

1 Key:

2 plain text = unchanged original language of CALEA

3 ~~redline-strikeout text~~ = deleted language from CALEA

4 **bold highlighted text** = new language proposed for inclusion in CALEA

5  
6 **Amendments to Communications Assistance for Law Enforcement Act of 1994,**

7 **Pub. L. No. \_\_\_\_\_, Stat. \_\_\_\_\_.**

8 **One Hundred Ninth Congress of the United States of America**

9 **AT THE SECOND SESSION**

10 **An Act**

11  
12 **To amend titles 47 and 18, United States Code, to further clarify a communications**  
13 **carrier's duty to cooperate in the interception of communications for law enforcement**  
14 **purposes, and for other purposes.**

15  
16 *Be it enacted by the Senate and House of Representatives of the United States of America in*  
17 *Congress assembled.*

18  
19 **TITLE I--INTERCEPTION OF DIGITAL AND OTHER COMMUNICATIONS**

20  
21 **SEC. 101. SHORT TITLE.**

22 This title may be cited as the '**Amendments to the** Communications Assistance for Law  
23 Enforcement Act'.

24  
25 **SEC. 102. DEFINITIONS.**

26  
27 [(1) The terms defined \* \* \*]

28  
29 (2) The term '**communication** ~~call~~-identifying information' means dialing, **routing,**  
30 **addressing** or signaling information that identifies the origin, direction, destination,  
31 **processing, transmission,** or termination of each communication generated or received  
32 by a subscriber **or other person** by means of any equipment, facility, or service of a  
33 ~~tele~~communications carrier. **Such term includes source and destination Internet**  
34 **protocol and other protocol addresses, the port number, packet file size, and user**  
35 **authentication and logon information, including session time and duration. Except**  
36 **in the case of network access service, such term includes post-cut-through digits.**

37  
38 [(3) The term 'Commission' \* \* \*]

39  
40 (4) The term 'electronic messaging services' means software-based services that enable  
41 the sharing of data, images, sound, writing, or other information among computing  
42 devices controlled by the senders or recipients of the messages.

43  
44 [(5) The term 'government' \* \* \*]



1 (6) The term 'exempt information services' means –

2 (A) ~~means the offering of a capability for generating, acquiring, storing,~~  
3 ~~transforming, processing, retrieving, utilizing, or making available~~  
4 ~~information via telecommunications; and~~ a service or application that is  
5 offered or accessed via equipment, facilities or services that are subject to the  
6 requirements of section 103, and provides –

7  
8 ~~(B) includes –~~

9  
10 (i) a capability for processing stored information;

11  
12 ~~(ii) a service that permits a customer to retrieve stored information~~  
13 ~~from, or file information for storage in, information storage facilities~~  
14 ~~facilities for the storage or retrieval from storage of information;~~

15  
16 (iii) electronic publishing;

17  
18 (iv) a software-based application that solely enables a user to obtain  
19 addressing or routing information from anyone other than the  
20 provider of the software-based application, that can be used to direct  
21 communications to another user of a software-based application  
22 without further assistance from the provider of the software-based  
23 application; or

24  
25 (v) electronic messaging services; ~~but~~ and

26  
27 (B) a service offered by an entity that is not otherwise a communications  
28 carrier, which service is intended to allow a device owned or controlled by  
29 the user to share a network access service at a distance of 300 feet or less of  
30 the premises of that entity, provided that such network access service shall be  
31 compliant with section 103, unless a compliant network access service is not  
32 reasonably available to the entity or the service is subject to an unexpired  
33 contract in existence on the effective date of this section; but

34  
35 (C) does not include –

36 (i) any capability for a telecommunications carrier's internal management,  
37 control, or operation of its telecommunications network; or

38 (ii) any telecommunications, or other wire or electronic  
39 communication transmission, routing, addressing or switching  
40 equipment, facilities or services, that are used to offer or access a  
41 service or application described in subsection 6(A);

42 (iii) any service subject to a determination by the Commission under  
43 subsection (8)(B)(iv).

1  
2 (7) The term 'telecommunications support services' means a product, software, or service  
3 used by a telecommunications carrier for the internal signaling, routing, addressing or  
4 switching functions of its telecommunications network.  
5

6 (8) The term 'telecommunications carrier'--

7 (A) means a person or entity engaged in the transmission, routing, addressing or  
8 switching of wire or electronic communications via any technology or method  
9 as a common carrier for hire or otherwise on a commercial basis available to  
10 the public; and  
11

12 (B) includes a person or entity engaged in providing any of the following --

13 (i) ~~a person or entity engaged in providing~~ commercial mobile service (as  
14 defined in section 332(d) of the Communications Act of 1934 (47 U.S.C.  
15 332(d)); or  
16

17 (ii) network access service;  
18

19 (iii) replacement telephone service; or  
20

21 (iv) any service that provides ~~a person or entity engaged in providing~~  
22 wire or electronic communication transmission, routing, addressing or  
23 switching or transmission service to the extent that the Commission  
24 finds, after consultation with the Attorney General, that such service is  
25 a replacement for a substantial portion of the local telephone  
26 exchange service and that it is in the public interest; to deem such a  
27 person or entity to be a telecommunications carrier for purposes of this  
28 title; but  
29

30 (C) does not include--

31 (i) persons or entities insofar as they are engaged in providing exempt  
32 information services; and

33 (ii) any class or category of telecommunications carriers that the  
34 Commission exempts by rule after consultation with the Attorney General.  
35

36 (9) The term "network access service" means the provision on a commercial  
37 basis available to the public, of wire, radio, electromagnetic, photooptical or  
38 photoelectronic services that enable a customer, subscriber or other person to send or  
39 receive wire or electronic communications, via any technology or method, to or from the  
40 Internet or other public communications or data network, except that such term does not  
41 include a replacement telephone service as defined herein.  
42

43 (10) The term "replacement telephone service" means the provision on a



1 commercial basis available to the public, of transmission, routing, addressing or switching  
2 services, to enable a customer, subscriber or other person, via any technology or method, to  
3 send and receive any communications involving the human voice in real or near-real time,  
4 including a service that resells or relies on the transmission, routing, addressing or  
5 switching facilities, equipment or services of another entity, except that such term does not  
6 include an application described in section 102(6)(A)(iv).  
7

1       **SEC. 103. ASSISTANCE CAPABILITY REQUIREMENTS.**

2  
3       (a) CAPABILITY REQUIREMENTS- Except as provided in subsections (b), (c), ~~and (d), (e)~~  
4       **and (g)** of this section and sections 108(a) and 109(b) and (d), a ~~tele~~communications carrier shall  
5       ensure that its equipment, facilities, or services that provide a customer or subscriber with the  
6       ability to originate, terminate, or direct communications are capable of--  
7

8               (1) expeditiously isolating and enabling the government, pursuant to a court order or  
9               other lawful authorization, to intercept **at a point-of-presence within the United States,**  
10              to the exclusion of any other communications, all wire and electronic communications  
11              carried by the carrier within a service area to or from equipment, facilities, or services of  
12              a subscriber of such carrier concurrently with their transmission to or from the  
13              subscriber's equipment, facility, or service, or at such later time as may be acceptable to  
14              the government;  
15

16              (2) expeditiously isolating and enabling the government, pursuant to a court order or  
17              other lawful authorization, to access **at a point-of-presence within the United States,**  
18              **all communication call-**identifying information that is **used by the carrier in the**  
19              **transmission, routing, addressing or switching of wire or electronic communications**  
20              **or, if not used by the carrier, is otherwise** reasonably available to the carrier --  
21

22                      (A) before, or during, or immediately after the **communication-identifying**  
23                      **information is generated or received by any equipment, facility, or service of**  
24                      **the communications carrier** ~~transmission of a wire or electronic communication~~  
25                      (or at such later time as may be acceptable to the government);

26                      (B) in a manner that allows it to be associated with the communication to which it  
27                      pertains, except that, with regard to information acquired solely pursuant to the  
28                      authority for pen registers and trap and trace devices (as defined in section 3127 of  
29                      title 18, United States Code), such **communication call-**identifying information  
30                      shall not include any information that may disclose the physical location of the  
31                      subscriber (except to the extent that the location may be determined from the  
32                      telephone number);  
33

34              (3) delivering intercepted communications and **communication call-**identifying  
35              information to the government, pursuant to a court order or other lawful authorization, in  
36              a **standard, commercially available, and reliable** format such that they may be  
37              transmitted by means of equipment, facilities, or services procured by the government to  
38              a location other than the premises of the carrier; and  
39

40              (4) facilitating authorized communications interceptions and access to **communication**  
41              **call-**identifying information ~~unobtrusively and with a minimum of interference with any~~  
42              ~~subscriber's telecommunications service and in a manner~~ **using methods or procedures**  
43              that **do not impair such interception or access and** ~~protects~~ --

(A) operate unobtrusively and with a minimum of interference with any subscriber's telecommunications service;

(B) protect the privacy and security of communications and communication call-identifying information not authorized to be intercepted; and

(C) protect information regarding the government's interception of communications and access to communication call-identifying information,

provided that, nothing in this subsection (4) shall be interpreted to prohibit a carrier from facilitating the use of processing or filtering methods or procedures applied by a law enforcement agency or officer, or their designee, to the full stream of wire or electronic communications and other information isolated by a carrier under subsection (e).

(b) LIMITATIONS-

(1) DESIGN OF FEATURES AND SYSTEMS CONFIGURATIONS- This title does not authorize any law enforcement agency or officer--

(A) to require any specific design of equipment, facilities, services, features, or system configurations to be adopted by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services; or

(B) to prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.

(2) ~~EXEMPT INFORMATION~~ SERVICES; PRIVATE NETWORKS AND INTERCONNECTION SERVICES AND FACILITIES- The requirements of subsection (a) do not apply, unless otherwise determined by the Commission pursuant to subsection 102(8)(B)(iv), to--

(A) exempt information services; or

(B) equipment, facilities, or services that support the transport or switching of communications for private networks not made available to the public on a commercial basis or for the sole purpose of interconnecting tele communications carriers.

(3) ENCRYPTION- A telecommunications carrier shall not be responsible for decrypting, or ensuring the government's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication.



1 (c) **PREMISES MONITORING - EMERGENCY, ~~OR~~ EXIGENT AND AUTHORIZED**  
2 **CIRCUMSTANCES-** In emergency or exigent circumstances (including those described in  
3 sections 2518 (7) or (11)(b) and 3125 of title 18, United States Code, and section 1805(e) **and**  
4 **1843** of title 50 of such Code), a carrier at its discretion may comply with subsection (a)(3) by  
5 allowing monitoring at its premises if that is **a the only** means of accomplishing the interception  
6 or access. **Pursuant to lawful order or other authorization, a carrier shall comply with**  
7 **subsection (a)(3) by allowing monitoring at its premises.**  
8  
9

10 (d) **MOBILE SERVICE ASSISTANCE REQUIREMENTS-** A ~~tele~~communications carrier that  
11 is a provider of commercial mobile service (as defined in section 332(d) of the Communications  
12 Act of 1934) offering a feature or service that allows subscribers to redirect, hand off, or assign  
13 their wire or electronic communications to another service area or another service provider or to  
14 utilize facilities in another service area or of another service provider shall ensure that, when the  
15 carrier that had been providing assistance for the interception of wire or electronic  
16 communications or access to ~~communication~~**call**-identifying information pursuant to a court  
17 order or lawful authorization no longer has access to the content of such communications or  
18 ~~communication~~**call**-identifying information within the service area in which interception has  
19 been occurring as a result of the subscriber's use of such a feature or service, information is made  
20 available to the government (before, during, or immediately after the transfer of such  
21 communications) identifying the provider of a wire or electronic communication service that has  
22 acquired access to the communications.  
23  
24

25 (e) **NETWORK ACCESS SERVICE ASSISTANCE REQUIREMENTS - A**  
26 **communications carrier that is engaged in any network access service shall ensure that its**  
27 **equipment, facilities, or services that support such network access service are capable of,**  
28 **pursuant to a court order or other lawful authorization, compliance with subsection (a),**  
29 **provided that, by way of compliance with subsections (a)(1) and (3), such carrier shall**  
30 **ensure that such equipment, facilities or services are capable of:**  
31

32 (1) **expeditiously and reliably isolating, at a point-of-presence within the United**  
33 **States, the stream of wire or electronic communications and other information,**  
34 **transmitted by the carrier to or from the facilities, equipment or services of a**  
35 **subscriber of such network access service, to the exclusion of all other wire and**  
36 **electronic communications and information, concurrently with such transmission;**  
37

38 (2) **expeditiously and reliably storing on a temporary basis, upon written request by**  
39 **the government agency or officer seeking to effectuate the lawful interception of**  
40 **wire or electronic communications or access to communication-identifying**  
41 **information, for a limited time period specified by such agency or officer as**  
42 **necessary to effectuate such interception or access, and in a standard commercially**  
43 **available file format --**



1 (a) the stream of communications and information isolated under subsection  
2 (e)(1), and,  
3 (b) the communication-identifying information isolated under subsection  
4 (a)(2);and  
5

6 (3) enabling expeditious and reliable transmission in a standard commercially  
7 available format of the stream of communications and information isolated under  
8 subsection (e)(1), and the communication-identifying information isolated under  
9 subsection (a)(2), to a location, device, facilities or process identified in writing by  
10 the government agency or officer seeking to effectuate the lawful interception of  
11 wire or electronic communications or access to communication-identifying  
12 information, at which the communications authorized to be intercepted and  
13 communication-identifying information authorized to be acquired may be recorded  
14 or decoded in accordance with such court order or lawful authorization,  
15

16 provided that, if such communications carrier is also engaged in any replacement telephone  
17 service or other service or activities subject to this section, it shall comply with subsection  
18 (a) and other applicable requirements with respect to such service or activity.  
19

20 (f) The Commission may, by rule established pursuant to section 107(b), after  
21 consideration of the cost-effectiveness for federal, state and local law enforcement agencies,  
22 specify one or more standard commercially available formats that shall be used by a class  
23 or category of communications carriers for delivery, storage or transmission pursuant to  
24 paragraphs (a)(3), (e)(2), and (e)(3) of this section. Nothing in this subsection shall limit the  
25 authority of the Commission pursuant to section 109 to determine whether delivery,  
26 storage or transmission in the format specified by rule is reasonably achievable with  
27 respect to any equipment, facility or service installed or deployed after January 1, 1995.  
28

29 (g) A point-of-presence within the United States as required by paragraphs (a)(1), (a)(2),  
30 and (e)(1) of this section, shall, in the case of satellite communications, be an earth station  
31 gateway. The Attorney General may agree to waive the requirement for a point-of-  
32 presence of any communications carrier within the United States subject to such conditions  
33 as are mutually agreed by the Attorney General and the carrier.  
34

1 **SEC. 104. NOTICES OF CAPACITY REQUIREMENTS.**

2 **(a) NOTICES OF MAXIMUM AND ACTUAL CAPACITY REQUIREMENTS-**

3 (1) IN GENERAL- Not later than 1 year after the date of enactment of this title, after  
4 consulting with State and local law enforcement agencies, telecommunications carriers,  
5 providers of telecommunications support services, and manufacturers of  
6 telecommunications equipment, and after notice and comment, the Attorney General **may**  
7 ~~shall~~ publish in the Federal Register and provide to appropriate telecommunications  
8 industry associations and standard-setting organizations--  
9

10 (A) notice of the actual number of communication interceptions, pen registers,  
11 and trap and trace devices, representing a portion of the maximum capacity set  
12 forth under subparagraph (B), that the Attorney General estimates that  
13 government agencies authorized to conduct electronic surveillance may conduct  
14 and use simultaneously by the date that is 4 years after the date of enactment of  
15 this title; and

16 (B) notice of the maximum capacity required to accommodate all of the  
17 communication interceptions, pen registers, and trap and trace devices that the  
18 Attorney General estimates that government agencies authorized to conduct  
19 electronic surveillance may conduct and use simultaneously after the date that is 4  
20 years after the date of enactment of this title.  
21

22 [(2) BASIS OF NOTICES - \* \* \* ]  
23

24 **[(b) COMPLIANCE WITH CAPACITY NOTICES- \* \* \*]**  
25

26  
27 **(c) NOTICES OF INCREASED MAXIMUM CAPACITY REQUIREMENTS-**  
28

29 (1) NOTICE- The Attorney General **may** ~~shall~~ periodically publish in the Federal  
30 Register, after notice and comment, notice of any necessary increases in the maximum  
31 capacity requirement set forth in the notice under subsection (a)(1)(B).  
32

33 (2) COMPLIANCE- Within 3 years after notice of increased maximum capacity  
34 requirements is published under paragraph (1), or within such longer time period as the  
35 Attorney General may specify, a telecommunications carrier shall, subject to subsection  
36 (e), ensure that its systems are capable of expanding to the increased maximum capacity  
37 set forth in the notice.  
38

39 (d) CARRIER STATEMENT- Within 180 days after the publication by the Attorney General of  
40 a notice of capacity requirements pursuant to subsection (a) or (c), a telecommunications carrier  
41 shall submit to the Attorney General a statement identifying any of its systems or services that do  
42 not have the capacity to accommodate simultaneously the number of interceptions, pen registers,  
43 and trap and trace devices set forth in the notice under such subsection.

1 (e) REIMBURSEMENT REQUIRED FOR COMPLIANCE- The Attorney General shall review  
2 the statements submitted under subsection (d) and may, subject to the availability of  
3 appropriations, agree to reimburse a telecommunications carrier for costs directly associated  
4 with modifications to attain such capacity requirement that are determined to be reasonable in  
5 accordance with section 109(e). Until the Attorney General agrees to reimburse such carrier for  
6 such modification, such carrier shall be considered to be in compliance with the capacity notices  
7 under subsection (a) or (c).  
8

9 **(f) MINIMUM CAPACITY - Notwithstanding any reimbursement, and unless the Attorney**  
10 **General has made publication of an applicable notice of capacity requirements, a**  
11 **communications carrier shall ensure that each of its switching, addressing, routing, or**  
12 **transmission facilities are capable of accommodating simultaneously a minimum of two**  
13 **each of interceptions, pen registers and trap and trace devices.**  
14  
15  
16  
17  
18  
19  
20



1     **SEC. 105. SYSTEMS SECURITY AND INTEGRITY.**

2     A telecommunications carrier shall ensure that any interception of communications or access to  
3     communication ~~call~~-identifying information effected within its transmission, routing,  
4     addressing or switching premises can be activated only in accordance with a court order or other  
5     lawful authorization and only with the affirmative intervention of an individual officer or  
6     employee of the carrier acting within the United States and in accordance with regulations  
7     prescribed by the Commission.  
8  
9

1     **SEC. 106. COOPERATION OF EQUIPMENT MANUFACTURERS AND PROVIDERS**  
2     **OF TELECOMMUNICATIONS SUPPORT SERVICES.**

3  
4     (a) CONSULTATION- A telecommunications carrier shall consult, as necessary, in a timely  
5     fashion with manufacturers of its telecommunications transmission, routing, addressing and  
6     switching equipment and its providers of telecommunications support services for the purpose of  
7     ensuring that current and planned equipment, facilities, and services comply with the capability  
8     requirements of section 103 and the capacity requirements identified by the Attorney General  
9     under section 104.

10  
11    (b) COOPERATION- Subject to sections 104(e), 108(a), and 109 (b) and (d), a manufacturer of  
12    telecommunications transmission, routing, addressing or switching equipment and a provider of  
13    telecommunications support services shall, on a reasonably timely basis and at a reasonable  
14    charge, make available to the telecommunications carriers using its equipment, facilities, or  
15    services such features or modifications as are necessary to permit such carriers to comply with  
16    the capability requirements of section 103 and the capacity requirements identified by the  
17    Attorney General under section 104.

1 **SEC. 107. TECHNICAL REQUIREMENTS AND STANDARDS; EXTENSION OF**  
2 **COMPLIANCE DATE.**

3  
4 (a) SAFE HARBOR-

5  
6 (1) CONSULTATION- To ensure the efficient and industry-wide implementation of the  
7 assistance capability requirements under section 103, the Attorney General, in  
8 coordination with other Federal, State, and local law enforcement agencies, shall consult  
9 with appropriate associations and standard-setting organizations of the  
10 telecommunications industry, with representatives of users of telecommunications  
11 equipment, facilities, and services, and with State utility commissions.

12  
13 (2) COMPLIANCE UNDER ACCEPTED STANDARDS- A telecommunications carrier  
14 shall be found to be in compliance with the assistance capability requirements under  
15 section 103, and a manufacturer of telecommunications transmission, routing,  
16 addressing or switching equipment or a provider of telecommunications support services  
17 shall be found to be in compliance with section 106, if the carrier, manufacturer, or  
18 support service provider is in compliance with publicly available technical requirements  
19 or standards adopted by an industry association or standard-setting organization, or by the  
20 Commission under subsection (b), to meet the requirements of section 103. --

21 (A) an industry association or standard-setting organization to meet the  
22 assistance capability requirements of section 103, except that this safe harbor  
23 provision shall not apply during the period after a petition is filed by the  
24 Attorney General under subsection (b) to determine whether such  
25 requirements or standards adopted by the industry association or standard-  
26 setting organization meet the assistance capability requirements of section  
27 103, until the effective date of an order entered by the Commission that --

28 (i) determines that such requirements or standards meet the  
29 assistance capability requirements of section 103; or

30 (ii) modifies such standards or requirements by rule under subsection  
31 (b);

32 (B) the Attorney General to meet the assistance capability requirements of  
33 section 103, and approved by the Commission pursuant to subsection (b);  
34 or

35 (C) the Commission pursuant to subsection (b).  
36

37 (b) COMMISSION AUTHORITY- ~~If industry associations or standard-setting organizations fail~~  
38 ~~to issue technical requirements or standards or if a Government agency or any other person~~  
39 ~~believes that such requirements or standards are deficient, the agency or person may petition the~~  
40 ~~Commission to establish, by rule, technical requirements or standards that--~~

41 ~~----- (1) meet the assistance capability requirements of section 103 by cost-effective methods;~~

42 ~~----- (2) protect the privacy and security of communications not authorized to be intercepted;~~

43 ~~----- (3) minimize the cost of such compliance on residential ratepayers;~~



~~(4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and~~  
~~(5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period.~~

(1) The Commission, on its own motion or on petition by the Attorney General, an industry association, standard-setting organization, Government agency, or any other person, may —

(A) issue a declaratory ruling regarding the applicability of the definition of communications carrier to a particular entity or class of entities;

(B) determine whether technical requirements or standards adopted by an industry association or standard-setting organization, or by the Attorney General, meet the assistance-capability requirements of section 103 or are deficient; or

(C) establish, by rule, any technical requirements, standards, guidelines or any other requirements as are necessary to meet the assistance-capability requirements of section 103 and, subject to meeting such assistance-capability requirements, will promote the use of methods that —

(i) are cost-effective methods for federal, state and local law enforcement agencies and communications carriers;

(ii) protect the privacy and security of communications not authorized to be intercepted in accordance with section 103(a)(4));

(iii) minimize the cost of such compliance on residential ratepayers; and

(iv) serve the policy of the United States to encourage the provision of new technologies and services to the public.

(2) The Commission may, in establishing rules, technical requirements or standards under subsection (b)(1), provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of communications carriers under section 103 during any transition period.

(3) The Commission shall, prior to making a determination under paragraph (b)(1), consult with the Attorney General as to the needs of law enforcement, public safety and national security.

(4) The Commission shall issue a written determination under paragraph (b)(1) within 180 days after it receives a petition, provided that, if the Attorney General certifies in the petition that emergency conditions require an expedited decision, the Commission shall expedite such written determination. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

1 (c) EXTENSION OF COMPLIANCE DATE FOR EQUIPMENT, FACILITIES, AND  
2 SERVICES-

3  
4 (1) PETITION- A telecommunications carrier proposing to install or deploy, or having  
5 installed or deployed, any equipment, facility, or service prior to the effective date of  
6 section 103 may petition the Commission for 1 or more extensions of the deadline for  
7 complying with the assistance capability requirements under section 103, **subject to the**  
8 **limitations on length of extensions provided in subsection (3).**  
9

10 (2) GROUNDS FOR EXTENSION- The Commission may, after consultation with the  
11 Attorney General, grant an extension under this subsection, if the Commission determines  
12 that compliance with the assistance capability requirements under section 103 is not  
13 reasonably achievable through application of technology available within the compliance  
14 period **and that the carrier has shown through particular facts that it will become**  
15 **compliant with such capability requirements within the extension period requested.**

16 (3) LENGTH OF EXTENSION- An extension under this subsection shall extend for no  
17 longer than the earlier of--

18  
19 (A) the date determined by the Commission as necessary for the carrier to comply  
20 with the assistance capability requirements under section 103; or

21 (B) ~~the date that is 2 years after the date on which the extension is granted~~ **the**  
22 **date that is 1 year after [the day before the bill is introduced].**  
23

24 (4) APPLICABILITY OF EXTENSION- An extension under this subsection shall apply  
25 to only that part of the carrier's business on which the new equipment, facility, or service  
26 is used.  
27  
28  
29  
30



1 SEC. 108. ENFORCEMENT ORDERS.

2  
3 (a) GROUNDS FOR ~~ISSUANCE~~ DEFENSE - A communications carrier may be found in  
4 compliance with the requirements of this court shall issue an order enforcing this title, in any  
5 proceeding under section 2522(a) of title 18, United States Code, ~~only~~ if the court finds that the  
6 communications carrier has demonstrated that --

- 7 ~~(1) alternative technologies or capabilities or the facilities of another carrier are not~~  
8 reasonably available to the law enforcement agency or officer seeking enforcement for  
9 the expeditious implementation of the interception of communications or access to  
10 call communication-identifying information; and  
11 ~~(2) compliance with the requirements of this title is reasonably achievable through the~~  
12 ~~application of available technology to the equipment, facility, or service at issue or would~~  
13 ~~have been reasonably achievable if timely action had been taken.~~

14  
15 (b) TIME FOR COMPLIANCE- Upon issuing an order enforcing this title, the court shall specify  
16 a reasonable time and conditions for complying with its order, considering the good faith efforts  
17 to comply in a timely manner, any effect on the carrier's, manufacturer's, or service provider's  
18 ability to continue to do business, the degree of culpability or delay in undertaking efforts to  
19 comply, any exigent need by the government for prompt compliance, and such other matters  
20 as justice may require.

21  
22 (c) LIMITATIONS- An order enforcing this title may not--

- 23 (1) require a telecommunications carrier to meet the Government's demand for  
24 interception of communications and acquisition of communication call-identifying  
25 information to any extent in excess of the minimum capacity, except for which the  
26 Attorney General has agreed to reimburse such carrier;  
27 (2) require any telecommunications carrier to comply with assistance capability  
28 requirement of section 103 if the carrier is deemed to be in compliance under  
29 Commission has determined (pursuant to section 109(b)(1)) that compliance is not  
30 reasonably achievable, unless the Attorney General has agreed (pursuant to section  
31 109(b)(2)) to pay the costs described in section 109(b)(23)(A); or  
32 (3) require a telecommunications carrier to modify, for the purpose of complying with  
33 the assistance capability requirements of section 103, any equipment, facility, or service  
34 deployed on or before January 1, 1995, unless--  
35  
36 (A) the Attorney General has agreed to pay the telecommunications carrier for all  
37 reasonable costs directly associated with modifications necessary to bring the  
38 equipment, facility, or service into compliance with those requirements;  
39 (B) the equipment, facility, or service has been replaced or significantly upgraded  
40 or otherwise undergoes major modification; or  
41 (C) the effective date of the court's order is after January 1, 2008.  
42



1 **SEC. 109. PAYMENT OF COSTS OF TELECOMMUNICATIONS CARRIERS TO**  
2 **COMPLY WITH CAPABILITY REQUIREMENTS.**

3 (a) EQUIPMENT, FACILITIES, AND SERVICES DEPLOYED ON OR BEFORE JANUARY  
4 1, 1995- The Attorney General may, subject to the availability of appropriations, agree to pay  
5 ~~tele~~communications carriers for all reasonable costs directly associated with the modifications  
6 performed by carriers in connection with equipment, facilities, and services installed or deployed  
7 on or before January 1, 1995, to establish the capabilities necessary to comply with section 103.

8  
9 (b) EQUIPMENT, FACILITIES, AND SERVICES DEPLOYED AFTER JANUARY 1, 1995-

10  
11 (1) Except as provided in subsection (b)(2) below, a communications carrier shall  
12 pay all costs directly associated with the modifications performed by carriers in connection  
13 with equipment, facilities, and services installed or deployed after January 1, 1995, to  
14 establish the capabilities necessary to comply with section 103.

15  
16 (+2) DETERMINATIONS OF REASONABLY ACHIEVABLE- The Commission, on  
17 petition conforming to the requirements stated herein from a telecommunications  
18 carrier ~~or any other interested person~~, and after notice to the Attorney General, shall  
19 determine whether compliance with the assistance capability requirements of section 103  
20 is reasonably achievable with respect to any equipment, facility, or service installed or  
21 deployed after January 1, 1995. The Commission shall make ~~such its~~ determination on  
22 each petition within ~~1 year~~ 180 days after the date such petition is filed. A petition filed  
23 by a communications carrier shall include a detailed description and supporting  
24 documentation setting forth the technical modifications and related costs necessary  
25 to achieving compliance with respect to each of its services and each of the separate  
26 applicable assistance capability requirements of section 103. The communications  
27 carriers shall bear the burden of proof as to each and every fact alleged in support  
28 of the petition. ~~In making such determination the~~ The Commission shall determine  
29 whether compliance would impose significant ~~difficulty or~~ expense on the carrier and  
30 make separate determinations with respect to each of the carrier's services and for  
31 each assistance capability requirement. ~~or on the users of the carriers systems and~~  
32 Where the Commission determines that compliance would impose such expense, the  
33 Commission shall consider the following factors in determining whether to grant the  
34 petition:

- 35  
36 (A) The effect on public safety and national security.  
37 (B) The effect on rates for basic residential telephone service.  
38 (C) The need to protect the privacy and security of communications not authorized  
39 to be intercepted.  
40 (D) The need to achieve the capability assistance requirements of section 103 by  
41 cost-effective methods.  
42 (E) The effect on the nature and cost of the equipment, facility, or service at issue.  
43 (F) The effect on the operation of the equipment, facility, or service at issue.

- (G) The policy of the United States to encourage the provision of new technologies and services to the public.
- (H) The financial resources of the telecommunications carrier.
- (I) The effect on competition in the provision of telecommunications services.
- (J) The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995.
- (K) Such other factors as the Commission determines are appropriate.

(23) COMPENSATION- If after reviewing a petition filed pursuant to section 109(b)(2), the Commission determines that compliance with the assistance capability requirements of section 103 is not reasonably achievable with respect to equipment, facilities, or services deployed after January 1, 1995--

- (A) the Attorney General, on application of a telecommunications carrier, may agree, subject to the availability of appropriations, to pay the telecommunications carrier for the additional reasonable costs of making compliance with such assistance capability requirements reasonably achievable; and
- (B) if the Attorney General does not agree to pay such costs, the telecommunications carrier shall be deemed to be in compliance with such capability requirements for a period set by the Commission but not to exceed two years following the Commission's determination of the petition filed under subsection (b)(2); provided that the Attorney General may petition at any time for reconsideration of the Commission's determination, and the Commission shall make its determination on such petition within 90 days after the date such petition is filed.

(c) ALLOCATION OF FUNDS FOR PAYMENT- The Attorney General shall allocate funds appropriated to carry out this title in accordance with law enforcement priorities determined by the Attorney General.

(d) FAILURE TO MAKE PAYMENT WITH RESPECT TO EQUIPMENT, FACILITIES, AND SERVICES DEPLOYED ON OR BEFORE JANUARY 1, 1995- If a carrier has requested payment in accordance with procedures promulgated pursuant to subsection (e), and the Attorney General has not agreed to pay the telecommunications carrier for all reasonable costs directly associated with modifications necessary to bring any equipment, facility, or service deployed on or before January 1, 1995, into compliance with the assistance capability requirements of section 103, such equipment, facility, or service shall be considered to be in compliance with the assistance capability requirements of section 103 until the earlier of the date on which the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification, January 1, 2008.

(e) COST CONTROL REGULATIONS-

(1) IN GENERAL- The Attorney General shall, after notice and comment, establish regulations necessary to effectuate timely and cost-efficient payment to telecommunications carriers under this title, under chapters 119 and 121 of title 18, United States Code, and under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

(2) CONTENTS OF REGULATIONS- The Attorney General, after consultation with the Commission, shall prescribe regulations for purposes of determining reasonable costs under this title. Such regulations shall seek to minimize the cost to the Federal Government and shall--

(A) permit recovery from the Federal Government of--

- (i) the direct costs of developing the modifications described in subsection (a), of providing the capabilities requested under subsection (b)(23), or of providing the capacities requested under section 104(e), but only to the extent that such costs have not been recovered from any other governmental or non-governmental entity;
- (ii) the costs of training personnel in the use of such capabilities or capacities; and
- (iii) the direct costs of deploying or installing such capabilities or capacities;

(B) 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, permit recovery of only the incremental cost of making the modification suitable for such law enforcement purposes; and

(C) maintain the confidentiality of trade secrets.

(3) SUBMISSION OF CLAIMS- Such regulations shall require any telecommunications carrier that the Attorney General has agreed to pay for modifications pursuant to this section and that has installed or deployed such modification to submit to the Attorney General a claim for payment that contains or is accompanied by such information as the Attorney General may require.

**(f) LIMITATION ON RECOVERY OF COSTS - A communications carrier shall not include in any charges to any government agency or officer pursuant to 18 U.S.C. §§ 3124(c), 2518(4), 2706 or 50 U.S.C. §§ 1805(c)(2)(D), 1842(d)(B)(iii), the costs directly associated with --**

**(i) modifications necessary to bring any equipment, facility, or service into compliance with the assistance capability requirements of section 103;**



(ii) compliance with any rules or regulations adopted by the Commission to implement the provisions of section 103 of this Act; and

(iii) compliance with any rules or regulations adopted by the Commission to implement the provisions of section 105 of this Act, unless specifically authorized by the Commission.

[Sections 110, 111 of CALEA not reprinted herein]

## SEC. 112. REPORTS.

### (a) REPORTS BY THE ATTORNEY GENERAL-

(1) IN GENERAL- On or before November 30, 1995, and on or before November 30 of each year thereafter, the Attorney General shall submit to Congress and make available to the public a report on the amounts paid during the preceding fiscal year to telecommunications carriers under sections 104(e) and 109.

(2) CONTENTS- A report under paragraph (1) shall include--

(A) a detailed accounting of the amounts paid to each carrier and the equipment, facility, or service for which the amounts were paid; and

(B) projections of the amounts expected to be paid in the current fiscal year, the carriers to which payment is expected to be made, and the equipment, facilities, or services for which payment is expected to be made.

### (b) REPORTS BY THE COMPTROLLER GENERAL-

(1) PAYMENTS FOR MODIFICATIONS- On or before April 1, 1996, and every 2 years thereafter, the Comptroller General of the United States, after consultation with the Attorney General and the telecommunications industry, shall submit to the Congress a report--

(A) describing the type of equipment, facilities, and services that have been brought into compliance under this title; and

(B) reflecting its analysis of the reasonableness and cost-effectiveness of the payments made by the Attorney General to telecommunications carriers for modifications necessary to ensure compliance with this title.

(2) COMPLIANCE COST ESTIMATES- A report under paragraph (1) shall include the findings and conclusions of the Comptroller General on the costs to be incurred by telecommunications carriers to comply with the assistance capability requirements of section 103 after the effective date of such section 103, including projections of the amounts expected to be incurred and a description of the equipment, facilities, or services for which they are expected to be incurred.

1                                    AMENDMENTS TO TITLE 18, UNITED STATES CODE

2  
3    Amendments to 18 U.S.C. § 2522 --

4  
5    SEC. 2522. ENFORCEMENT OF THE COMMUNICATIONS ASSISTANCE FOR LAW  
6    ENFORCEMENT ACT

7        (a) ENFORCEMENT BY COURT ISSUING SURVEILLANCE ORDER- If a court  
8        authorizing an interception under this chapter, a State statute, or the Foreign Intelligence  
9        Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) or authorizing use of a pen register or a  
10       trap and trace device under chapter 206, **the Foreign Intelligence Surveillance Act of**  
11       **1978 (50 U.S.C. 1841 et seq.),** or a State statute finds that a telecommunications carrier  
12       has failed to comply with the requirements of the Communications Assistance for Law  
13       Enforcement Act **as amended,** the court may, in accordance with section 108 of such  
14       Act, **and in addition to any information, facilities and technical assistance directed**  
15       **by the Court under the authority provided in sections 2518(4) or 3124(a) or (b) of**  
16       **this title,** direct that the carrier comply forthwith and may direct that a provider of  
17       support services to the carrier or the manufacturer of the carrier's transmission, **routing,**  
18       **addressing** or switching equipment furnish forthwith modifications necessary for the  
19       carrier to comply.

20  
21       (b) ENFORCEMENT UPON APPLICATION BY ATTORNEY GENERAL- The  
22       Attorney General may, in a civil action in the appropriate United States district court,  
23       obtain an order, in accordance with section 108 of the Communications Assistance for  
24       Law Enforcement Act **as amended,** directing that a telecommunications carrier, a  
25       manufacturer of telecommunications transmission, **routing, addressing** or switching  
26       equipment, or a provider of telecommunications support services comply with such Act.

27  
28       (c) CIVIL PENALTY-

29            (1) IN GENERAL- A court issuing an order under this section against a  
30            telecommunications carrier, a manufacturer of telecommunications transmission,  
31            **routing, addressing** or switching equipment, or a provider of telecommunications  
32            support services may impose a civil penalty of up to \$10,000 per day for each day  
33            in violation after the issuance of the order or after such future date as the court  
34            may specify.

35            (2) CONSIDERATIONS- In determining whether to impose a civil penalty and in  
36            determining its amount, the court shall take into account--

37  
38                    (A) the nature, circumstances, and extent of the violation;

39                    (B) the violator's ability to pay, the violator's good faith efforts to comply  
40                    in a timely manner, any effect on the violator's ability to continue to do  
41                    business, the degree of culpability, and the length of any delay in  
42                    undertaking efforts to comply; and

43                    (C) such other matters as justice may require.

1 (d) DEFINITIONS- As used in this section, the terms defined in section 102 of the  
2 Communications Assistance for Law Enforcement Act **as amended** have the meanings  
3 provided, respectively, in such section.  
4

5 **Amendment to 18 U.S.C. § 2518(4)--**  
6

7 **Adding the following to the second-to-last sentence:** ". . . Any provider of wire or  
8 electronic communication service, landlord, custodian, or other person furnishing such  
9 facilities or technical assistance shall be compensated therefor by the applicant for  
10 reasonable expense incurred in providing such facilities or assistance, **upon the**  
11 **presentation of evidence of such expenses in an itemized form and consistent with**  
12 **standard billing practices.**  
13

14 **Further Amendment to 18 U.S.C. § 2518(4) --**  
15

16 **Adding the following to the last sentence:** "Pursuant to section 2522 of this chapter,  
17 **and in addition to any information, facilities and technical assistance directed by the**  
18 **court pursuant to this subsection,** an order may also be issued to enforce the assistance  
19 capability and capacity requirements under the Communications Assistance for Law  
20 Enforcement Act **as amended.**"  
21

22 **Amendment to 18 U.S.C. § 3124(c) --**  
23

24 (c) Compensation - A provider of a wire or electronic communication service, landlord,  
25 custodian, or other person who furnishes facilities or technical assistance pursuant to this  
26 section shall be reasonably compensated for such reasonable expenses incurred in  
27 providing such facilities or assistance, **upon the presentation of evidence of such**  
28 **expenses in an itemized form and consistent with standard billing practices.**  
29

30 **Amendments to 18 U.S.C. § 3124(f) --**  
31

32 (f) COMMUNICATIONS ASSISTANCE ENFORCEMENT ORDERS- Pursuant to  
33 section 2522, **and in addition to any information, facilities and technical assistance**  
34 **directed by the court pursuant to this subsection,** an order may **also** be issued to  
35 enforce the assistance capability and capacity requirements under the Communications  
36 Assistance for Law Enforcement Act **as amended.**'.



1  
2 [X.1] Amendment to be incorporated into 18 U.S.C. §§ 2511(2)(a)(ii), 3124(d), or to  
3 CALEA --

4  
5 **Anti-Liability Provision**

6  
7 Except as otherwise provided in section 108 of this Act and section 2252 of title 18,  
8 no cause of action shall lie in any court against any communications carrier,  
9 manufacturer of its communications transmission, routing, addressing and  
10 switching equipment, or provider of communications support services, their officers,  
11 employees, or agents for providing any information, facilities or assistance or  
12 making any modifications to equipment, facilities or services, or ensuring any  
13 capability in accordance with this Act.

1                   AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934

2  
3   Amendment to 47 U.S.C. § 229 --

4  
5           SEC. 229. COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT  
6   COMPLIANCE.

7           (a) IN GENERAL- The Commission shall prescribe such rules as are necessary to  
8   implement the requirements of the Communications Assistance for Law  
9   Enforcement Act **as amended**.

10  
11           (b) SYSTEMS SECURITY AND INTEGRITY- The rules prescribed pursuant to  
12   subsection (a) shall include rules to implement section 105 of the  
13   Communications Assistance for Law Enforcement Act **as amended** that require  
14   **communications** ~~common~~-carriers, **as defined in such Act** ---

15           ` (1) to establish appropriate policies and procedures for the supervision  
16   and control of its officers and employees--

17  
18                   ` (A) to require appropriate authorization to activate interception of  
19   communications or access to **communication** ~~call~~-identifying  
20   information;

21                   ` (B) to prevent any such interception or access without such  
22   authorization;

23                   **(C) to require that one or more officers or employees are**  
24   **available within the United States, seven days a week, 24 hours**  
25   **a day, to assist a law enforcement agency with any such**  
26   **interception or access;**

27                   **(D) to require that carriers provide to a law**  
28   **enforcement agency or officer upon request, the names and**  
29   **appropriate identifying information of officers,**  
30   **employees or persons otherwise under the carrier's control**  
31   **who have access to any information about the government's**  
32   **interception of communications or access to communication-**  
33   **identifying information; and**

34                   **(E) to require that all officers, employees or persons otherwise**  
35   **under the carrier's control who have access to any information**  
36   **regarding the government's interception of communications or**  
37   **acquisition of communication-identifying information shall be**  
38   **located in the United States;**

39  
40           (2) to maintain secure and accurate records of any interception or access  
41   with or without such authorization; and

42           (3) to submit to the Commission the policies and procedures adopted to  
43   comply with the requirements established under paragraphs (1) and (2).

1 (c) COMMISSION REVIEW OF COMPLIANCE- The Commission shall review  
2 the policies and procedures submitted under subsection (b)(3) and shall order a  
3 **communications** carrier to modify any such policy or procedure that the  
4 Commission determines does not comply with Commission regulations. ~~The~~  
5 ~~Commission shall conduct such investigations as may be necessary to insure~~  
6 ~~compliance by common carriers with the requirements of the regulations~~  
7 ~~prescribed under this section.~~  
8

9 **(d) COMMISSION INVESTIGATIONS OF COMPLIANCE- The**  
10 **Commission shall conduct such investigations and impose such penalties as**  
11 **may be necessary to ensure compliance by communications carriers with the**  
12 **requirements of the Communications Assistance for Law Enforcement Act as**  
13 **amended and any regulations prescribed thereunder.**  
14

15 ~~(e)~~ PENALTIES- For purposes of this Act, a violation by an officer or employee  
16 of any policy or procedure adopted by a **communications** ~~common~~ carrier  
17 pursuant to subsection (b), or of a rule prescribed by the Commission pursuant to  
18 subsection (a), shall be considered to be a violation by the carrier of a rule  
19 prescribed by the Commission pursuant to this Act.  
20

21 **(e)f) COST RECOVERY FOR COMMUNICATIONS ASSISTANCE FOR LAW**  
22 **ENFORCEMENT ACT COMPLIANCE-**

23 **(1) PETITIONS AUTHORIZED-** A common carrier may petition the  
24 Commission to adjust charges, practices, classifications, and regulations to  
25 recover costs expended for making modifications to equipment, facilities,  
26 or services pursuant to the requirements of section 103 of the  
27 Communications Assistance for Law Enforcement Act.

28 **(2) COMMISSION AUTHORITY-** The Commission may grant, with or  
29 without modification, a petition under paragraph (1) if the Commission  
30 determines that such costs are reasonable and that permitting recovery is  
31 consistent with the public interest. The Commission may, consistent with  
32 maintaining just and reasonable charges, practices, classifications, and  
33 regulations in connection with the provision of interstate or foreign  
34 communication by wire or radio by a common carrier, allow carriers to  
35 adjust such charges, practices, classifications, and regulations in order to  
36 carry out the purposes of this Act.

37 **(3) JOINT BOARD-** The Commission shall convene a Federal-State joint  
38 board to recommend appropriate changes to part 36 of the Commission's



1 rules with respect to recovery of costs pursuant to charges, practices,  
2 classifications, and regulations under the jurisdiction of the Commission.'

3  
4 **(g) DETERMINATIONS OF PUBLIC INTEREST -**

5  
6 **The Commission, in any determination or proceeding regarding a**  
7 **communications carrier as such term is defined by the Communications**  
8 **Assistance for Law Enforcement Act as amended, which determination**  
9 **requires consideration of the public interest, shall inquire of the carrier as to**  
10 **the status of its compliance with such Act and shall consider any non-**  
11 **compliance by such carrier with any provision of such Act to be a factor**  
12 **weighing against a determination that the relief sought by the carrier is in**  
13 **the public interest.**  
14  
15

## Amendments to Communications Assistance for Law Enforcement Act (CALEA)

### Section-by-Section Analysis

Lawful interception of communications is a critical tool for enforcement of the Nation's laws, protection of its citizens, and maintenance of the national security. Law enforcement agencies at all levels of Federal, State and local government, having the responsibility and the duty to serve these important missions, must ensure that the effectiveness of lawful electronic surveillance is preserved.

However, the complexity and variety of communications technologies and services have dramatically increased in recent years, and the lawful intercept capabilities of the Federal, State and local law enforcement community have been under continual stress, and in many cases have decreased or become impossible. Legal mandates represent a key element of the overall strategy to preserve law enforcement's intercept capabilities in today's world of advancing communications technology. Such mandates, however, must be combined with the continuing efforts of law enforcement agencies to develop and maintain technical electronic surveillance techniques, as well as expanding assistance and cooperation from the many entities that provide communications services. This Bill updates the primary Federal assistance mandate, the Communications Assistance for Law Enforcement Act (CALEA), with a view toward harmonizing such requirements with the other measures necessary to an effective and comprehensive strategy for maintaining lawful interception capabilities.

Congress enacted CALEA in 1994 to help preserve the crucial law enforcement investigative technique of electronic surveillance. CALEA was designed to ensure that Federal, State and local law enforcement would maintain their ability to conduct lawful electronic surveillance in the face of changes in telecommunications technology, regulation, and market forces. The statute largely succeeded in making sure that cellular-telephone carriers -- a nascent industry in 1994 -- would incorporate critical surveillance capabilities into their networks, although implementation difficulties remain with respect to both wireless and traditional land-line telephone services.

Today the world is experiencing a communications revolution, due largely to the Internet. Users can communicate more information faster and to more destinations on the planet than ever before using a single broadband connection. Voice-Over-Internet-Protocol services are also enabling broadband subscribers to replace their traditional telephones. This Bill aims to update CALEA for today's communications revolution by ensuring that it will be understood to apply to the communications services deemed most important for ensuring surveillance access to law enforcement and national security agencies, while at the same time resolving potentially complex issues about the obligations that will be imposed. As discussed herein, such communications services continue to include traditional voice telephony but also the "Voice-Over-Internet

Protocol" services that now provide effective alternatives to traditional services. Such services also include network-access services, such as DSL and cable-modem services. It is critical that law enforcement agencies and those charged with protecting national security maintain a surveillance access point and reasonable surveillance capabilities with respect to rapidly growing network-access services, which enable customers to access a wide array of other communications-related services. In defining the obligations of network-access services, the Bill recognizes that these providers often have little knowledge of the other services that users are accessing through their service.

Another reality of today's communications revolution is that services are being developed and deployed more rapidly and in a more decentralized manner. The Bill therefore reforms the process of creating regulatory safe harbors for CALEA compliance, in order to create incentives for industry associations which develop standards to comply with CALEA's requirements and to lead service providers to build full CALEA compliance into their technologies. It also recognizes the new law enforcement realities and critical national security concerns of the post-9/11 world by strengthening the Act's provisions to provide for efficient and effective enforcement.

The following section-by-section analysis provides an explanation of each amendment in the Bill. For clarity, the section numbers from existing CALEA are retained. The analysis provides the existing law, discusses the purpose for each amendment, and describes the amendment.

#### **Section 102(2) - Amendments to Definition of Call-Identifying Information**

The existing definition of the term "call-identifying information" (hereinafter "CII") refers to "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication." It is in some ways akin to addressing and postmarking information on an envelope. Under Section 103(a)(2) of CALEA and under the new Section 103(e), carriers are required to be capable of isolating and enabling the government to acquire this information. The amendments are intended to update the language and remove its ambiguity.

It is important to note that the definition of CII in CALEA and the definitions of "pen register" and "trap and trace" in ECPA, 18 U.S.C. § 3127(3), (4), are not congruent. As the District of Columbia Court of Appeals noted, CALEA "neither cross-references nor incorporates ECPA's definitions of pen registers and trap and trace devices." *See USTA v. FCC*, 227 F.3d 450, 459 (D.C. Cir. 2000). The Court further noted that differences between CALEA and ECPA illustrate the "inherent ambiguity" of the term. *Id.* Another important distinction is that at least some information that falls within the CII definition is expressly *not* authorized to be acquired from the provider solely with a pen/trap order. In particular, CII has been held to include wireless antenna location information at the origination and termination of a wireless call, but CALEA expressly precludes access to such information from the provider when the government is acting "solely pursuant to the authority for pen registers and trap and trace devices." 47 U.S.C.



§ 1002(a)(2); *USTA v. FCC*, 227 F.3d at 463 (upholding FCC's decision in the CALEA Third Report and Order that "call identifying information" includes wireless location information).

The "inherent ambiguity" of the CII definition has led to interpretation problems. For example, in 1998, the industry adopted the first CALEA standard, known as J-STD-025. The FBI petitioned for review of the standard to the FCC, contending that it did not provide for the ability to capture all of the necessary aspects of CII, which became known as the "punch list." The "punch list" capabilities, in general, were intended to capture various dialed numbers and signals related to call progress. Much of the ensuing litigation focused on whether any of this information fell within the meaning of the CII definition and, in particular, on the undefined terms "origin, direction, destination or termination." The FCC concluded that many of the "punch list" capabilities were required by CALEA. In a subsequent appeal, the Court of Appeals remanded the FCC's decision, in part based on what the court found to be critical inconsistencies in the FCC's interpretation of these terms. *USTA v. FCC*, 227 F.3d at 460.

The Bill's amendments to the definition of the term "call-identifying information" are intended to: (1) update the language with respect to packet communications; and (2) remove ambiguity created by the terms "origin, direction, destination and termination" by adding additional terms used in ECPA. Additional amendments, including the specification of post-cut-through digits and certain packet-related information within the definition of CII, are discussed further below and are made with regard to other changes included in Section 103, pertaining to a carrier's duty to isolate CII and make it available to the government.

The term "call" is changed to "communication" to make the language less specific to telephony and thereby eliminate doubt about whether CALEA applies to services that are not telephony. The terms "routing" and "addressing" are added to "dialing" and "signaling" for the same reason. This addition mirrors a change to the pen register and trap and trace device definitions in 18 U.S.C. § 3127(3), (4) made by the USA PATRIOT Act. These terms are also inserted throughout CALEA wherever the terms "transmission and switching" now appear, for the same reasons. The phrases "processing" and "transmission" are added to "origin, direction, destination, or termination" in order to remove ambiguities or perceived limitations imposed by the original terms. These additional terms are also intended to ensure that CII encompasses, but is not necessarily limited to, the information available under ECPA's pen register and trap and trace authority, by using terms similar to those used in the USA PATRIOT Act amendments to 18 U.S.C. § 3121(c) ("A government agency authorized to install and use a pen register or trap and trace device . . . shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing and signaling information utilized in the processing and transmitting of wire or electronic communications") (emphasis added). The term "or other person" is added to clarify the definition, because the original language appears unintentionally limited to communications of the carrier's "subscriber."

This section is further amended by confirming that it includes (but is not limited to)

certain items of communication-identifying information deemed particularly critical to law enforcement. The first is "post-cut-through digits" which consist of the additional digits dialed after a call is initially set up through the local provider's switch. An example is a 1-800 call to a long distance provider, where the post-cut-through dialed digits are those dialed by the user after the 1-800 call is initially set up. See *USTA v. FCC*, 227 F.3d at 462 ("Some post-cut-through dialed digits are telephone numbers, such as when a subject places a calling card, credit card, or collect call by first dialing a long-distance carrier access number and then, after the initial call is 'cut through,' dialing the telephone number of the destination party."). This change is intended to codify current law and to confirm its application to all carriers, including providers of replacement telephone service. Current law requires traditional telephone providers and cell phone providers to maintain the capability to isolate the post-cut-through dialed digits. See *In the Matter of Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd. 6896, 6926-27 ¶ 80 (2002) ("*CALEA Order on Remand*"). The phrase "post-cut-through-digits" is intended to encompass "dialed" and "signaled" and "pulsed" digits, and therefore the phrase "post-cut-through-digits" is employed. This change would not affect the requisite legal authority of the government to obtain post-cut-through-digits.

This section is further amended to specify that communication-identifying information includes (but again is not limited to) certain specified packet-related information, including source and destination Internet protocol and other protocol addresses, the port number, packet file size, and user authentication and logon information, including session time and duration. All of this information is deemed to be within the general definition of communication-identifying information. It is specifically listed herein to avoid potentially lengthy litigation regarding interpretation of the statutory language, because it is critical to law enforcement that carriers implement the capability to isolate this particular information without delay. Again, this change would not affect the requisite legal authority of the government to obtain the specified information.

The following is an illustrative, non-exhaustive list of information that falls within the definition of communication-identifying information:

called party number; calling party number; start time, end time, call duration; feature invocation and deactivation; feature interaction; registration information; diverted-to number; conference party numbers; post-cut-through dialed digits; in-band and out-of-band signaling; party add, drop and hold information; time, date, size, duration and volume of data transfers; domain names; MAC or Internet Protocol addresses, including both source and destination; port numbers; "to" and "from" information in an electronic mail header; packet sizes; types of protocols or services; special purpose flags; location information; and other header information that meets the definition of communication identifying information.

This list includes information previously determined by the Commission and/or the courts to fall within the existing definition of "call-identifying information." The Bill leaves unchanged the

existing requirements with respect to location information. The list also includes additional information that would derive primarily from the newer services whose coverage is intended to be confirmed through the amendments. While all of this information falls within the meaning of the definition of communication-identifying information, the duty of a carrier to ensure the government's access to such information is governed by Section 103. Under some circumstances defined in that section, a carrier may need only to ensure that the government is afforded access to its customer's packet stream containing the communication-identifying information specified above. Under other circumstances, a carrier may be required to ensure the capability to isolate specific communication-identifying information by extracting it from a packet stream.

### **Sections 102(6) and 102(10) - Amendments to Coverage Definitions**

CALEA's coverage, under current law, is mainly governed by the definitions of the terms "information services" and "telecommunications carrier." The requirements apply to entities that meet the definition of "telecommunications carrier," but exempt them "insofar as they are engaged in providing information services."

The scope of the terms "information services" and "telecommunications carrier" has been difficult to delineate, particularly as newer services combine the characteristics of both, and the formerly distinct telephone and data networks converge. Additionally, both "information service" and "telecommunications carrier" are terms that are used in the Telecommunications Act. *Compare* 47 U.S.C. § 153(20) *with* 47 U.S.C. § 1001(6). Because some communications services that should be covered by the surveillance assistance requirements may be found to be included within the Telecommunications Act's definition of "information services," the similar terms could set unnecessary legal impediments to the proper application of CALEA in these areas.

The amendments are intended primarily to: (1) update the language; (2) preserve CALEA's current applicability; (3) ensure CALEA's application to certain newer technologies, including "replacement telephone service" and "network access service"; and (4) broaden the FCC's authority to deem services subject to CALEA.

#### **A. Section 102(8) - Definition of Telecommunications Carrier**

The amendments eliminate the term "telecommunications carrier" and replace it with "communications carrier" in order to remove similarity with the Telecommunications Act, and to confirm the applicability of CALEA's requirements to services without regard to their regulatory status for other purposes. The words "via any technology or method" are also inserted into the general definition of the term found in Section 102(8)(A). This is intended to codify the Commission's prior determinations recognizing that CALEA's requirements are "technology neutral." *See In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd. 7105 at 7120, n.69 (1999) ("*CALEA Second Report and Order*").



The terms "routing" and "addressing" are added to the existing language of "transmission and switching" in order to update the language to apply to new communications technologies, including those providing Voice-Over-Internet Protocol services. Similar changes are being made to the definition of "communication-identifying information" in the amendments to Section 102(2), as noted above.

The term "common carrier for hire" in the general definition in Section 102(8)(A) is being retained. This is to ensure that CALEA will continue to cover all entities it currently covers. However, the words "or otherwise on a commercial basis available to the public" are added to ensure that CALEA will apply to any for-hire transmission, switching, routing or addressing service available to the public, notwithstanding whether such service is bundled with another service, offered on a stand-alone basis directly to the public for a fee, or considered a "common carrier" service for other regulatory purposes. The current law requiring resellers of service to ensure CALEA capabilities would remain unchanged. *See CALEA Second Report and Order* at 7120-21, ¶ 24; *CALEA Second Order on Reconsideration*, 16 FCC Rcd. 8959, ¶ 37 (2001) (confirming obligation of resellers to ensure CALEA capabilities). This additional language confirms CALEA's applicability to services offered to the public directly for a fee, or indirectly by being combined with another service. In this regard, the language confirms the inapplicability, for purposes of CALEA, of the Commissions's reasoning in *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4823 (2002). In that decision, the Commission opined that cable modem service was not a "telecommunications service" under the Telecommunications Act because it is not made available "for a fee directly to the public." The amendment would not change the Commission's decision, but is intended to limit such decision to interpretations of the Telecommunications Act and to preclude extension of that reasoning to CALEA. Cable modem service, for example, would therefore be covered by CALEA notwithstanding whether it is made available "for a fee directly to the public," or whether providers thereof are considered "common carriers" for other regulatory purposes. Likewise, the amendments will confirm CALEA's applicability to other communications services, notwithstanding the technology used. Under the existing law, some confusion has existed with regard to services such as the so-called "short message service" and "push-to-talk" service, largely based on the newer technology used to provide such services. *See In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd. 15,676, 15725 ¶ 144 (2004) (holding CALEA applicable to push-to-talk services). The amendments will confirm the coverage of push-to-talk, short message service, voice mail service, and other communications services offered on a commercial basis to the public are covered.

Subsection 102(8)(B) is amended to include an illustrative, non-exhaustive, list of types of carriers subject to CALEA. Subsection (B)(i) retains existing language applying CALEA to providers of "commercial mobile service." New subsections (B)(ii) and (iii) contain newly defined terms "network access service" and "replacement telephone service." These terms are defined in new Sections 102(9), (10). These terms are intended to confirm CALEA's application

to providers of broadband Internet access, and certain types of "Voice-Over-Internet-Protocol" (VOIP) (not including certain applications that solely provide the ability to obtain addressing from other users). These new terms are also used to define new capabilities required for certain network access service carriers under Section 103.

Subsection 102(8)(B)(iv) (formerly (B)(ii)) is amended to broaden the FCC's authority to deem an entity subject to CALEA "to the extent that the Commission finds that it is in the public interest." The amendments include removing the requirement for a finding that the entity is engaged in a service that is a "replacement for a substantial portion of the local telephone exchange," which is potentially too limiting. The Bill also adds a section providing that, in determining the "public interest," the Commission will consult with the Attorney General, in order to ensure that the Commission obtains his assessment of the needs of law enforcement, public safety or national security. This is appropriate because the Department of Justice is in the best position to assess such needs. As discussed below, it is also intended that the FCC will be able to exempt a service from the "exempt services" section by using this authority.

Due to the constant change of the technology, a comprehensive list of covered carriers is neither possible nor desirable, however the following provides an illustrative non-exhaustive list of carriers intended to be covered by these amendments: Voice-Over-Internet-Protocol providers, subject to the exemptions discussed below; broadband Internet Access providers, including providers of facilities-based access using DSL, cable modem or other wired technologies, broadband over powerline, radio, satellite, electromagnetic, photooptical or photoelectronic facilities. Again, this list is not intended to be all-inclusive.

Subsection 102(8)(C) retains the concept that a communications carrier "does not include persons or entities insofar as they are engaged in providing" exempt services. However, the amendments to subsection 102(6)(C)(iii) provide that the term "exempt services" does not include any service subject to a determination by the Commission under subsection (8)(B)(iv). This provision authorizes the Commission to override the exempt services clause by making a determination under its authority contained in subsection 102(8)(B)(iv). Similar language has been inserted into subsection 103(b)(2), which currently exempts from CALEA's assistance capability requirements any "information services," "private networks," and equipment that is for the sole purpose of "interconnecting" carriers.

#### **B. Section 102(6) - Definition of Information Services**

This provision is amended to eliminate both the term and the definition for "information service." This change is intended to eliminate similarities with the Telecommunications Act, and confirm that CALEA may apply to a service or entity that is otherwise exempted from regulation under such Act. It is also intended to limit all CALEA exceptions to only those services and applications that are "accessed" through an already-covered service (e.g. network access service). The intent here is to ensure that an interception capability will be maintained with respect to communications transmitted to or from an exempt service. For example, the service used to

transmit an electronic message (e-mail) would be covered, but the service used to store or process the electronic message would be exempt. CALEA's original legislative history suggests that this was Congress's original intent:

"[T]he capability requirements only apply to those services or facilities that enable the subscriber to make, receive or direct calls. They do not apply to information services, such as electronic mail services, or on-line services, such as Compuserve, Prodigy, America-on-Line or Mead Data, or Internet service providers. (The storage of a message in a voice mail or E-mail 'box' is not covered by the bill. The redirection of the voice mail message to the 'box' and the transmission of an E-mail message to an enhanced service provider that maintains the E-mail service are covered.)"

H.R. Rep. 103-827, pt I, at 23 (1994).

As discussed below, the amendments likewise cover transmission services even where bundled or combined with an otherwise exempt service.

Subsections (A)(i) through (A)(v) describe the types of "exempt services" under CALEA. It is intended to exempt certain general types of services reached via a public network, such as the Internet, but not exempt the transmission path by which the network is reached, such as via a network access provider.

Subsection (i) retains the term "processing" from the original definition of "information services." This section is intended to exempt remote computer processing.

Subsection (ii) clarifies that the exemption originally found in Section 102(6)(B)(i) applies to storage and retrieval "facilities." It is intended to exempt computer servers, such as those accessed when web browsing, to the extent that they provide only storage and retrieval facilities. The Bill is intended to be interpreted such that so-called "Internet Service Providers" (ISPs) would only be covered to the extent they combine their services with or resell the transmission service used to reach the end-user. ISPs today are significantly different entities from those that Congress intended to exempt from CALEA in its original enactment. In 1994, public access to the Internet was generally afforded through the services of an ISP reached via a "dial-up" connection provided by a common carrier. Entities today often combine both aspects, and utilize "broadband" rather than dial-up facilities. Cable modem service is one example, discussed below. The intent of these amendments, as discussed below, is to maintain the applicability of CALEA to the transmission portion of the service, notwithstanding that it may be combined with other information processing or storage and retrieval services that may be deemed exempt.

Subsection (iii) retains the "electronic publishing" exemption in the original statute (formerly Section 102(6)(b)(ii)).

Subsection (iv) is a new definition that is intended to exempt the provision of a software application that solely permits the retrieval from other users of addressing information, without any other assistance (including provision of a directory service) from the provider of the application. It is intended that law enforcement access to communications associated with such applications would occur through the carrier supplying a network access service to the user. Specifically, the definition exempts certain software-based applications that solely enable a user to obtain addressing or routing information from other users. It is not intended to exempt the provider of a software-based application when such provider also offers any routing, transmission, addressing or switching or other service or assistance, including offering a computer server that provides a directory or look-up service.

Subsection (v) retains the existing exemption for "electronic messaging services." No court has yet interpreted the definition of "electronic messaging services." Congress intended in the original enactment that this term would apply to certain forms of electronic mail service, as stated in CALEA's legislative history:

"The term 'information services' includes messaging services offered through software such as groupware and enterprise or personal messaging software, that is, services based on products (including but not limited to multimedia software) of which Lotus Notes (and Lotus Network Notes), Microsoft Exchange Server, Novell Netware, CC: Mail, MCI Mail, Microsoft Mail, Microsoft Exchange Server, and AT&T Easylink (and their associated services) are both examples and precursors.

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By including such software-based electronic messaging services within the definition of information services, they are excluded from compliance with the requirements of the bill."

H.R. Rep. 103-827, pt I, at 21(1994).

An electronic messaging service is therefore a separate service that is accessed via another transmission service that is covered by CALEA. An example is a web-based electronic mail provider that is accessed through a covered network access service carrier. It is intended that the interception access point for these types of electronic mail services would be at the network access service provider.

Subsection 102(6)(B) is intended to exempt those who are not otherwise communications carriers when they share a network access service with their patrons on or near their premises. For instance, a retail business that incidentally provides wireless Internet connections on its premises will be exempt if the service the business allows its patrons to share complies with the requirements of section 103. In the case that either (1) a business or other entity already has an existing contract in force for the service being shared or (2) no service that complies with section 103 is available to the business or other entity, the obligation to share only a compliant service is



relieved. A business or other entity that has a contract for non-compliant service will no longer be permitted to share a non-compliant service after the expiration of that contract, unless no compliant service is available. The limitation that the service must be intended to provide access within 300 feet of the premises realizes that businesses may choose to use technologies such as wireless access points that allow access just beyond their premises and that circumstances such as power fluctuations or non-standard user configurations could cause signals to exceed 300 feet. Notwithstanding such unintended possibilities, the service would remain exempt so long as the equipment used by the sharing entity was intended by the sharing entity to provide service within 300 feet of its premises.

Subsection 102(6)(C) is amended to address the situation where an exempt service (e.g. electronic messaging service) and a covered service (e.g. network access service) are combined and alleged to become a single integrated service. The intent is to maintain CALEA's applicability with respect to the covered portion of the service notwithstanding a combination or "bundling" of two types of service. The necessity for ensuring this point is illustrated in the FCC's approach to cable modem service, which the FCC concluded was a combination of "telecommunications" and "data processing" that is "a single [information] service" under the Telecommunications Act. *In re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC 02-77 (March 15, 2002), ¶ 39 (holding that cable modem service is an "information service" under the Telecommunications Act because the "telecommunications component [of cable modem service] is not, however, separable from the data-processing capabilities of the service. As provided to the end-user the telecommunications is part and parcel of the cable modem service and is integral to its other capabilities."). The amendments make it clear that, for purposes of CALEA, the communications component of a bundled service would be subject to CALEA.

As discussed above, the changes to subsection (C) are also intended clearly to permit the FCC to *remove* a service from the exemption (and thus bring it within CALEA's ambit) by using the authority in subsection 8(B)(iv).

### **C. Sections 102(9) and (10) - New Carrier Definitions**

The new definition in Section 102(9) for "network access service" confirms CALEA's application to what is commonly referred to as "broadband Internet access." It is intended to cover DSL, cable modem, and any other methods of network access. The definition is intended to cover transmission services, as distinct from the variety of services that can be provided *via* the network access service. For example, the definition does not include "VOIP" telephony, which falls within the definition of "replacement telephone service."

The new definition in Section 102(10) for "replacement telephone service" confirms CALEA's application to certain types of service commonly referred to as "VOIP." This definition *excludes* providers of certain software applications that only enable a user to obtain information from another user. In general, it is intended to cover those services where a carrier is

providing or managing the transmission, switching, routing or addressing, including providing a directory to supply such addressing, but not applications that solely enable a user to obtain the addressing information from another user.

### **Section 103 - Amendments to Assistance Capability Requirements**

Section 103 of the existing CALEA sets forth the surveillance assistance capabilities required for all telecommunications carriers. This Section provides for four carrier duties, which are generally summarized as follows: (1) isolate and ensure the capability to intercept communications; (2) isolate and ensure the capability to acquire call-identifying information that is "reasonably available" to the carrier; (3) provide for the delivery of intercepted communications and CII via government procured facilities; (4) facilitate interceptions in a manner that ensures privacy of communications not authorized to be intercepted and information regarding the government's interception.

The amendments fall into two general categories. First, several amendments are intended to clarify certain aspects of the requirements described above. Second, a new Section 103(e) is being added for the purpose of modifying such requirements for providers of network access service.

#### **A. Section 103(a)(1)-(2), 103(g) - Domestic Point of Presence for Surveillance**

Amendments to subsections 103(a)(1) and (a)(2) add a requirement for each carrier to maintain a point of presence within the United States at which interception or access to communication-identifying information can be performed. The purpose of this requirement is to address situations where carrier equipment is located in a foreign country, thereby making law enforcement access difficult and less secure. An example of this is found in the case of satellite service providers who maintain earth-station gateways in a foreign country. The requirement established by the amendment would require such providers to establish earth-station gateways in the United States, but such requirement would, under new subsection 103(g), be subject to waiver by the Attorney General under mutually agreed conditions. This provision recognizes that the requirement might, under circumstances agreed by the Attorney General, be met through other means. The establishment of a network switch or other network point-of-presence within the United States at which communications and communication-identifying information could be lawfully intercepted or accessed is one possible example.

#### **B. Section 103(a)(2) - Clarify the Scope of Communication-Identifying Information that Carriers Must Isolate**

Section 103(a)(2) is further amended by including the phrase "used by the carrier in the transmission, routing, addressing or switching of wire or electronic communications or, if not used by the carrier, is otherwise [reasonably available]." The additional language is intended to supplement the term "reasonably available" and to provide that carriers must isolate and provide

to the government any communication-identifying information that they use in the transmission, switching, routing or addressing of communications.

The term "reasonably available" has been the source of interpretational difficulties in industry standards-forming groups and has generated litigation. The "punch list" litigation revolved around this term, among other issues, since the industry argued that each disputed capability was not "reasonably available." The FCC ultimately adopted a definition of the phrase, finding that "call-identifying information is 'reasonably available' to a carrier if it is present at an intercept access point and can be made available without the carrier being unduly burdened with network modifications." *In the Matter of Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 FCC Rcd. 16794, 16802-03 ¶ 14 (1999); 47 C.F.R. § 22.1102; *In the Matter of Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd. 6896, 6926-27 ¶ 80 (2002) ("*CALEA Order on Remand*") ("We think . . . something is 'available' if it is accessible . . . . [I]f information is only accessible by significantly modifying a network, then we do not think it is 'reasonably' available."). The FCC's definition, however, may only continue disputes as to the scope of "reasonably available" information, because it turns on another undefined concept: "significant network modification."

This amendment is intended to clarify the scope of communication-identifying information that a carrier is obligated to isolate and to enable the government to acquire so that it includes, at a *minimum*, the information that the carrier uses in the processing and transmitting of wire or electronic communications. Since several of the original "punch list" items included signals actually used by the carrier (e.g. subject signaling; network signaling; party hold, drop, join messages; location information), this clarification could reduce litigation, as it would ensure that carriers are clearly obligated to ensure law enforcement access to such information. The amended subsection retains the original phrase "reasonably available" in order to preserve the FCC's decisions regarding communication-identifying information that is not used by the carrier in processing communications but is nevertheless available to the carrier. For example, the FCC determined that "post-cut-through dialed digits" are reasonably available with respect to certain carriers, even though such digits may not be used by such carriers. *CALEA Order on Remand*, at 6826-27 ¶ 80.

### **C. Section 103(a)(3), (f) - Amendments to Delivery Requirements**

Existing law under Section 103(a)(3) requires carriers to ensure that intercepted communications and CII are delivered to the government 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." The amendment inserts the phrase "standard, commercially available, and reliable" to further describe the format in which carriers are to provide for delivery of such communications and CII. It is intended to require carriers to deliver intercepted communications in a standard format or protocol, rather than in a proprietary, non-standard, or unreliable format or protocol.

An additional new requirement, specified in new subsection 103(f), would authorize the Commission to specify by rule one or more standard, commercially available, reliable delivery formats to be used by a particular class or category of communications carriers. Such rules could also be made applicable to particular services of a communications carrier, as deemed appropriate by the Commission. This rulemaking authority extends also to the delivery and storage requirements for network access carriers described below with regard to new section 103(e).

#### **D. Section 103(a)(4) - Duty to Ensure Privacy and Interception Security**

Existing law under Section 103(a)(4) requires carriers to facilitate interceptions (and access to CII) "unobtrusively and with a minimum of interference with any subscriber's telecommunications service" and "in a manner that protects the privacy and security of communications not authorized to be intercepted and information regarding the government's interception of communications and access to CII."

The amendment clarifies these requirements by adding additional language providing that they should not be interpreted to *preclude* any interception or access to communication-identifying information. The purpose of the amendment is to make clear that the carrier's duty in this regard does not override its primary duty to facilitate access to all of the communications or communication-identifying information that a law enforcement agency has been authorized to obtain. The carrier's privacy duty is clarified by adding a proviso that is intended to confirm that such requirements would not preclude a carrier from affording the government access to a subject's full packet stream and using a process to extract a more limited set of information. Additional provisions discussed below are intended to require network access providers to isolate a subject's full packet stream.

#### **E. Section 103(c) - Amendments to Carrier-Premises Monitoring**

Subsection 103(c) currently authorizes a carrier to comply with the delivery requirement of Section 103(a)(3) by allowing a law enforcement officer to conduct monitoring at the carrier's premises in the carrier's discretion and under certain circumstances. The amendment clarifies that allowing such monitoring in a carrier's discretion need not be under circumstances where that is the "only" means of accomplishing the interception. The amendment also recognizes that the carrier must allow such monitoring if required to by a lawful order or other authorization.

#### **F. Section 103(e) - Network Access Service Assistance Capability Requirements**

New subsection 103(e) and related changes to section 102(2) are intended to clarify the assistance capability requirements specified in CALEA for "network access service" providers (e.g. broadband Internet access providers). Network access service providers are to ensure the following capabilities: (1) isolate a customer's or user's packet stream; (2) isolate the communication-identifying information used by the carrier, plus other reasonably available



communication-identifying information (pursuant to subsection 103(a)(2)); (3) store the isolated packet stream or the set of isolated communication-identifying information if requested and under conditions specified by the law enforcement agency conducting surveillance; and (4) enable the delivery of the isolated packet stream or isolated communication-identifying information to a facility specified by the law enforcement agency conducting surveillance for recording or further processing to extract the authorized information. The same requirements for a point-of-presence within the United States found in subsections 103(a)(1), and (2), and 103(g) are also required here.

The need for further clarity here lies in the nature of packet-switched networks. Packetized communications may contain a variety of addressing, routing and related information and convey a variety of services. Much of this information merely passes through a network access carrier's system without being "read" or otherwise detected by the network equipment, because the information is contained in a different "layer" and may be formatted using a different protocol from the one the carrier's network uses to transmit communications. E-mail to/from addresses are an example in some situations. Isolating this type of pass-through information requires extracting it from packets using specialized filtering devices or other processes. A commercial example of such an extraction capability is "Etherpeek."

Extraction of communication-identifying information for specific services not provided by the communications carrier is considered costly and technically difficult by the industry. The amendments address industry concerns by continuing to impose the existing legal standard upon network access carriers that they isolate only "reasonably available" information, which under the modified version of section 103(a)(2), would include (but not be limited to) the information a carrier "uses" to route information. This is a requirement that a carrier should be able to meet without undue burden. This provision further requires a network access carrier to isolate the subject's entire packet stream. These amendments would not require such carriers to maintain the ability to extract particular types of packet streams (communications services) or other communication-identifying information carried within the packet stream that are not otherwise "reasonably available." It is not feasible to require network access carriers to maintain full extraction capabilities for services they do not control in a manner that is sufficiently accurate, reliable and up-to-date to properly meet the needs of law enforcement agencies. Additionally law enforcement agencies have obtained, or given additional resources could obtain, the technology (filtration techniques) to extract the authorized communications or communication-identifying information from the isolated packet stream. The development of such capabilities requires an ongoing maintenance and engineering research effort, because new communications protocols and technologies are constantly added to the marketplace. Hence appropriate resources will need to be allocated for this purpose.

The technology associated with law enforcement filtration techniques often requires regulation of the total flow of data through the law enforcement device. In order to keep this flow within manageable limits, some temporary storage or buffering may be necessary. Typically, it will be necessary for the carrier to maintain this type of storage for no longer than a

few hours before the buffer is emptied. For this reason, proposed section 103(e)(3) requires network access service carriers to be capable of storing communications and other information for a time period specified by the law enforcement agency as necessary to effectuate the interception or access. The provision does not expand nor limit any existing legal authority, under 18 U.S.C. § 2703(f) for example, for a law enforcement agency to require an entity to retain records.

#### **Section 104 - Amendments to Capacity Requirements**

CALEA requires carriers to provide for the capability to accommodate multiple simultaneous interceptions, pen registers, and trap and trace orders. The level of the capacity requirement is to be specified in a Notice issued by the Attorney General. *See, e.g.*, FBI Final Notice of Capacity, 63 Fed. Reg. 12218 (1998). The Notice also triggers a carrier's duty to comply with the capacity requirements. Since CALEA's enactment, carriers' systems have developed such that they usually are not limited in terms of the number of wiretaps, pen registers and trap and trace orders that they are able to accommodate at the same time. For example, the FBI-developed "dial-out solution," which permits intercepted communications to be delivered to a law enforcement agency via an ordinary telephone line, renders interception capacity largely a moot issue.

Since issuance of further notices of capacity may be unnecessary for law enforcement, the changes to Section 104(a) and (c), and the addition of a "minimum capacity" requirement of two simultaneous interceptions, pen registers and trap and trace orders for each of a carrier's switching, addressing, routing, or transmission facilities, is intended to make further capacity notices discretionary.

#### **Sections 105 and 229 - Amendments to System Security and Integrity Requirements and Commission Investigation and Enforcement Requirements**

CALEA's existing system security and integrity provision, Section 105, requires that interceptions within a carrier's switching premises be activated only in accordance with a court order or other lawful authorization and with the affirmative action of a carrier employee acting in accordance with Commission regulations. The Commission has adopted rules under this provision pursuant to its authority in CALEA Section 229(b). *See* 47 C.F.R. § 64.2100-.2106.

The amendments add to Section 105 a requirement that the carrier employee activating the interception must be "within the United States." This amendment addresses the increasingly common situations involving foreign-located carrier equipment or employees, and is consistent with the changes to Section 103 requiring a surveillance "point-of-presence within the United States." The amendment also mandates FCC adoption of rules under Section 229(b) directed toward surveillance security, including: (1) a 24/7 point-of-contact for law enforcement; (2) disclosure of the names and other identifiers for employees or other persons under a carrier's control upon law enforcement request; and (3) location of surveillance-assistance employees

within the United States. The first requirement is a codification of an existing FCC rule applicable to common carriers. *See* 18 U.S.C. § 64.2103(b)(4). The amendments will ensure application of such requirement to other carriers subject to CALEA, including but not limited to network access service providers and replacement telephone service providers. The second requirement is intended to provide a mechanism for enhancing the security of communications interceptions, by providing law enforcement agencies with an ability, if they deem it necessary to acquire information, regarding the backgrounds of carrier personnel involved with facilitating surveillance. This is intended to provide law enforcement agencies with minimal background information, while at the same time recognizing that requiring all carriers to conduct background investigations could impose an undue burden. The final requirement is addressed at providing further security for situations where a carrier maintains foreign-located facilities.

The changes to Section 229(c) and (d) of the Communications Act of 1934 are intended to provide the FCC with the authority and mandate to enforce provisions of CALEA. The amendment clarifies the existing requirement found in Section 229(c) for the Commission to "conduct such investigations as may be necessary to insure compliance by common carriers with the requirements of the regulations prescribed under this section." This authority would be in addition to the judicial authority, as described in Section 108 below.

#### **Section 106 - Cooperation Between Manufacturers and Carriers**

The bill does not change Section 106 except to add "routing" and "addressing" to the existing "transmission" and "switching."

#### **Section 107 - Safe Harbor Standards and Commission Rulemaking Authority**

Existing law in Section 107(a) of CALEA provides a carrier with a "safe harbor" for compliance with the requirements of Section 103, if it is in compliance with "technical requirements or standards" adopted by an industry association or standard-setting organization. Standards are engineering specifications and are often relied upon in the communications industry to establish interoperable systems. They are formed by committees comprised of representatives from various companies within the industry. Standards formed to meet CALEA requirements have legal significance in that, once adopted, the standards provide a "safe harbor" for a carrier's compliance with the assistance capability requirements.

Existing law under Section 107(b) provides a process by which the government, or other person, can petition the FCC for a determination that a standard is deficient. The Commission is authorized to establish by rule technical requirements or standards that meet four criteria specified in Section 107(b)(1) through (4), including: (1) meet the assistance capability requirements by cost effective methods; (2) protect privacy; (3) minimize the costs to residential ratepayers; and (4) encourage the provision of new technologies. The Commission may also provide a reasonable time and conditions for compliance with the new standard.

Although compliance with a standard is not mandated by CALEA, it is generally considered by the industry to be the preferred method of compliance because it is the only way to achieve the desirable assurance of a safe harbor. Two primary concerns are associated with the safe harbor provisions. First, the set of capabilities contained in an industry-adopted standard may be inadequate. Law enforcement's only recourse under current law is a time-consuming petition to the FCC; meanwhile, the industry-adopted standard is a safe harbor until the FCC says otherwise. This was the case with adoption of the J-STD-025, and the FBI's subsequent petition to the FCC to require the "punch list" capabilities. Second, industry associations in some cases delay the adoption of any standard at all, which can delay the development of surveillance solutions.

The amendments address these issues by (1) providing that, in the event that the AG files a petition for deficiency with regard to an industry-adopted standard, such standard would not become a safe harbor until approved or otherwise modified by the FCC; (2) ensuring the existence of a mechanism for the Attorney General to propose a standard which would become a safe-harbor after approval by the FCC, and to petition the FCC to adopt rules to satisfy Section 103 and determine coverage; (3) clarifying the criteria under which the FCC is to adopt such rules.

Currently even a deficient standard would arguably become a safe harbor immediately upon adoption by an industry organization, and remain so during the pendency of what could be a lengthy FCC proceeding. The amendments to Section 107(b) will preclude that occurrence when the AG seeks FCC review of a standard, until such time as the Commission either approves the standard or modifies it by adopting necessary rules. An industry-adopted standard will continue to accord safe-harbor status, as under current law, when the AG does not file a petition for FCC review of whether the standard is in compliance with the assistance capability requirements.

The revised Section 107(b) (now Section 107(b)(1)) makes clear that the FCC has authority to determine coverage and adopt rules to say what Section 103 requires as to a given service. The FCC could use this authority, among other things, to approve Attorney General-adopted standards, to approve or modify industry-adopted standards, or to adopt rules itself, for example, to declare that a particular technical capability is required by Section 103. The FCC would be obligated to respond to a petition (whether filed by industry or the Attorney General) within 180 days, but the Attorney General could further expedite such decision by certifying that emergency conditions exist. Section 107(b)(1)(C)(i)-(iv) retains, in amended form, the four criteria specified in existing Section 107(b)(1) through (4). However, the amendments provide that the Commission's rules must first "meet the assistance-capability requirements of Section 103" and, subject to meeting those requirements, should promote the use of methods that satisfy the four criteria, including cost-savings. The intent of this amendment is to ensure that the Commission's rules will first and foremost ensure the surveillance capability requirements, and that the other criteria will be satisfied through a consideration of alternative methods of meeting such requirements.



The provision in Section 107(b)(3) would also require the FCC to consult with the Attorney General as to the needs of law enforcement, public safety, and national security. This is warranted because the Attorney General is best suited to making such judgements. The Attorney General's analysis will likely continue to be provided to the industry through the publication of surveillance "needs documents," as is the FBI's current practice.

Section 107(c) currently gives the FCC authority to provide extensions to carriers who deploy or proposed to deploy equipment before "the effective date of Section 103." The effective date of Section 103 was 4 years after enactment of CALEA in 1998. The FCC has tentatively concluded that this provision applies only to pre-October 25, 1998 equipment. *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd. 15,676, 15725 ¶ 97 (2004). The changes to this Section would bar any further extensions for pre-1998 equipment beyond a date certain – set at one year after [the day before the bill is introduced], and requires a precise factual showing for any carrier still seeking an extension under this Section.

### **Section 108 - Amendments to Provisions Concerning Enforcement Orders**

Section 108 of the current statute requires a court to find, before issuing an enforcement order, that (1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information and (2) compliance with the requirements of CALEA is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken. This Bill revises each of those two criteria.

The amendments would allow consideration of the availability of alternative technologies only under Section 2522(a), in cases where a court has issued a surveillance order. The provision would allow a communications carrier to be found in compliance where alternative technologies or the facilities of another carrier are reasonably available to the law enforcement agency or officer seeking enforcement for the expeditious implementation of the authorized surveillance. The availability of such alternative technologies or facilities would not, however, be a defense to an action brought by the Attorney General under 18 U.S.C. § 2522(b), seeking an order directing that a communications carrier, a manufacturer of communications transmission or switching equipment or a provider of communications support services comply with CALEA.

The amendments would eliminate the provision in Section 108(a)(2) requiring that a court find that compliance with CALEA's requirements is reasonably achievable. The current provision could be interpreted as placing a burden of proof on the government to demonstrate that compliance is reasonably achievable in each enforcement action. The amendments are premised upon the fact that the statute's requirements are designed to be reasonable, and that Section 109(b) provides a mechanism for anyone subject to its provisions to seek relief in the

event that compliance is not reasonably achievable. A finding by the Federal Communications Commission pursuant to Section 109(b) that compliance is not reasonably achievable would remain a defense to an enforcement action pursuant to Section 108(c)(2). This amendment would also ensure that highly technical questions of reasonable achievability are decided by the Commission rather than by a court.

The Bill also amends Section 108(c)(3) to eliminate uncertainty regarding the meaning of “significantly upgraded” and, consistent with amendments to Section 109, to eliminate the exemption for pre-1995 equipment and facilities as of January 1, 2008.

### **Section 109 - Amendments to Provisions Concerning Payment of Costs**

The new Section 109(b)(1) makes clear that communications carriers are responsible for payment of all costs directly associated with any modifications they may need to perform in connection with equipment, facilities or services installed or deployed after January 1, 1995, to establish the capabilities necessary to comply with Section 103. The new Section 109(f) makes clear that a communications carrier is not permitted to include the costs of complying with this Act in any charges to any government agency or officer that such a carrier may submit to the government to cover its costs of complying with a particular surveillance order.

The amendments to Section 109(b)(1) (redesignated as Section 109(b)(2)) should help ensure that any petition to the Commission seeking a determination that compliance with this Act’s requirements is not reasonably achievable must include a detailed description and supporting documentation setting forth the technical modifications and related costs necessary to achieving compliance with respect to each service and requirement from which relief is sought. The amendments also make clear that the burden is on the communications carrier to show that relief is warranted. In order to reflect the importance of these determinations to both the industry and law enforcement, the Bill shortens the period for Commission action on the petition from the 1 year provided in the original enactment to 180 days. The additional changes to Section 109(b)(2) (redesignated as Section 109(b)(3)) provide that any FCC finding that compliance is not reasonably achievable shall permit an exemption from Section 103’s capability requirements for no longer than a period of two years, provided that the Attorney General may seek reconsideration at any time. Reconsideration is likely to be sought under circumstances of urgency; hence the Commission’s decision is required to be made within 90 days.

Section 109(d) of the current statute provides that pre-1995 equipment need not be brought into compliance with Section 103’s assistance-capability requirements unless the Attorney General agrees to pay the costs of such an upgrade or until such time as the equipment “is replaced or significantly upgraded” or “undergoes major modification.” This Bill eliminates the “significantly upgraded” and “major modification” provisions, which have proven difficult to apply, and sets a firm cutoff date of January 1, 2008, after which this exception will no longer be available to such carriers.

### **Amendments to Title 18, United States Code**

Section 2522 of Title 18, United States Code, provides for enforcement of CALEA's provisions. This Bill makes technical amendments to Section 2522(a) to make explicit that enforcement of CALEA is available in contexts where a court has authorized a pen register or trap and trace device under the Foreign Intelligence Surveillance Act of 1978.

The Bill also adds language to Section 2522(a), Section 2518(4), and Section 3124(f) to clarify that assistance to law enforcement required by CALEA is in addition to, and not a substitute for, the general assistance duty required of any person pursuant to an order issued under Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2510, et seq.) or the Pen/Trap Statute (18 U.S.C. § 3121, et seq.).

The Bill further amends Sections 2518(4) and Section 3124(c) to require that any expenses for which a communications carrier seeks reimbursement from law enforcement be itemized. This change helps implement the clarifications to Section 109 that ensure that a communications carrier is responsible for, and may not charge the government for, the costs of bringing its equipment into compliance with CALEA.

Section [X.1] sets forth an anti-liability provision for CALEA compliance that is similar to and based on the language that is currently found in Title III and the Pen/Trap Statute at 18 U.S.C. §§ 2511(2)(a)(ii), 3124(d). The new CALEA-specific language may be added to CALEA, or the provision may be incorporated into the cited sections of Title III and the Pen/Trap Statute. The amendment would provide carriers with further assurances that compliance with any provision of CALEA could not subject the carrier to civil liability. Carriers have at times argued that implementing surveillance capabilities could subject them to liability. This amendment could therefore promote compliance.

### **Amendments to the Communications Act of 1934**

Section 229 of the Communications Act of 1934 [47 U.S.C. § 229] requires the Commission to make rules to implement CALEA generally, and specifically to require carriers to establish policies and procedures to protect the security and integrity of their systems, and to conduct investigations as to CALEA compliance. Most of the amendments to Section 229 are explained above with regard to Section 105.

The Bill further adds a new subsection (g) to Section 229 to require the Commission to inquire into and consider a carrier's non-compliance with CALEA and to consider such non-compliance to be a factor weighing against any determination that any relief sought by such carrier under the Communications Act is in the public interest.