

**Model Act to Permit Continued Access
by Law Enforcement to
Wire & Electronic Communications**

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Model Act to Permit Continued Access by Law Enforcement to Wire and Electronic Communications Policy Statement

The nation's various telecommunications systems are often used in the furtherance of serious and sometimes violent criminal activities including illegal drug trafficking, organized crime, terrorism, kidnapping and extortion. One of the most important and effective tools in the investigation of these crimes by federal, state and local law enforcement agencies is the court authorized interception of communications.

The telecommunications industry, which has relied on the same analog technology for approximately 50 years, is now rapidly moving to more advanced telecommunications systems and fundamentally different technology, i.e., personal communication networks, advanced cellular, and integrated services digital networks. These new technologies have the capacity for high speed, simultaneous transmission of multiple, comingled communications.

Advances in technology continue to complicate law enforcement's ability to effect lawful court orders to intercept electronic communications. In some cases, advanced cellular technology and new digital features have already frustrated orders, thereby allowing criminals to circumvent detection by law enforcement.

These technologies inadvertently hamper the ability of law enforcement to investigate crimes and protect the public. These new telecommunications systems frequently transmit multiple communications through a single "wire" thereby preventing law enforcement from discerning the target communication from others simultaneously transmitted. This was not a problem with the old analog technology because every communication was distinct and identifiable and could be accessed at several points within the network. Without modifications to systems software and in some cases, hardware, the telecommunications systems of this country will no longer be able to accommodate access by law enforcement to conduct electronic surveillance. If the legitimate needs of law enforcement were considered during the design and development phases of these new systems, the systems could continue to provide law enforcement access to the types of communications presently available.

The Model Act relies on the telecommunications industry to develop technical solutions which will ensure that telecommunications technology continues to meet the needs of law enforcement while remaining cost effective. The Model Act simply requires the telecommunications service providers, when served with a court order, to be able to identify and provide the entire content of specific telephone conversations to the exclusion of all others, regardless of the technology involved.

The Model Act also ensures that all providers of telecommunications services remain on the same competitive “level playing field” by requiring all telecommunications service providers ultimately to use systems that take into consideration both the legitimate need for law enforcement to access criminal conversations and the intense competitive demands of the market place.

In 1968, Congress carefully considered and passed the Omnibus Crime Control and Safe Streets Act which set forth a meticulous procedure by which law enforcement can obtain judicial authorization to conduct electronic surveillance. This law was enacted after Congress exhaustively debated the government’s need to effectively address serious and often violent criminal conduct against an individual’s right to privacy. Nothing in the model act seeks to change or enhance this authority or procedure. The 1968 law requires the telecommunications industry to provide the “technical assistance necessary to accomplish the interception.” The model act clarifies the duties of the telecommunications industry in responding to court orders and assisting law enforcement in the face of advances in digital telephony technology.

Highlights of the Model Act to Permit Continued Access by Law Enforcement to Wire and Electronic Communications

PRESERVES CURRENT ABILITY TO ACCESS CRIMINAL CONVERSATIONS UNDER NEW TELECOMMUNICATIONS SYSTEMS

- Establishes the responsibilities of electronic communication service providers and private branch exchange operators to provide law enforcement with the technical assistance necessary to conduct the lawful interception of communications.
- Ensures that law enforcement's continued ability to conduct intercepts is not impeded by current to emerging telecommunications technologies.

ASSISTANCE REQUIREMENTS

- Requires real time and identical communication signals as transmitted to or by the individual(s) named in the court order.
- Requires isolation of all communication signals and services directed to and/or from the subject of the intercept to the exclusion of all other users who are not the subject of the lawful interception.
- Authorizes interception availability at a monitoring facility remote from the target of the court order and separate from the facility of the communications service provider.

- Provides access without detection by the subject of the interception or any other subscriber.
- Provides access without degradation or interruption of the subscriber's telecommunications service.

IMPLEMENTATION ISSUES

- Requires providers of electronic communications services within the public switched network, such as local exchange carriers, interexchange carriers, cellular carriers, etc., to ensure that their systems comply with these requirements within 18 months of enactment into law.
- Requires private branch exchange operators to ensure that their systems comply with these requirements within three years of enactment into law.
- Provides the attorney general with the authority to grant exemptions to these requirements as well as exceptions to the implementation deadlines.
- Provides the attorney general specific authority to seek civil penalties and injunctive relief to enforce the provisions of this law.

Model Act to Permit Continued Access by Law Enforcement to Wire and Electronic Communications

Section 1. Short Title.

This [Act] shall be known and may be cited as the “Model Continued Law Enforcement Access to Communications Act.”

Section 2. Legislative Findings.

(a) Telecommunications systems and networks are often used in the furtherance of criminal activities including organized crime, racketeering, extortion, kidnapping, and trafficking in illegal drugs.

(b) Recent and continuing advances in telecommunications technology, and the introduction of new technologies and transmission modes by the telecommunications industry, have made it increasingly difficult for government agencies to implement lawful orders or authorizations to intercept wire and electronic communications, and thus threaten the ability of such agencies effectively to enforce the laws and protect the public safety.

(c) The assistance and cooperation of providers of electronic communications services and private branch exchange operators is necessary due to the introduction of new technologies and transmission modes into telecommunications systems without consideration and accommodation of the need of government agencies lawfully to intercept wire and electronic communications, so that the ability of such agencies effectively to carry out their responsibilities for the public safety will not be impeded.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goal and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) (“entitled at least to great respect”).

Law enforcement agencies are at a distinct disadvantage in this new age of technology in the telecommunica-

tions industry. The use of new types of transmissions in furtherance of criminal activities creates difficulties for law enforcement agencies to obtain and comply with lawful orders and authorizations to intercept these transmissions.

The new technologies pose problems for law enforcement agencies because the agencies are unable to provide the content of communications targeted by the court order, to the exclusion of all other communications by persons not engaged in criminal conduct. The old analog technology avoided this problem because each communication was distinct, identifiable, and could be accessed within the network.

In order for law enforcement agencies to fulfill their responsibilities, providers of electronic communication services and private branch exchange operators must assist the agencies by developing solutions to the problems of lawfully intercepting wire and electronic transmissions.

Section 3. Purpose.

The purpose of this [Act] is to ensure that providers of wire and electronic communication services and private branch exchange operators provide government agencies the necessary assistance to implement lawful court orders or authorizations to intercept wire and electronic communications. Nothing in this [Act] is intended to expand or reduce (1) the authority of the government to lawfully intercept the content of communications; or (2) any criminal penalties for unlawfully intercepting the content of communications.

COMMENT

This [Act] ensures continuing access by law enforcement agencies to the contents of wire and electronic communications as that technology develops and changes.

Section 4. Definitions.

As used in this [Act]:

- (a) "Communication" means any wire or electronic communication as defined in 18 U.S.C. §2510(1) and §2510(12).
- (b) "Government" means the government of the United States and any agency or instrumentality thereof, any state or political subdivision thereof, the District of Columbia, and any commonwealth, territory or possession of the United States.
- (c) "Intercept" shall have the same meaning as set forth in 18 U.S.C. §2510(4).
- (d) "Provider of electronic communication service" or "private branch exchange operator" means any service or operator, except the federal government or agency thereof, which provides to users thereof the ability to send or receive wire or electronic communications.

COMMENT

This section defines how four terms used frequently in the [Act] should be interpreted. These definitions should eliminate ambiguities and ensure uniform interpretations of the defined terms.

Section 5. Compliance.

- (a) Providers of electronic communication services and private branch exchange operators shall provide within the state capability and capacity for the government to lawfully intercept wire and electronic communications:
 - (1) concurrent with the transmission of the communication to the recipient of the communication;
 - (2) in the signal form transmitted by the electronic communication services provider or private branch exchange operator that represents the content of the communication between the subject of the intercept and any individual with whom the subject is communicating, exclusive of any other signal representing the content of the communication between any other subscribers or users of the electronic communication services provider or private branch exchange operator, and including information on the individual calls, including origin, destination and other call set-up information, and services, systems, and features used by the subject of the interception;

(3) notwithstanding the ability of the subject of the intercept or the use by the subject of the intercept of any features of the telecommunication system, including, but not limited to, speed-dialing or call forwarding features;

(4) at a government monitoring facility remote from the target facility and remote from the system of the electronic communication services provider or private branch exchange operator;

(5) without detection by the subject of the intercept or any subscriber: and

(6) without degradation of any subscriber's telecommunications service.

(b) Providers of electronic communication services within the public switched network, including local exchange carriers, cellular service providers, and interexchange carriers, shall comply with subsection (a) of this section within [eighteen months] from the date of enactment of this [Act].

(c) Providers of electronic communication services outside of the public switched network, including private branch exchange operators, shall comply with subsection (a) of this section within [three years] from the date of enactment of this [Act].

COMMENT

Section 5(a) requires the providers of electronic communications services and private branch exchange operators to provide the government, when the government is authorized by law, with the ability to intercept wire and electronic communications at the same time as the person who receives the transmission in order to give law enforcement agencies the latest and most current information without delay.

The interception should be in the original signal form to avoid confusion or misinterpretations of information. These interceptions should also be exclusive of any other user of the providers' services in order to lawfully comply with court orders.

In addition to the content of the communications, the government should have access to information regarding the origins, destinations, set ups, etc. of specific calls as well as information about the extent of the services and systems employed by the subject.

For the sake of convenience and to frustrate any detection, the government should be able to intercept communications at its own facility apart from the subject's

and provider's facilities. The interception should also not be hampered by any of the services provided by the telecommunication provider to the subject. From the subject's end, the interception should be absolutely undetectable. The subject's telecommunication service should not suffer in quality or be disrupted.

Subsections (b) and (c) discuss the deadlines for compliance with the [Act] for various services. Carriers are differentiated by whether they are within or outside the public switched networks, and have different compliance deadlines respectively.

Section 6. Attorney General's Authority.

(a) The attorney general, after consultation with the appropriate state agencies which regulate providers of electronic communications services and private branch exchange operators, may except from the application of any part or all of Section 5 classes and types of providers of electronic communication services and private branch exchange operators. The attorney general may waive the application of any or all of Section 5 at the request of any provider of electronic communication services or private branch exchange operator.

(b) The attorney general shall have exclusive authority to enforce the provisions of Section 5. The attorney general may apply to the [appropriate state court] for an order restraining or enjoining any violation of Section 5. The [appropriate state court] shall have jurisdiction to restrain and enjoin violations of subsection (a) of this section.

COMMENT

The attorney general has the sole authority to grant exceptions from the statute and to enforce its penalties by way of injunction or through a fine.

Section 7. Penalties.

Any person who intentionally violates Section 5 of this [Act] shall be subject to a civil penalty of [\$10,000] per day for each day in violation. The attorney general may file a civil action in the [appropriate state court] to collect, and the [appropriate state court] shall have jurisdiction to impose such fines.

Section 8. Severability.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 9. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date][reference to specific date].