

CLIENT ALERT

Gag Orders on Tech Companies: A Higher Burden on Prosecutors

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The U.S. Department of Justice has ended a long-standing practice of seeking potentially indefinite gag orders on tech companies. Historically, while operating under the Stored Communications Act, prosecutors were able to apply for protective orders that were readily renewable, precluding providers of electronic communications from informing their customers or subscribers that their personal data was disclosed to government agencies in response to investigative demands. That practice ended over the weekend, when Deputy Attorney General Rod Rosenstein's new memorandum on gag orders took effect. The new directive now places a higher burden on prosecutors seeking such orders. Specifically, prosecutors must tailor gag order applications to ensure they are necessary and explain their basis, which may relate to destruction of evidence or risk of flight from prosecution, for example. The policy also requires "exceptional circumstances" to ask that the gag order extend beyond one year, a deviation from the practice of seeking routine and potentially indefinite extensions.

At the forefront, the memorandum states that the Stored Communications Act does not "by default" forbid a provider from notifying a customer or subscriber that their data has been surrendered, but may forbid the disclosure if "the government obtains a protective order under 18 U.S.C. § 2705(b), based on a need for protection from disclosure." The memorandum establishes six criteria for a § 2705(b) applications for such orders and states that each order "should extend only as long as necessary to satisfy the government's interest."

As of Saturday, November 18, 2017, prosecutors must consider the following six criteria: **First**, prosecutors who apply for a § 2705(b) order must conduct an individualized and meaningful assessment regarding the need for protection from disclosure. **Second**, prosecutors must tailor the application to include the available facts of the specific case and/or concerns attendant to the particular type of investigation, examining the factors delineated in § 2705(b)(1)-(5). **Third**, prosecutors may seek a single protective order that covers multiple grand jury subpoenas issued as part of the same investigation, or a single protective order that covers other sets of nearly-identical legal process in a discrete investigation and imposes certain service requirements. **Fourth**, protective order applications may only seek to delay notice for no more than one year, subject to exceptional circumstances (*i.e.*, prohibiting indefinite gag orders). **Fifth**, DOJ recognizes that judges may allow shorter or longer periods for orders. **Lastly**, extensions may be sought if the factors justifying protection from disclosure continue to exist when the original order expires.

This change in DOJ policy will impact the many businesses that produce information to the government pursuant to a Stored Communications Act order, and provides these businesses with increased flexibility to determine whether and when to give notice to its customers about the disclosure of their information to the government.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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