

newer telecommunications carriers may be among those telecommunications carriers least able to meet CALEA requirements, because smaller and newer telecommunications carriers may lack the resources of larger telecommunications carriers. We seek proposals that will enable us to ensure that CALEA's objectives are fully met while, at the same time, not imposing any unnecessary burdens upon those entities that are least able to meet them.

37. Section 403 of the Communications Act¹²⁵ empowers the Commission to require that carriers provide their policies and procedures, and records related to electronic surveillance policies and procedures if, in the Commission's discretion, such production is warranted to ensure compliance with Section 229(b)(3). We further note that Section 503(b) of the Communications Act¹²⁶ specifies penalties for violations by common carriers of Commission Rules, and that Section 1.80 of the Commission's Rules¹²⁷ specifies procedures in forfeiture proceedings. We request comment as to whether the procedures and penalties that are specified in those provisions should be applied to all entities that are subject to CALEA.¹²⁸ We also request comment on the date by which carriers should be required to file their initial procedures and certifications with the Commission. We tentatively conclude that 90 days from the effective date of the rules adopted in this proceeding should be sufficient for carriers to complete their preparations and file with this Commission. We request comment on this tentative conclusion. In addition, we recognize that as technological advances occur and as companies merge or are divested, that there will be a continuing need to update systems security procedures. We request comment on the time that carriers should have preceding, and following, a merger or divestiture to make a new filing or filings.

38. Although Section 229 of the Communications Act uses the term "common carrier,"¹²⁹ after reviewing the statutory scheme as a whole, we tentatively conclude that Congress intended CALEA security rules to apply to all telecommunications carriers, as that term is defined by Section 102(8) of CALEA.¹³⁰ Section 229(b) is designed to implement the systems security and integrity requirements of Section 105 of CALEA. Section 105

¹²⁵ 47 U.S.C. § 403.

¹²⁶ 47 U.S.C. § 503(b).

¹²⁷ 47 C.F.R. § 1.80.

¹²⁸ Parties who conclude that the penalties specified at 47 U.S.C. § 503(b) or the procedures specified at 47 C.F.R. § 1.80 should not be used should recommend penalties and procedures that, in their view, would be more consistent with CALEA and its legislative history.

¹²⁹ See 47 U.S.C. §§ 229(b) - (e).

¹³⁰ 47 U.S.C. § 1001(8).

explicitly imposes security obligations upon telecommunications carriers.¹³¹ We therefore tentatively conclude that Section 105 of CALEA and Section 229 of the Communications Act are to be read consistently, and that the rules promulgated pursuant to Section 229 shall apply to all telecommunications carriers as defined by CALEA and clarified in this rulemaking proceeding. We seek comment on this tentative conclusion.

C. JOINT BOARD

39. Section 229(e)(3) of the Communications Act requires the Commission to "convene a Federal-State joint board to recommend appropriate changes to part 36 of the Commission's rules with respect to recovery of costs pursuant to charges, practices, classifications, and regulations under the jurisdiction of the Commission."¹³² Part 36 of the Commission's rules addresses the separation of costs and revenues recorded in the accounts specified in Part 32 among the federal and state jurisdictions. The Commission issued a Notice of Proposed Rulemaking that addresses the impact of CALEA upon Part 36 and convened a joint board to address the issues that are identified in Section 229(e)(3) of the Communications Act. Interested parties are encouraged to review and respond to the issues raised therein.¹³³

D. ADOPTING TECHNICAL STANDARDS

1. Background

(a) Section 103 of CALEA

40. Section 103 of CALEA requires telecommunications carriers to ensure that their equipment, facilities, and services will meet four functional, or assistance capability, requirements that enable law enforcement to conduct authorized electronic surveillance.¹³⁴ First, a telecommunications carrier must be capable of expeditiously isolating, and enabling the government to intercept, all wire and electronic communications within that carrier's network to or from a specific subscriber of such carrier.¹³⁵ Second, the carrier must be

¹³¹ See 47 U.S.C. § 1004.

¹³² 47 U.S.C. § 229(e)(3).

¹³³ Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, FCC 97-354, CC Docket No. 80-286 (adopted Oct. 2, 1997).

¹³⁴ 47 U.S.C. § 1001.

¹³⁵ 47 U.S.C. § 1002(a)(1).

capable of rapidly isolating, and enabling the government to access, call-identifying information that is reasonably available to the carrier.¹³⁶ With respect to information acquired solely through pen registers or trap and trace devices,¹³⁷ the call-identifying information cannot include any information that may disclose the physical location of the subscriber, except to the extent that the location may be determined by the telephone number alone.¹³⁸ Third, a carrier must be capable of delivering intercepted communications and call-identifying information to a location specified by the government, other than the premises of the carrier.¹³⁹ Fourth, a carrier must be capable of conducting interceptions and providing access to call-identifying information unobtrusively.¹⁴⁰ Carriers must protect the privacy and security of communications and call-identifying information not authorized to be intercepted, as well as information concerning the government's interception of the content of communications and access to call-identifying information.¹⁴¹

(b) Section 107 of CALEA

41. Section 107 of CALEA contains a safe harbor provision, stating that a carrier, a manufacturer of telecommunications transmission or switching equipment, or a provider of telecommunications support services will be deemed in compliance with CALEA's capability requirements if it complies with publicly available technical requirements.¹⁴² An industry association or a standards-setting organization will set these standards.¹⁴³ The Attorney General must consult with the industry and standards-setting organizations, with representatives of users of telecommunications equipment, facilities, and services, and with State utility commissions, "to ensure the efficient and industry-wide implementation of the

¹³⁶ 47 U.S.C. § 1002(a)(2). See *supra* note 30 for a description of call-identifying information.

¹³⁷ See *supra* note 2 for a description of pen registers and trap and trace devices.

¹³⁸ 47 U.S.C. § 1002(a)(2)(B).

¹³⁹ 47 U.S.C. § 1002(a)(3).

¹⁴⁰ 47 U.S.C. § 1002(a)(4).

¹⁴¹ *Id.*

¹⁴² 47 U.S.C. § 1006(a)(2). As part of their effort to comply with CALEA's capability and capacity requirements, telecommunications carriers are to consult with manufacturers of their transmission and switching equipment and their providers of telecommunications support services. *Id.* at § 1005(a). Such manufacturers and providers are to cooperate with the telecommunications carriers in that effort. *Id.* at § 1005(b).

¹⁴³ 47 U.S.C. § 1006(a)(2).

assistance capability requirements.¹⁴⁴ The absence of industry standards however, does not relieve a carrier of its assistance capability obligations.¹⁴⁵

42. Under Section 107 of CALEA, if technical requirements or standards are not issued, or if any person believes any standards issued are deficient, that party may petition the Commission to establish such requirements or standards.¹⁴⁶ The Commission may, therefore, establish technical standards or requirements in only two situations: (1) if industry or standard-setting organizations fail to issue such requirements; or (2) if a government agency or any other person believes that any standards issued are deficient.¹⁴⁷ The Commission may commence a rulemaking proceeding upon the petition of a government agency or other person.¹⁴⁸ Technical standards or requirements established by the Commission must:

- meet the assistance capability requirements of Section 103 of CALEA by cost effective methods;
- protect the privacy and security of communications not authorized to be intercepted;
- minimize the cost of such compliance on residential ratepayers;
- serve the policy of the United States of encouraging the provision of new technologies and services to the public; and
- 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 of CALEA during any transition period.¹⁴⁹

(c) **Section 229 of the Communications Act**

43. Section 301(a) of CALEA, 47 U.S.C. § 229(a), requires the Commission to "prescribe rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act." Section 229, therefore, grants the Commission authority to establish technical standards or requirements to implement CALEA. In addition,

¹⁴⁴ 47 U.S.C. § 1006(a)(1).

¹⁴⁵ 47 U.S.C. § 1006(a)(3)(B).

¹⁴⁶ 47 U.S.C. § 1006(b).

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Id.

Section 107(b) of CALEA, 47 U.S.C. § 1006(b), requires the Commission to act on a petition from a manufacturer, carrier, or government agency or any other person that believes it has been aggrieved by the industry standards-setting process.

2. Proposals

44. A subcommittee of the Telecommunications Industry Association (TIA) has, since early 1995, been working to develop a technical standard for the assistance capability envisioned by CALEA. This effort has included participation by industry and law enforcement. Earlier this year, a proposed standard was considered by TIA for approval as a national standard. The balloting procedure of this organization resulted in many detailed comments. As a result, the proposed standard was revised,¹⁵⁰ and submitted for parallel balloting by TIA and the American National Standards Institute (ANSI). The comment period associated with that balloting process expires on October 28, 1997. In the meantime, on July 16, 1997, the Cellular Telecommunications Industry Association (CTIA) filed a petition with the Commission to "promulgate by rule, the industry consensus document, attached hereto as Exhibit 1,¹⁵¹ as the technical standard for the assistance capability requirements of Section 103 of CALEA, 47 U.S.C. § 1004"¹⁵² (footnotes added). In addition, CTIA recommends that the Commission allow a period of two years from the date the Commission establishes the technical standards for implementation, which would postpone the October 25, 1998 implementation deadline set forth in CALEA.¹⁵³ On August 11, 1997, the Center for Democracy and Technology and the Electronic Frontier Foundation filed comments in response to CTIA's Petition.¹⁵⁴ Our intention in this proceeding is to focus on obligations assigned specifically to the Commission by CALEA, and we will address CTIA's Petition, including CTIA's request for an extension, separately. Based on the ongoing nature of the standard-setting process, we conclude that it would be inappropriate at this time for us to address technical capability standards issues. Nothing in this Notice should be construed as evidence of any predisposition on the part of the Commission regarding capability standards, and we encourage the industry and law enforcement community to continue their efforts to

¹⁵⁰ TIA/EIA SP 3580A, Lawfully Authorized Electronic Surveillance, July 28, 1997.

¹⁵¹ TIA/EIA SP 3580, Lawfully Authorized Electronic Surveillance, July 15, 1997.

¹⁵² In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking, CTIA Petition (Jul. 16, 1997), at 2.

¹⁵³ See paragraph 49, *infra*, for a discussion on the compliance date.

¹⁵⁴ In the Matter of Implementation of the Communications Assistance for Law Enforcement Act, Comments on Petition for Rulemaking of the Center for Democracy and Technology and the Electronic Frontier Foundation (response to July 16, 1997 Petition of the Cellular Telecommunications Industry Association) (August 11, 1997).

develop the necessary requirements, protocols and standards.

E. REQUESTS UNDER THE "REASONABLY ACHIEVABLE" STANDARD

1. Background

45. Under Section 109 of CALEA, telecommunications carriers or any other interested person may petition the Commission to determine whether requiring equipment, facilities, or services deployed after January 1, 1995 to comply with CALEA's Section 103 capability requirements is "reasonably achievable."¹⁵⁵ The Attorney General must be notified of the petition, and the Commission must make a determination under the reasonably achievable standard within one year after the date such a petition is filed.¹⁵⁶ When considering any such petition under the reasonably achievable standard, "the Commission shall determine whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems."¹⁵⁷ Factors to be considered by the Commission in determining whether compliance with the assistance capability requirements of Section 103 is reasonably achievable include the following:

- The effect [of compliance] on public safety and national security;
- The effect [of compliance] on rates for basic residential telephone service;
- The need to protect the privacy and security of communications not authorized to be intercepted;
- The need to achieve the capability assistance requirements of Section 103 by cost-effective methods;
- The effect [of compliance] on the nature and cost of the equipment, facility, or service at issue;
- The effect [of compliance] on the operation of the equipment, facility, or

¹⁵⁵ 47 U.S.C. § 1008(b)(1); see para. 40, *supra*, for a list of Section 103 requirements. Equipment, facilities, and services deployed on or before January 1, 1995 need not comply with the capability requirements of Section 103. "The Attorney General may, subject to the availability of appropriations, agree to pay telecommunications carriers for all reasonable costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with Section 103." *Id.* at § 1008(a). If the Attorney General does not agree to pay all reasonable costs directly related to such modifications, the "equipment, facility, or service [deployed on or before January 1, 1995] shall be considered to be in compliance with the assistance capability requirements of Section 103 until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification." *Id.* at § 1008(d).

¹⁵⁶ 47 U.S.C. § 1008(b)(1).

¹⁵⁷ *Id.*

service at issue:

- The policy of the United States to encourage the provision of new technologies and services to the public;
- The financial resources of the telecommunications carrier;
- The effect [of compliance] on competition in the provision of telecommunications services;
- The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995;
- Such other factors as the Commission determines are appropriate.¹⁵⁸

46. If the Commission determines that compliance with the assistance capability requirements of Section 103 is not reasonably achievable, the affected carrier may petition the Attorney General to pay for the additional, reasonable costs necessary to make compliance reasonably achievable.¹⁵⁹ The Attorney General may agree to compensate the affected carrier for the "additional reasonable costs" of complying with the assistance capability requirements of Section 103.¹⁶⁰ If the Attorney General does not agree to pay such additional reasonable costs, the affected carrier would be deemed to be in compliance with CALEA's capability requirements.¹⁶¹

47. Section 104 requires that telecommunications carriers comply with capacity requirements established by the Attorney General, after the Attorney General has consulted with State and local law enforcement agencies, telecommunications carriers, providers of telecommunications support services, and manufacturers of telecommunications equipment. Capacity refers to the ability of carriers' equipment, facilities, and services to accommodate communications interceptions, pen registers, and trap and trace devices simultaneously.¹⁶² The capacity requirements are stated in terms of the actual number of communications interceptions, pen registers, and trap and trace devices carriers must accommodate, as well as in terms of the maximum capacity carriers must be able to accommodate simultaneously.¹⁶³

¹⁵⁸ Id.

¹⁵⁹ 47 U.S.C. § 1008(b)(2)(A).

¹⁶⁰ Id.

¹⁶¹ 47 U.S.C. § 1008(b)(2)(B).

¹⁶² See 47 U.S.C. § 1003(b).

¹⁶³ Id. at § 1003(a)(1). The Federal Bureau of Investigation proposed "percentage of engineered capacity" as the capacity criterion for telecommunications carriers. The percentage of engineered capacity means the maximum number of simultaneous interceptions and call identifications that a network must be capable of

Telecommunications carriers have to comply within three years from the publication date of the Attorney General's notice of capacity requirements.¹⁶⁴ The Attorney General may reimburse carriers for reasonable costs directly associated with modifications to their networks that are necessary to comply with the capacity requirements.¹⁶⁵ If the Attorney General does not reimburse a carrier for its reasonable costs, a carrier would be deemed by statute to be in compliance with the capacity requirements, whether or not the carrier is in actual compliance.¹⁶⁶ The FBI, operating under delegated authority from the Attorney General, initiated a rulemaking proceeding to determine initial and maximum capacity requirements pursuant to Section 104 of CALEA, but has not yet published rules.¹⁶⁷

2. Proposals

48. We request comment on the specific factors contained in Section 109(b)(1), (a) through (j), and the extent to which the Commission should consider specific factors when determining if compliance with CALEA's assistance capability requirements is reasonably achievable. We note that Section 109(b)(1)(k) allows the Commission to consider "[s]uch other factors as the Commission determines are appropriate."¹⁶⁸ We seek comment on what additional factors the Commission should consider in determining whether compliance with CALEA's assistance capability requirements is reasonably achievable, and why. We ask commenters to state how such additional factors would be consistent with the intent of CALEA, and how those factors should be balanced against the explicit criteria contained in Section 109(b)(1).

F. EXTENSION OF COMPLIANCE DATE

1. Background

providing to law enforcement officials or entities, and is expressed as a percentage of total access lines. For example, if the Attorney General determines that the percentage of engineered capacity is .05, or five one-hundredths of one percent, a telecommunications carrier with 100,000 access lines must be able to provide up to 50 (100,000 multiplied by .0005) simultaneous interceptions and call identifications in order to be in compliance with Section 104 of CALEA. See Implementation of the Communications Assistance for Law Enforcement Act, 60 Fed. Reg. 53,643 (1995).

¹⁶⁴ 47 U.S.C. § 1003(b)(1).

¹⁶⁵ Id. at § 1003(e).

¹⁶⁶ Id.

¹⁶⁷ Second Notice of Capacity, Notice of Proposed Rulemaking, 62 FR 1902 (1997).

¹⁶⁸ 47 U.S.C. § 1008(b)(1)(k).

49. Under Section 107(c) of CALEA,¹⁶⁹ a telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service prior to October 25, 1998, may petition the Commission for an extension of time in order to comply with the assistance capability requirements of Section 103.¹⁷⁰ The last date by which an extension may be sought, therefore, will be October 24, 1998.¹⁷¹ The Commission may grant an extension of time until October 24, 2000 if, after consultation with the Attorney General, "the Commission determines that compliance with the assistance capability requirements under Section 103 is not reasonably achievable through application of technology available within the compliance period."¹⁷² Any extension of time granted by the Commission would apply only to "that part of the carrier's business on which the new equipment, facility, or service is used."¹⁷³

2. Proposals

50. Because it is not clear whether requests for extension of time of the Section 103 compliance date will be forthcoming, we do not propose to promulgate specific rules regarding requests at this time. We propose to permit carriers to petition the Commission for an extension of time under Section 107, on the basis of the criteria specified in Section 109¹⁷⁴ to determine whether it is reasonably achievable for the petitioning carrier "with respect to any equipment, facility, or service installed or deployed after January 1, 1995" to comply with the assistance capability requirements of Section 103 within the compliance time period. We seek comment on that proposal. We also seek comment on what factors, other than those specified in Section 109 of CALEA, the Commission should consider in determining whether CALEA's assistance capability requirements are reasonably achievable within the compliance period. We ask commenters to state how such additional factors would be consistent with the intent of CALEA.

¹⁶⁹ 47 U.S.C. § 1006(c).

¹⁷⁰ 47 U.S.C. § 1002.

¹⁷¹ Section 111 of CALEA states that Section 103 "shall take effect on the date that is 4 years after the date of enactment of [CALEA]." 47 U.S.C. § 1001 note 1. President Clinton signed CALEA on October 25, 1994. Thus, Section 103 takes effect on October 25, 1998.

¹⁷² 47 U.S.C. § 1008(c)(2) and (c)(3). Under Section 107(c), the Commission may grant an extension for a period of time that it deems necessary for the carrier to comply with the assistance capability requirements. Id. at § 1008(c)(3)(A). The extension may be no longer, however, than "[t]he date that is 2 years after the date on which the extension is granted." Id. at § 1008(c)(3)(B).

¹⁷³ 47 U.S.C. § 1008(c)(4).

¹⁷⁴ See supra para. 45 for a discussion of Section 109 and the reasonably achievable standard.

IV. PROCEDURAL MATTERS

A. Scope of Proceeding

51. With this NPRM, we propose rules to implement CALEA pursuant to Section 229 of the Communications Act of 1934 as amended. We encourage interested parties to comment not only on the specific proposals that are contained in this NPRM, but also to provide recommendations and propose rules that they believe will enable us to implement CALEA efficiently and effectively. We further request that commenters include their recommendations and the text of proposed rules in their initial comments, so that other parties will have the opportunity to comment on those proposals in their reply comments. The final rules that will be adopted in this proceeding will reflect our assessment of the entire record (including rules and recommendations that are proposed by parties in response to this NPRM) that is compiled in this proceeding as well as our knowledge of matters that are of public record (e.g., notice of facts, statutes, and judicial determinations, etc.). As a consequence, all interested persons are requested to comment on the issues raised in this Notice of Proposed Rulemaking, as well as those that may be raised in the comments in response to this notice.

B. Ex Parte

52. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Paperwork Reduction Act

53. This Notice of Proposed Rulemaking ("NPRM") contains a proposed information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM. OMB comments are due 60 days from date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Initial Regulatory Flexibility Analysis

54. As required by the Regulatory Flexibility Act ("RFA"),¹⁷⁵ the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected significant economic impact on small entities by the policies and rules suggested in this Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking ("CALEA NPRM"). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the CALEA NPRM provided above on the first page, in the heading. The Secretary shall send a copy of the CALEA NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with paragraph 603(a).¹⁷⁶

I. Need for and Objectives of the Proposed Rules: This Notice of Proposed Rulemaking responds to the legislative mandate contained in the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

II. Legal Basis: The proposed action is authorized under the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.). The proposed action is also authorized by Sections 1, 4, 201, 202, 204, 205, 218, 229, 332, 403 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, 218, 229, 301, 303, 312, 332, 403, 501 and 503.

III. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply: The proposals set forth in this proceeding may have a significant economic impact on a substantial number of small telephone companies identified by the SBA. We seek comment on the obligations of a telecommunications carrier for the purpose of complying with CALEA.

55. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction" and the same meaning as the term "small business concern" under the Small Business Act, unless the

¹⁷⁵ 5 U.S.C. §603.

¹⁷⁶ The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the "Small Business Regulatory Enforcement Act of 1996" (SBREFA).

Commission has developed one or more definitions that are appropriate to its activities.¹⁷⁷ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).¹⁷⁸ The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.¹⁷⁹ We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

56. Telephone Companies (SIC 483). Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this IRFA.¹⁸⁰ Nevertheless, as mentioned above, we include small incumbent LECs in our IRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."¹⁸¹

57. Total Number of Telephone Companies Affected. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing

¹⁷⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

¹⁷⁸ 15 U.S.C. § 632. See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc., 176 B.R. 82 (N.D. Ga. 1994).

¹⁷⁹ 13 C.F.R. § 121.201.

¹⁸⁰ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶¶ 1328-30, 1342 (Local Competition First Report and Order). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the Local Competition First Report and Order, pending review on the merits. Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir., Oct. 15, 1996).

¹⁸¹ See 13 C.F.R. § 121.210 (SIC 4813).

telephone services, as defined therein, for at least one year.¹⁸² This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."¹⁸³ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this NPRM.

58. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.¹⁸⁴ According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.¹⁸⁵ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules recommended for adoption in this NPRM.

59. *Local Exchange Carriers.* Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our

¹⁸² United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

¹⁸³ 15 U.S.C. § 632(a)(1).

¹⁸⁴ 1992 Census, supra, at Firm Size 1-123.

¹⁸⁵ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.¹⁸⁶ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules recommended for adoption in this NPRM.

60. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 130 companies reported that they were engaged in the provision of interexchange services.¹⁸⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 130 small entity IXCs that may be affected by the decisions and rules recommended for adoption in this NPRM.

61. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 57 companies reported that they were engaged in the provision of competitive access services.¹⁸⁸ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 57 small entity CAPs that may be affected by the decisions and rules recommended for

¹⁸⁶ Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (December, 1996) ("TRS Worksheet").

¹⁸⁷ TRS Worksheet.

¹⁸⁸ 13 C.F.R. § 121.201, SIC 4813.

adoption in this NPRM.

62. *Operator Service Providers* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 25 companies reported that they were engaged in the provision of operator services.¹⁸⁹ Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 25 small entity operator service providers that may be affected by the decisions and rules recommended for adoption in this NPRM.

63. *Wireless (Radiotelephone) Carriers* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.¹⁹⁰ According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.¹⁹¹ The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules recommended for adoption in this NPRM.

64. *Cellular and Mobile Service Carriers* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile

¹⁸⁹ *Id.*

¹⁹⁰ United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

¹⁹¹ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 117 companies reported that they are engaged in the provision of mobile services.¹⁹² Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 792 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this NPRM.

65. Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁹³ For Block F, an additional classification for "very small business" was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁹⁴ These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.¹⁹⁵ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a

¹⁹² TRS Worksheet, at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

¹⁹³ See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96-278, WT Docket No. 96-59, paras. 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); see also 47 CFR § 24.720(b).

¹⁹⁴ Id., at para. 60.

¹⁹⁵ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

total of 183 small PCS providers as defined by the SBA and the Commissioner's auction rules.

66. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.¹⁹⁶ The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules recommended for adoption in this NPRM.

67. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this IRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions recommended for adoption in this NPRM.

68. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information

¹⁹⁶ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 260 companies reported that they were engaged in the resale of telephone services.¹⁹⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 260 small entity resellers that may be affected by the decisions and rules recommended for adoption in this NPRM.

69. *Cable Services or Systems (SIC 4841)*. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in revenue annually.¹⁹⁸ This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,788 such cable and other pay television services and 1,439 had less than \$11 million in revenues.¹⁹⁹

70. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's Rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.²⁰⁰ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.²⁰¹ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

71. The Communications Act also contains a definition of a small cable system

¹⁹⁷ *Id.*

¹⁹⁸ 13 C.F.R. § 121.201, SIC 4841.

¹⁹⁹ 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

²⁰⁰ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

²⁰¹ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for December 30, 1995).

operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁰² The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.²⁰³ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.²⁰⁴ We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,²⁰⁵ and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. We further note that recent industry estimates project that there will be a total of 65,000,000 subscribers, and we have based our fee revenue estimates on that figure.

72. Other Pay Services. Other pay services are also classified under SIC 4841, which include cable operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

73. The proposed rules require telecommunications carriers to establish policies and procedures governing the conduct of officers and employees who are engaged in surveillance activity. The proposed rules require telecommunications carriers to maintain records of all interceptions of communications and call identification information. Further, the proposed rules require telecommunications carriers classified as Class A companies pursuant to 47 U.S.C. § 32.11 to file individually with the Commission a statement of its processes and procedures used to comply with the systems security rules promulgated by the Commission. Telecommunications carriers classified as Class B companies pursuant to 47 U.S.C. § 32.11 may elect to either file a statement describing their security processes and procedures or to

²⁰² 47 U.S.C. § 543(m)(2).

²⁰³ 47 C.F.R. § 76.1403(b).

²⁰⁴ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

²⁰⁵ We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.1403(b) of the Commission's Rules. See 47 C.F.R. § 76.1403(d).

certify that they observe procedures consistent with the security rules promulgated by the Commission. We note in paragraph 43, *supra*, that the FBI is developing electronic surveillance capacity requirements through the rulemaking process that all telecommunications carriers will have to meet in order to be in compliance with CALEA's requirements. Until these requirements become Federal Rules, it is not possible to predict with certainty whether the costs of compliance will be proportionate between small and large telecommunications carriers.

74. We tentatively conclude that a substantial number of telecommunications carriers, who have been subjected to demands from law enforcement personnel to provide lawful interceptions and call-identifying information for a period time preceding CALEA, already have in place practices for proper employee conduct and recordkeeping. We seek comment on this tentative conclusion. As a practical matter, telecommunications carriers need these practices to protect themselves from suit by persons who claim they were the victims of illegal surveillance.²⁰⁶ By providing general guidance regarding the conduct of carrier personnel and the content of records in this NPRM, the Commission permits telecommunications carriers to use their existing practices to the maximum extent possible. Thus, we tentatively conclude that the additional cost to most telecommunications carriers for conforming to the Commission regulations contained in this NPRM, should be minimal. We seek comment on this tentative conclusion.

V. Significant Alternatives to Proposed Rules Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives:

75. As we noted in Part I of this IRFA, *supra*, the need for the proposed regulations is mandated by Federal legislation. The legislation is specific on the content of employee conduct and recordkeeping regulations for telecommunications carriers, which removes from Commission discretion the consideration of alternative employee conduct and recordkeeping regulations for smaller telecommunications carriers. The legislation, however, provides for Commission discretion to formulate compliance reporting requirements for telecommunications carriers that favor smaller telecommunications carriers, and the Commission exercised that discretion by proposing rules that allow smaller carriers the option to file a certification of compliance with the Commission instead of a statement of the policies, processes and procedures they use to comply with the CALEA regulations.

²⁰⁶ 18 U.S.C. § 2520 provides for the recovery of civil damages by persons who endured illegal electronic surveillance.

VI. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules.

76. As we noted in Part I of this IRFA, supra, the need for the proposed regulations is mandated by Federal legislation. As stated in paragraphs 1 and 9 of this NPRM, supra, the purpose of CALEA was to empower and require the Federal Communications Commission and the Department of Justice to craft regulations pursuant to specific statutory instructions. Because there were no other Federal Rules in existence before CALEA was enacted, there are no duplicate Federal Rules. In addition, there are no overlapping, duplicating, or conflicting Federal Rules to the Federal Rules proposed in this proceeding.

E. Notice and Comment Provisions

77. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before forty-five (45) days after publication in the Federal Register, and reply comments are due on or before thirty (30) days after comments. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus twelve copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

78. Written comments by the public on the proposed information collections are due on or before forty-five (45) days after publication in the Federal Register. Written comments must be submitted by OMB on the proposed information collections on or before 60 days after publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to faint@al.eop.gov.

VII. ORDERING CLAUSES

79. Accordingly, pursuant to Sections 1, 4, 201, 202, 204, 205, 218, 229, 301, 303, 312, 332, 403, 501 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201, 202, 204, 205, 218, 229, 301, 303, 312, 332, 403, 501 and 503, IT IS ORDERED that this NOTICE OF PROPOSED RULEMAKING is hereby adopted.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

APPENDIX A - Proposed Final Rules**AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS****PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

Part 64 of Title 47 of the Code of Federal Regulations (C.F.R) is amended as follows:

1. The authority citation for Part 64 is amended to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 154, 201, 202, 205, 218-220, and 332 unless otherwise noted. Interpret or apply §§ 201, 218, 225, 226, 227, 229, 332, 48 Stat. 1070, as amended, 47 U.S.C. § 201-204, 218, 225, 226, 227, 229, 332, 501 and 503 unless otherwise noted.

2. The table of contents for Part 64 is amended to add Subpart Q to read as follows:

Subpart Q - Telecommunications Carrier Interceptions pursuant to the Communications Assistance to Law Enforcement Act (CALEA)

§ 64.1700	Purpose.
§ 64.1701	Scope.
§ 64.1702	Definitions.
§ 64.1703	Interception Requirements and Restrictions.
§ 64.1704	Carrier Records.
§ 64.1705	Compliance Statements.

Part 64 is proposed to be amended to add Subpart Q to read as follows:

Subpart Q - Telecommunications Carrier Interceptions pursuant to the Communications Assistance for Law Enforcement Act (CALEA)

Sections 64.1700 through 64.1704 are added to read as follows:

64.1700 Purpose.

Pursuant to the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.), this subpart contains implementation and compliance rules to govern telecommunications carriers subject to CALEA. These rules are in addition to rules promulgated by the Department of

Justice pursuant to CALEA requirements.

64.1701 Scope.

The definitions included in this subpart shall be used solely for the purpose of implementing CALEA's requirements.

64.1702 Definitions.

(a) Telecommunications Carrier. The term "telecommunications carrier" means -

(1) a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and

(2) includes -

(A) a person or entity engaged in providing commercial mobile service (as defined in Section 332(d) of the Communications Act of 1934 (47 U.S.C. § 332(d)); or

(B) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title; but

(3) does not include persons or entities insofar as they are engaged in providing information services.

(b) Information Services. The term "information services"

(1) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and

(2) includes -

(A) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(B) electronic publishing; and

(C) electronic messaging services; but

(3) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

(c) Appropriate Legal Authorization. The term "appropriate legal authorization" means:

(1) a court order signed by a judge of competent jurisdiction authorizing or approving interception of wire or electronic communications; or (2) a certification in writing by a person specified in 18 U.S.C. §2518(7); or (3) a certification in writing by the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.

- (d) **Appropriate Carrier Authorization.** The term "appropriate carrier authorization" means policies adopted by telecommunications carriers to identify carrier employees authorized to assist law enforcement in conducting communications authorizations.
- (e) **Third Party.** "Third party" means a person other than those authorized to receive a communication pursuant to 47 U.S.C. §605 of the Communications Act.

64.1703 Interception requirements and restrictions

An employee or officer of a telecommunications carrier shall assist in intercepting and disclosing to a third party a wire, oral, or electronic communication or shall provide access to call-identifying information only upon receiving a court order or other lawful authorization.

64.1704 Carrier records

- (a) The officers of any telecommunications carrier shall ensure that the carrier maintains records of any assistance provided for the interception and disclosure to third parties of any wire, oral, or electronic communication or of any call-identifying information. The record will be made either contemporaneously with each interception, or not later than 48 hours from the time each interception begins, and shall include:
- (1) the telephone number(s) or circuit number(s) involved;
 - (2) the date and time the interception started;
 - (3) the date and time the interception stopped;
 - (4) the identity of the law enforcement officer presenting the authorization;
 - (5) the name of the judge or prosecuting attorney signing the authorization;
 - (6) the type of interception (e.g., pen register, trap and trace, "Title III" interception pursuant to 18 U.S.C. § 2510 et seq., and collateral state statutes, Foreign Intelligence Surveillance Act ("FISA") 50 U.S.C. § 1801 et seq.); and
 - (7) the names of all telecommunications carrier personnel involved in performing, supervising, and internally authorizing, the interception, and the