

FACT SHEET

Barriers to Electronic Evidence Collection & Potential Solutions

Prior to any action on HR 699 or similar bills, Congress should also give full consideration to the lesser-known challenges that constrain access to electronic evidence by law enforcement during the course of investigations. Some examples of non-technical barriers that we encounter every day include:

- Erratic intake of orders and subpoenas (there is no standard process for submitting law enforcement requests or receiving provider responses, so it varies widely depending on the provider);
- Delayed responses and otherwise unpredictable timelines for response (there are no rules or standards governing response times by providers);
- Inaccurate responses (e.g. provider incorrectly asserts that there is no record of an account holder);
- Incomprehensible or imprecise responses (specialized skills are required for interpreting certain evidence returned by providers); and
- Prohibitively expensive responses (providers usually charge law enforcement for the time and effort required to provide the requested evidence, but there are no rules or standards across industry for setting rates).

Improvements that should be considered include:

- Ensure that probable cause orders in the electronic world are executed with the same expectations as probable cause orders in the physical world, where law enforcement has the ability to be present and participate in the execution of the order in some reasonable way.
- Enhance public accountability by service providers and the government by requiring transparency and reporting regarding the number, type, and outcome of court orders and other legal process. This can be enabled by putting in place standardized electronic submission systems that can account for and provide reporting on how often process is served on service providers. This can augment what some providers are already producing through voluntary “transparency reports.” It can also provide transparency around how long it takes for providers to respond to probable cause warrants and other legal process, and the aggregate amounts paid by taxpayers to service providers to obtain evidence in criminal investigations. Such a system could replace existing fax-based transmission systems and offer acknowledgement of the receipt of an order, status updates on the processing of an order, a method for dialogue during the execution of the order, authentication of the lawful authority and source address/return address of the information sought pursuant to the order, certification of the response, warrant return, and inventory and encryption of the response to ensure confidentiality of the compelled disclosure.
- Ensure more consistent and accurate responses by service providers to legal process, including a requirement that each service provider maintain an agent for service of legal process in every state. This will help investigators efficiently serve their process and generate higher-quality leads

and reduce errors such as “no responsive information” responses returned to law enforcement when in fact records do exist in a provider’s systems.

- Treat emergency situations with the level of attention and thoroughness they deserve by changing the current *voluntary* response posture of the service providers with a requirement to provide response. The current practice fails to meet the needs and responsibilities of law enforcement and certainly fails to meet the expectations of crime victims and their families. The determination of an emergency or a circumstance requiring an exigent response should not provoke a debate between the affected agency and the network service provider. Providers should be required to release certain evidence to law enforcement if the requesting agency can *certify* that an emergency exists that meets the applicable law(s).
- Ensure that the definition of an emergency is brought into line with what the public expects. The definition should go beyond the outlines of “[grave and] imminent threat of death or serious physical injury” - a definition offered in the Wiretap Act. Circumstances that are described as “exigent” in nature should compel the same LE response that is accorded to the present definition of imminent threat of death or serious physical injury. Certain specific situations should be reflected in the law as clear emergencies.
- Improve the process by which service providers charge fees for compliance with legal process. Several models could be adopted that would ensure more standardization of rates, providing more transparency and more predictability for both industry and law enforcement.
- Ensure that evidence is available when needed with appropriate legal authorization. Consideration should be given to developing standardized retention schedules across the communications and information service provider spectrum to the greatest extent possible.

The preceding ideas should be part of any discussion about updating Federal law to bring ECPA into the 21st Century, because the standard of proof required to collect evidence is only relevant if law enforcement has meaningful access to that evidence in the first place.