foreign-produced direct product of the technology is *not* subject to the EAR unless: (1) It is exported from the country of manufacture to a destination in Country Group D:1 or E:2 (Cuba); or (2) it is exported from the United States after having been shipped to the United States from the country of manufacture.

However, all foreign-produced direct product of technology or software exported under License Exception ENC under either paragraph (a)(1) (for internal development of new products by a 'license-free zone' (Supplement No. 3 to part 740) ''private sector end-user'') or (a)(2) (to a ''U.S. subsidiary'' for internal use or development) are currently subject to the EAR by the terms of the notes to paragraphs (a)(1) and (a)(2).

Request for Comment

BIS is seeking public comment on the impact such a revision to section 736.2(b)(3)(i) would have on both U.S. manufacturers of encryption technology and software and foreign manufacturers of products (including under contract to U.S. companies who own and maintain the intellectual property, branding, marketing and distribution rights to the end-products manufactured offshore) that are derived in whole or in part from U.S.-origin encryption technology or software. BIS is also seeking information about the cost of compliance with such a revision, including U.S. Government review of foreign direct products prior to export from abroad. BIS is also seeking information on the burdens of complying with multiple sets of laws, foreign and U.S., which could result from the potential revision.

BIS would also like information about the various (commercial and military) applications of foreign products that are derived in whole or in part from U.S.-origin encryption technology or software. In addition, BIS is seeking information from foreign-manufacturers of encryption items about the factors that they or their competitors might consider in deciding to produce or use U.S.-origin encryption technology or software.

Additionally, BIS is interested in specific information (URL addresses, technical specifications, etc.) about the availability of foreign encryption technology and software that is equivalent to U.S.-origin encryption technology and software classified under ECCNs 5E002 and 5D002. Finally, BIS seeks information on the impact on the U.S. information technology manufacturing base and American jobs if encryption products continue to be not subject to the EAR when exported from abroad or reexported to countries other than those listed in Country Group D:1 and E:2, simply by being manufactured under an export license, when identical products manufactured onshore by U.S. companies (or overseas by U.S. subsidiaries pursuant to LE ENC or LE ENC-eligible ''private sector end-users'') are subject to the EAR.

Dated: December 29, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8–31371 Filed 1–5–09; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 197

[USCG–1998–3786]

RIN 1625–AA21

Commercial Diving Operations

AGENCY: Coast Guard, DHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend the commercial diving regulations. We request public comment on industry standards and current practices that might be incorporated in our regulations or accepted as regulatory equivalents; the use of third-party auditing; new requirements for compliance documentation; the adoption of recommendations made following the investigation of a 1996 fatality; and possible additional regulatory revisions. This rulemaking will promote the enhancement of maritime safety which is a strategic goal of the Coast Guard.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before March 9, 2009 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–1998–3786 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*.

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Lieutenant Commander Rogers Henderson, U.S. Coast Guard, telephone (202) 372–1411. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–1998–3786), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert ''USCG–1998–3786'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches,

suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert USCG–1998–3786 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

D. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

II. Abbreviations

ACDE Association of Commercial Diving Educators
ADC Association of Diving Contractors
ADCI Association of Diving Contractors International
ANPRM Advance Notice of Proposed Rulemaking
IMCA International Marine Contractors Association
NOSAC National Offshore Safety Advisory Committee

III. Background and Purpose

In 1994, an industry group known as the Association of Diving Contractors (ADC) (now the Association of Diving Contractors International, or ADCI), asked the Coast Guard to update commercial diving operation regulations in 46 CFR Part 197, Subpart B. Among other things, ADC recommended that we incorporate their consensus standards by reference. In response, we began this rulemaking and published an advance notice of proposed rulemaking (ANPRM, 63 FR 34840, June 26, 1998; comment period extended, 63 FR 50848, Sept. 23, 1998). The ANPRM referenced ADC's recommendations, and sought public comment on the necessity and scope of potential regulatory revisions.

Public comments received in response to the 1998 ANPRM revealed a deep split of opinion over incorporation of the ADC standards. Although the majority of commenters favored incorporation of the ADC standards, many said those standards were either inadequate or, alternatively, were unnecessarily burdensome and costly for small businesses. Other industry groups—the Association of Commercial Diving Educators (ACDE) and the International Marine Contractors Association (IMCA)—offered their own proposals. No further regulatory action was taken. However, the Coast Guard continued to recognize the need for further regulation to improve the safety of commercial diving.

Earlier this year, the Coast Guard received recommendations for commercial diving regulatory improvements from the National Offshore Safety Advisory Committee (NOSAC), a Federal advisory committee that advises the Coast Guard on matters related to operations and safety on the outer continental shelf including commercial diving safety. We have placed those recommendations in the docket for this rulemaking and are in the process of analyzing them for possible action. To assist in our analysis, we are soliciting public comments on the NOSAC recommendations, and on other ways in which we might improve our regulations, in light of experience and lessons learned since 1978, and since our first ANPRM in 1998. As noted, commercial diving industry groups were active in responding to the 1998 ANPRM, and we look forward to hearing from them again. We encourage those groups to work together to explore possible areas of agreement as to the regulatory changes that might do most to improve diver safety throughout the industry.

To assist you in organizing your comments, we invite your consideration of the following observations:

1. *Industry standards.* Our 1978 regulations in Part 197 provide a minimum framework for commercial diving safety. We are aware that in many regulated industries, regulated persons and companies often develop voluntary standards that provide protection at levels equal or superior to the protection that regulations can provide. Increasingly since 1978, Federal agencies, including the Coast Guard, have encouraged the development of, and compliance with, these standards. They provide regulatory flexibility and can be effective, efficient tools for attaining regulatory safety objectives. We would like to know whether such standards exist, or could be developed, for the commercial diving industry. We could consider incorporating such standards in our Part 197 regulations, or we could consider accepting compliance with such standards as equivalent to compliance with our regulations.

As previously discussed, public comments on our 1998 ANPRM revealed a deep split of opinions over the adequacy, effectiveness, and cost of the then-current industry standards. The apparent lack of industry consensus as to the value of the then-current standards was a major reason why the Coast Guard took no further regulatory action in the ensuing decade. Therefore, we strongly encourage commercial diving industry groups to work together to define standards to which all or most commercial diving operations can subscribe.

2. *Third-party audits.* The Coast Guard prefers to use regulations as a tool to encourage compliance, before injuries or deaths occur, rather than as a way of punishing violators in the wake of a tragedy. A third-party audit system could augment Coast Guard resources and help commercial diving operators avoid casualties before they happen, by providing regular monitoring of an operator's compliance with Part 197 or with an equivalent industry standard. The Coast Guard could regulate third-party auditors, and require commercial diving operators to be audited following promulgation of a final rule, and then annually and after any accident resulting in a diver's injury or death.

3. *Compliance documentation.* Even with annual compliance audits, there remains the potential for accidents leading to injury or death. The best protection against accidents are the diving operation's safety policies and practices, which need to be encouraged at all organizational levels beginning

with industry owners and operators. The Coast Guard believes that in many industries, owners and operators are more aware of safety requirements and do more to make sure their employees follow those requirements when they must document their compliance with those requirements.

4. *Rig No. 12 report.* The Coast Guard devotes significant resources to studying the causes of accidents that result in serious property losses, injury, or death, so that similar accidents can be avoided in the future. Lessons learned from tragedy make special demands on us to give them serious consideration and to implement them if possible. In the docket for this rulemaking at *http://www.Regulations.gov*, we are placing the formal investigation report into a commercial diving death at Cliff's Drilling Rig No. 12 in 1996. The report includes 13 recommendations and the Coast Guard is considering adopting most of these, in some cases with modifications.

5. *Regulatory priorities.* We have indicated our interest in industry standards, third-party audits, compliance documentation, and the Rig No. 12 report recommendations. In addition, we invite you to comment on overall regulatory approaches or on specific regulatory requirements that you believe should be a priority for this rulemaking. We are also inviting comments on current industry practices and changes in circumstances from conditions existing in 1998.

6. *Costs and Benefits.* We request comments on the costs and benefits of regulatory revisions suggested by the commenters. Providing us with specific information on the costs and benefits of regulatory suggestions will assist us with fully evaluating the merits of such suggestions. We are especially interested in information providing data on the cost of regulatory suggestions on small entities, and State, local, and tribal governments.

Dated: December 22, 2008.

Brian M. Salerno,

Assistant Commandant for Marine Safety, Security and Stewardship, U.S. Coast Guard.

[FR Doc. E8–31415 Filed 1–5–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1301

[STB Ex Parte No. 676]

Rail Transportation Contracts Under 49 U.S.C. 10709

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rule.

SUMMARY: The Surface Transportation Board (Board or STB) proposes to amend its rules to provide that where an agreement for rail carriage contains the disclosure statement to be set forth in this new rule, the Board will not find jurisdiction over a dispute involving the rate or service under the agreement and will treat that agreement as a rail transportation contract governed by 49 U.S.C. 10709; and conversely where an agreement for rail carriage fails to contain the disclosure statement, the Board will find jurisdiction over a dispute involving the rate or service under the agreement, absent clear and convincing evidence that the parties intended to enter into a rail transportation contract governed by 49 U.S.C. 10709; and the shipper was made aware that it could request service under a common carrier tariff rate that would be subject to STB jurisdiction.

DATES: Comments on this proposal are due by February 5, 2009. Reply comments are due by March 9, 2009.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's Web site, at *http://www.stb.dot.gov*. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, *Attn.:* STB Ex Parte No. 676, 395 E Street, SW., Washington, DC 20423–0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Timothy Strafford at (202) 245–0356. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

SUPPLEMENTARY INFORMATION: In a Notice of Proposed Rulemaking in STB Ex Parte No. 669 served on March 29, 2007 (2007 NPRM) and published in the **Federal Register** on April 4, 2007 (72 FR 16316–18), the Board sought to address two concerns arising from hybrid rail pricing mechanisms such as the one involved in *Kansas City Power & Light Company* v. *Union Pacific Railroad Company*, STB Docket No. 42095 (STB served Mar. 27, 2007) (*KCPL*), which, despite having characteristics of a rail transportation contract beyond the Board's jurisdiction under 49 U.S.C. 10709, are designated by the carrier as common carriage rates subject to the Board's jurisdiction.

The first concern was uncertainty. Although Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board's jurisdiction, 49 U.S.C. 10709(c), the statute provides no clear demarcation between a contract rate and common carriage rate. The issue of whether a rate is a contract rate or common carriage rate has been examined on a case-by-case basis in light of the parties' intent. *See Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV*, 364 I.C.C. 678, 689 (1981). With the enactment of the ICC Termination Act of 1995 (ICCTA), it became more difficult to distinguish between the two types of rates, as railroads are no longer required to file with the agency either tariffs containing their common carriage rates or summaries of their non-agricultural contracts.

The second concern was that increased use of hybrid pricing arrangements could create an environment where collusive activities in the form of anticompetitive price signaling could occur. Although the terms of a rail transportation contract generally are kept confidential, the terms and conditions of common carriage rates must be publicly disclosed upon request, 49 U.S.C. 11101, thereby increasing the possibility of collusive behavior in a highly concentrated industry.

In the 2007 NPRM, the Board proposed to address these two concerns by interpreting the term ''contract'' in 49 U.S.C. 10709 as embracing ''any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.''

Both shippers and carriers opposed that proposal. After reviewing their comments, the Board concluded that its original proposal might have unintended and undesirable