

### III. Applicable Administrative Procedures and Executive Orders

#### A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* requires the preparation of an initial regulatory flexibility analysis whenever an agency is required by law "to publish general notice of proposed rulemaking for any proposed rule." 5 U.S.C. 603(a). This publication provides our response to the remand instructions of the Court of Appeals, by providing further explanation and guidance regarding the final notice of capacity issued pursuant to CALEA, 47 U.S.C. 1003. We are not republishing the final notice of capacity, and are therefore not changing the final regulatory flexibility analysis provided with the final notice. Rather, this publication pertains only to the two discrete issues remanded by the Court, those being our interpretation of the term "simultaneously" and our decision to present only one "actual" and one "maximum" capacity requirement per geographic region. Our initial regulatory flexibility analysis is therefore limited to those issues.

The reason for this publication is to respond to the Court's remand instructions. Our objective in issuing it, is to provide further explanation for our interpretation of the term "simultaneously" and to provide additional guidance on the application of the capacity requirements with respect to different types of surveillance (interceptions versus pen registers/traps and traces).

The Regulatory Flexibility Act requires a description of, and if feasible, an estimate of the number of small entities to which a proposed rule will apply. 5 U.S.C. 603(b)(3). A "small entity" in the wired or wireless telecommunications business includes an entity that is independently owned and operated, not dominant in its field of operation, and has fewer than 1,500 employees. 5 U.S.C. 601(6)(1); 15 U.S.C. 632; 13 CFR 121.201. The Bureau of the Census issued the 1997 Economic Census on October 20, 2000. The Economic Census profiles the U.S. economy every 5 years, from the national to the local level. The 2002 Economic Census is currently being conducted, and thus the 1997 data represents the most current information. The 1997 Economic Census reports that there were 2,797 wired telecommunications communications (NAICS code 513310) firms, of which all but 24 had fewer than 1,000 employees. See 1997 Economic Census, Establishment and Firm Size, Publication EC97S51S-SZ. It further

reports that there were 1,238 cellular and other wireless telecommunications (NAICS code 513322) firms, of which all but 12 had fewer than 1,000 employees. Firms engaged as telecommunications resellers (NAICS code 513330) numbered 1,417, of which all but 2 had fewer than 1,000 employees. We are unaware of any source of further information from which we could determine the number of firms that are independently owned and operated and not dominant in their field of operation.

This publication imposes no reporting or record-keeping requirements. The final notice imposed certain compliance requirements, the application of which is further guided and clarified by the statements herein. We are not republishing the final notice, nor changing the existing numerical capacity requirements stated therein. We are also providing further guidance as to the application of the capacity requirements in regions with the highest requirements, by setting a maximum number of communications interceptions that is lower than the total capacity requirement. The economic impact of compliance with the capacity requirements for small entities that operate in regions affected by this guidance, therefore, might be lowered if the entity employed a system that could benefit from a requirement for fewer simultaneous communications interceptions. In all other cases the economic impact created by the final notice will remain unchanged by this publication. We therefore find that there will be no significant economic impact on small businesses as a result of this publication. The FBI is unaware of any rules which would overlap, duplicate or conflict with this publication or the statements therein.

#### B. Executive Order 12866: Regulatory Planning and Review

This publication has been drafted and reviewed in accordance with Executive Order 12866. The FBI does not find that it constitutes a "significant regulatory action" in accordance with that Order. In particular, we had already determined that the final notice of capacity did not meet the criterion for a "significant regulatory action" and that it would not result in an annual impact on the economy in excess of \$100,000,000, nor would economically impact State, local or tribal governments. 63 FR 12220. This publication does not significantly alter the economic analysis contained in the final notice, except that compliance costs may be reduced in some cases.

In this publication, we are neither republishing the final notice, nor

changing the existing numerical capacity requirements stated therein. We are providing further guidance as to the application of the capacity requirements in regions with the highest requirements, by setting a maximum number of communications interceptions that is lower than the total capacity requirement. The economic impact of compliance with the capacity requirements for entities that operate in regions affected by this guidance, therefore, might be lowered if the entity employed a system that could benefit from a requirement for fewer simultaneous communications interceptions. In all other cases the economic impact created by the final notice, remains unchanged by this publication. Although not required by Executive Order 12866, this publication has been submitted for review by the Office of Management and Budget.

#### C. Executive Order 13132: Federalism

This publication will not have a substantial direct effect of the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this publication does not have any federalism implications that warrant preparation of a federalism impact statement.

#### D. Executive Order 12988: Civil Justice Reform

This publication meets the applicable standards set forth in sections 3(a) and 3(b) of Executive Order 12988, Civil Justice Reform.

#### E. Unfunded Mandates Reform Act of 1995

We determined in the final notice of capacity that it would not result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. This publication only provides further explanation and guidance with regard to two matters contained in the final notice of capacity and would neither alter the analysis contained in the final notice, nor would result in any increase in any expenditures. Therefore, no actions deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532(a).