. 3401-3422; 18 U.S.C. 981, 1956, 1957, 2254, 3061; 21 U.S.C. 881; Inspector General Act of 1978, as amended (Pub. L. No. 95-452, as amended), 5 U.S.C. App.3.

2. Paragraph (c)(9) of § 233.3 is revised to read as follows:

§ 233.3 Mail covers.

* * * * *

(c) * * *

(9) *Protection of the national security* means to protect the United States from any of the following actual or potential threats to its security by a foreign power or its agents:

(i) An attack or other grave, hostile act;

(ii) Sabotage, or international terrorism; or

(iii) Clandestine intelligence activities, including commercial espionage.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

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