

**Legislation for Recommendation 5.2.3 - Amend the Pen Register and Trap and Trace Statute (18 U.S.C. § 3121)**

**Staff Introduction to Proposal.** This proposal reduces ambiguity and allows the private sector a broader range of defensive techniques by amending the Pen Register and Trap and Trace statute to help enable certain “active defense” activities.

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**SEC. 202. PEN REGISTER TRAP AND TRACE AND ACTIVE DEFENSE.**

Section 3121 of chapter 206 of title 18, United States Code, is amended in subsection (b)—

(a) by striking “by a provider of electronic or wire communication service” in the matter preceding paragraph (1);

(b) in paragraph (1), by—

(1) inserting “by a provider of electronic or wire communication service” before “relating to the operation”; and

(2) striking “; or” and inserting “;”;

(c) in paragraph (2), by inserting “by a provider of electronic or wire communication service” before “to record the fact”;

(d) in paragraph (3), by striking the period at the end and inserting “; or”; and

(e) by inserting at the end the following paragraph:

“(4) where such device is installed pursuant to a search warrant or used under a circumstance in which the contents of a communication may be intercepted under chapter 119 of this title.”.

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**Legend.** This proposal amends existing legislation (18 U.S.C. § 3121). Changes are **highlighted** with new words **underlined** and deleted words with **strikethroughs**.

§ 3121. General prohibition on pen register and trap and trace device use; exception

(a) In General—Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or

under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) or an order from a foreign government that is subject to an executive agreement that the Attorney General has determined and certified to Congress satisfies section 2523.

(b) Exception.—The prohibition of subsection (a) does not apply with respect to the use of a pen register or a trap and trace device ~~by a provider of electronic or wire communication service~~—

(1) ~~by a provider of electronic or wire communication service~~ relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service; or

(2) ~~by a provider of electronic or wire communication service~~ to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(3) where the consent of the user or of the subscriber of that service has been obtained;  
~~or-~~

~~(4) where such device is installed pursuant to a search warrant or used under a circumstance in which the contents of a communication may be intercepted under chapter 119 of this title.~~

(c) Limitation.—A government agency authorized to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

(d) Penalty.—Whoever knowingly violates subsection (a) shall be fined under this title or imprisoned not more than one year, or both.