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## **Surveillance**

### **Draft Proposal Would Pressure Web Firms To Be Ready for Wiretap Orders, Sources Say**

*by Alexei Alexis*

The Obama administration is developing a legislative proposal aimed at pressuring U.S. internet firms to be technologically ready to comply with government wiretap orders, sources told BNA April 29.

A draft proposal developed by the FBI and other agencies would update the federal Wiretap Act to establish tough monetary penalties for electronic communications providers, including internet firms such as Facebook Inc., that fail to comply with court-approved surveillance orders, according to former law enforcement officials who are familiar with the effort.

“This is not about expanding what can be wiretapped or the standard for obtaining a wiretap, but making sure that companies that are already subject to wiretap orders are ready to comply,” one source told BNA. “The only thing this changes is the economic incentive for companies to develop technical solutions to facilitate wiretaps.”

A spokesman for the FBI confirmed that it is part of an interagency group considering legislation to address a “growing dark” problem facing the law enforcement community, which involves gaps in the government's ability to intercept electronic communications that are increasingly occurring over the internet. The FBI spokesman said he could not provide further details on the effort.

#### **Existing Law Fails to Cover Key Businesses**

The 1994 Communications Assistance to Law Enforcement Act (CALEA) requires telecommunications carriers to build electronic surveillance capabilities into their networks for law enforcement purposes. **However, communications are increasingly being handled by companies that are not covered by the statute, according to Paul Tiao, a partner at Hunton & Williams LLP, who recently left the FBI after serving several years as senior counselor for cybersecurity and technology to the agency's director, Robert S. Mueller.**

**“With the explosion in internet-based communications during the last 15 years, law enforcement agencies have become concerned about a growing gap between legal**

**authorities and technical capabilities that makes it difficult for them as a practical matter to gain access to the communications of dangerous actors, even though they have a court order to do so,” Tiao told BNA. “Many companies are able to comply with the court orders and deliver the communications of terrorists, foreign spies, child porn distributors and other criminal actors in a timely fashion, but the government is concerned that compliance is not consistent across industry. The key is to address this issue without undermining American competitiveness or innovation.”**

### **CALEA Rewrite Abandoned**

Last year, the administration came under fire following reports that it was circulating a draft proposal to expand CALEA by requiring major web companies such as Facebook and Google Inc. to make their services wiretap-friendly (95 PRA, 5/17/12).

A source familiar with the current approach told BNA that it is mainly focused on Wiretap Act changes, which might be more palatable than trying to rewrite CALEA to cover internet communications.

“I think there was a recognition that trying to rewrite CALEA to address other forms of communication was a political non-starter,” the source said. “That option was heavily debated and was ultimately abandoned in favor of the proposed Wiretap Act changes.”

The new draft would establish a new enforcement mechanism under the Wiretap Act that would enable judges to impose “fairly substantial” fines on companies that fail to comply with a court-approved surveillance order, the source said.