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## TELECOMMUNICATIONS LAW UPDATES

### FCC ADOPTS RULES ON CARRIER WIRETAP ASSISTANCE

On March 15, 1999, the Federal Communications Commission ("FCC") released new rules that, for the first time, regulate what carriers must do when they receive a wiretap request from a law enforcement agency.<sup>1</sup> This is the first set of rules issued by the FCC pursuant to the Communications Assistance for Law Enforcement Act ("CALEA"), which Congress enacted in 1994. The rules are, by and large, a victory for carriers. At the FBI's prompting, the FCC had proposed imposing extensive and burdensome requirements on carriers. In the end, the FCC retreated from many of those proposals. Nonetheless, carriers now must adopt written policies and procedures for their support of electronic surveillance, and those policies must be filed with the FCC this fall, possibly as soon as October.

Congress enacted CALEA in 1994 in response to concerns that technological advances in telecommunications were outstripping law enforcement's ability to conduct electronic surveillance. Although the thrust of CALEA is to ensure that carriers design and build their networks to include capacity and capabilities for electronic surveillance, CALEA also imposes new obligations regarding *how* carriers are to implement requests for surveillance.

Specifically, section 105 of CALEA requires telecommunications carriers to ensure that electronic surveillance is conducted on carrier premises only (1) pursuant to court order or "other lawful authorization," and (2) with the "affirmative

intervention" of a carrier officer or employee. Section 229 of the Communications Act grants the FCC general authority to promulgate rules to implement CALEA and gives the FCC specific directions regarding how to implement section 105. Section 229 also directs the FCC to review carriers' electronic surveillance policies and authorizes the FCC to punish any violation of these policies or the FCC's new rules in the same manner as it punishes violations of other FCC rules.

The FCC's recent order implements sections 105 and 229 by adopting several rules. Among the most important is a requirement that two types of authorization be present before a carrier employee implements an order for electronic surveillance: under the carrier's own internal procedures ("internal authorization"), *and* by an appropriate court order or certification ("external authorization").

Carriers appear to have broad flexibility in devising what *internal authorization* an employee must have. The new regulations define "appropriate carrier authorization" simply as the "policies and procedures" that a carrier adopts to supervise its employees conducting electronic surveillance. The FCC has generally provided little guidance about the content of those policies, and different policies may be appropriate for different types of carriers. It is clear, however, that carriers must impose some policies spelling out how employees should handle a court order or other lawful authorization for electronic surveillance. Furthermore, it is important

that employees be made aware of the policies and consistently follow them: Section 229 authorizes the Commission to impose penalties for employee violations of “any policy or procedure adopted by a common carrier pursuant to” section 229.

Turning to the *external authorization* requirement, when a carrier is presented with a court order ostensibly authorizing electronic surveillance, the FCC’s rules require the carrier to determine only whether the document “is what it purports to be.” Thus, the FCC rules do not require the carrier to determine whether the law enforcement agency actually has legal authorization to conduct electronic surveillance, but only whether the court order presented by that agency is facially valid. Carriers also must appoint a senior officer or employee as a “point of contact” for law enforcement, and this employee must be available on a daily, around-the-clock basis. Carriers’ surveillance policies must describe how a law enforcement agency can contact these employees and must specify the duties and obligations of these employees.

In addition to imposing authorization requirements, the FCC’s new rules require carriers to report any incidents of unlawful electronic surveillance or compromises of electronic surveillance. Carriers must report such incidents to affected law enforcement agencies “within a reasonable time upon discovery.”

Carriers also are now required to compile a set of records detailing their electronic surveillance activities. For each surveillance, carriers must complete a “certification” containing various

descriptive information about the surveillance. This must be completed within a reasonable time after the beginning the surveillance and must be signed by the carrier employee overseeing the surveillance. Carriers are required to retain their records of *authorized* call content interceptions for “a reasonable period of time” to be determined by each carrier. For *unauthorized* call content interceptions and for all interceptions involving call-identifying information (e.g., a pen register investigation), carriers must retain their records for ten years. As currently drafted, the FCC’s record-retention rules appear to require carriers to retain the actual contents of each interception. A number of parties, however, have already notified the FCC that carriers do not have legal authority to acquire such information, much less to maintain records of it. These parties have suggested that the FCC modify its rules accordingly, but the agency has yet to take any action on these requests.

Finally, the FCC’s rules require all carriers — regardless of size — to submit their surveillance policies to the FCC for review and to modify their policies if the agency determines them not to be in compliance with its regulations. Carriers will have 180 days to file their policies after the new FCC rules are published in the *Federal Register*. The FCC has indicated that the new rules should be published soon, which would give carriers until sometime in October or November to make their filings.

<sup>1</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Report and Order, FCC 99-11 (rel. March 15, 1999).

**This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:**

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