

this section to appeal the preliminary determination described in paragraph (b) of this section. The appeal shall be made directly to the Commissioner.

(d) *Procedures for administrative review.* (1) To appeal a preliminary determination described in paragraph (b) of this section, the authorized recipient shall send a written request for a conference to: Commissioner of Internal Revenue (Attention: SE:S:CLD:GLD), 1111 Constitution Avenue, NW., Washington, DC 20224. The request must include a complete description of the authorized recipient's present system of safeguarding returns or return information received by the authorized recipient (and its authorized contractors or agents, if any). The request must state the reason or reasons the authorized recipient believes that such system or practice (including improvements, if any, to such system or practice expected to be made in the near future) is or will be adequate to safeguard returns or return information.

(2) Within 45 days of the receipt of the request made in accordance with the provisions of paragraph (d)(1) of this section, the Commissioner or Deputy Commissioner personally shall hold a conference with representatives of the authorized recipient, after which the Commissioner or Deputy Commissioner shall make a final determination with respect to the appeal.

(e) *Effective/applicability date.* This section applies to all authorized recipients of returns and return information that are subject to the safeguard requirements set forth in section 6103(p)(4) on or after February 11, 2009.

#### **§ 301.6103(p)(7)–1T [Removed]**

■ **Par. 5.** Section 301.6103(p)(7)–1T is removed.

Linda E. Stiff,

*Deputy Commissioner for Services and Enforcement.*

Approved: January 13, 2009.

Eric Solomon,

*Assistant Secretary of the Treasury (Tax Policy).*

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## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

### **29 CFR Part 1611**

#### **Privacy Act Regulations**

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission is revising its regulations at 29 CFR Part 1611, which implement the Privacy Act of 1974, to exempt one of its systems of records from one of the Act's requirements.

**DATES:** *Effective Date:* February 11, 2009.

#### **FOR FURTHER INFORMATION CONTACT:**

Thomas J. Schlageter, Assistant Legal Counsel, or Kathleen Oram, Senior Attorney, at (202) 663–4640 (voice) or (202) 663–7026 (TTY). Copies of this final rule are also available in the following alternate formats: large print, Braille, audiotope and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publication Center at 1–800–669–3362 (voice) or 1–800–800–3302 (TTY).

**SUPPLEMENTARY INFORMATION:** The Equal Employment Opportunity Commission is adding a new section 1611.15 to its Privacy Act regulations to exempt records contained in EEOC–22, EEOC Personnel Security Files, from the accounting and disclosure provisions of the Privacy Act in accordance with section k(5) of the Act, but only to the extent that an accounting of disclosures or a disclosure itself identifies witnesses promised confidentiality as a condition of providing information during the course of a background investigation. The Commission is also amending sections 1611.5(a)(5) and 1611.5(b) to conform them to the addition of the new exemption.

The Commission published these proposed changes in a Proposed Rule on March 31, 2008. 73 FR 16806. EEOC did not receive any comments on the proposed rule. This final rule, therefore, adopts the amendments proposed without change.

#### **Regulatory Procedures**

##### **Executive Order 12866**

Pursuant to Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

##### **Paperwork Reduction Act**

This rule contains no new information collection requirements subject to review by the Office of Management and Budget under the

Paperwork Reduction Act (44 U.S.C. Chapter 35).

##### **Regulatory Flexibility Act**

The Commission, in accordance with the Regulatory Flexibility Act (5 U.S.C. 606(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

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

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

##### **Congressional Review Act**

This action concerns agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

##### **List of Subjects in 29 CFR Part 1611**

Privacy Act.

Dated: February 4, 2009.  
For the Commission.

Stuart J. Ishimaru,  
*Acting Chairman.*

■ Accordingly, chapter XIV of title 29 of the Code of Federal Regulations is amended as follows:

#### **PART 1611—PRIVACY ACT REGULATIONS**

■ 1. The authority citation for Part 1611 continues to read as follows:

**Authority:** 5 U.S.C. 552a.

■ 2. In section 1611.5 revise paragraphs (a)(5) and (b) to read as follows:

##### **§ 1611.5 Disclosure of requested information to individuals.**

(a) \* \* \*  
\* \* \* \* \*

(5) The Commission shall not deny any request under § 1611.3 concerning the existence of records about the requester in any system of records it maintains, or any request for access to such records, unless that system is exempted from the requirements of 5

U.S.C. 552a in §§ 1611.13, 1611.14, or 1611.15.

\* \* \* \* \*

(b) Upon request, the appropriate Commission official shall make available an accounting of disclosures pursuant to 5 U.S.C. 552a(c)(3), unless that system is exempted from the requirements of 5 U.S.C. 552a in §§ 1611.13, 1611.14, or 1611.15.

\* \* \* \* \*

■ 3. Section 1611.15 is added to read as follows:

**§ 1611.15 Exemption—EEOC Personnel Security Files.**

EEOC's system of records entitled EEOC Personnel Security Files contains records that document and support decisions regarding suitability, eligibility and fitness for service of applicants for EEOC employment and contract positions. The records include background investigation records. Pursuant to section (k)(5) of the Privacy Act, 5 U.S.C. 552a(k)(5), this system of records is exempt from the provisions of sections (c)(3) and (d)(1) of the Privacy Act, 5 U.S.C. 552a(c)(3) and (d)(1), but only to the extent that the accounting of disclosures or the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence.

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## LIBRARY OF CONGRESS

### Copyright Royalty Board

#### 37 CFR Part 385

[Docket No. 2006-3 CRB DPRA]

#### Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Final rule.

**SUMMARY:** The Copyright Royalty Judges are announcing four modifications to the royalty terms previously adopted in their final determination of rates and terms for the mechanical and digital phonorecord delivery statutory license. These modifications are made to more clearly reflect the law as stated in the Register of Copyrights' decision of January 26, 2009.

**DATES:** *Effective Date:* March 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Richard Strasser, Senior Attorney, or

Gina Giuffreda, Attorney Advisor. Telephone: (202) 707-7658. Telefax: (202) 252-3423.

**SUPPLEMENTARY INFORMATION:** On November 24, 2008, the Copyright Royalty Judges ("Judges") issued their final determination establishing rates and terms for the mechanical and digital phonorecord delivery statutory license found at 17 U.S.C. 115.<sup>1</sup> Rates and terms were promulgated for the use of musical works in physical phonorecords, permanent downloads, ringtones, limited downloads, interactive streaming and incidental digital phonorecord deliveries. Rates and terms for the latter three categories—limited downloads, interactive streaming and incidental digital phonorecord deliveries—were adopted pursuant to an agreement reached by all participants in the proceeding and presented to the Judges for adoption. After publishing the agreement in the **Federal Register** and allowing interested parties to comment as required by 17 U.S.C. 801(b)(7)(A), the Judges determined that the same section did not allow them to review or reject the agreement, or portions thereof, in the absence of an objection from one of the participants to the proceeding. Under the Judges' interpretation of the statute, if an objection is filed, the Judges may review the agreement for reasonableness. However, with no objection tendered, the agreement should be adopted *in toto*.

On January 26, 2009, the Register of Copyrights published a notice in the **Federal Register** pursuant to 17 U.S.C. 802(f)(1)(D). 74 FR 4537 (January 26, 2009). That section provides that the "Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges." The Register faulted our adoption of the participants' agreement of rates and terms for limited downloads, interactive streaming and incidental digital phonorecord deliveries, concluding that "it was legal error for the CRJs to conclude that the restrictions on its authority to review the reasonableness of specific valid terms and rates also precluded its review of the legality of the provisions of the agreement as a threshold matter." 74 FR at 4540. The Register further stated that her "conclusion is consistent with the CRJs' decision that it had the

authority to decline to adopt language in the participants' agreement that stated that the rates in the agreement have no precedential effect and may not be introduced or relied upon in any governmental or judicial proceeding." *Id.*, citing 72 FR 61586 (October 31, 2007).<sup>2</sup>

It is evident from the Register's pronouncement that the Copyright Act grants the Judges considerably broader authority over review of agreements than discerned by the Judges in the statute. The Register stated that an agreement must pass a threshold review prior to the application of 17 U.S.C. 801(b)(7)(A). The Judges have the authority, and in fact the obligation, to review any and all provisions in an agreement. Provisions that are deemed legally erroneous may not be part of the codification based on the agreement; otherwise their adoption results in an error of law. *See* 74 FR at 4540. The Register stated that once the agreement is vetted for errors of law, the remaining portions of the agreement may be adopted as the agreement of the participants unless, of course, there is an objection from one or more of the participants in which case the procedures set forth in section 801(b)(7)(A) would apply.

The Register identified four provisions in the agreement adopted in the Code of Federal Regulations that contain errors of law. All four were in the participants' agreement. First, the Register concluded that the second sentence of the definition of an "interactive stream" contained in § 385.11 of the regulations was in error because it altered the statutory terms of the section 115 license regarding what constitutes a digital phonorecord delivery.<sup>3</sup> 74 FR at 4541. That sentence

<sup>2</sup> The cited proceeding established the rates and terms for preexisting subscription services making digital transmissions of sound recordings and ephemeral recordings. Docket No. 2006-1 CRB DSTR. The Judges made two changes to the agreement submitted by the parties in that proceeding, changing the numbering of the proposed provisions to reflect their ultimate position in Chapter III of title 37 of the Code of Federal Regulations, and correcting a clerical error in the agreement for the location to submit notices of intention to audit preexisting subscription services. The Judges also eliminated a provision concerning the experimental and precedential effect and use of rates in an agreement in a proceeding to adjust the rates and terms for noncommercial educational broadcasting services under 17 U.S.C. 118. 72 FR 19138 (April 17, 2007). We declined to give such a term effect because it was outside the scope of our jurisdiction to set rates for the section 118 license. 72 FR at 19139 ("It is not our task to offer evaluations, limitations or characterizations of the rates and terms, or make statements about their use or value in proceedings other than this one.").

<sup>3</sup> The Register asserts the faulty provision contained in the § 385.11 definition of an "interactive stream" is the product of the Judges'

<sup>1</sup> The Librarian of Congress, pursuant to 17 U.S.C. 803(c)(6), published the Judges' determination in the **Federal Register** on January 26, 2009. *See* 74 FR 4510.