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**BEFORE THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVES**

**AT A HEARING CONCERNING
“FISA AMENDMENTS ACT REAUTHORIZATION”**

**PRESENTED ON
JUNE 21, 2012**

Derived From: NSA/CSSM 1-52
Dated: 20070108
Declassify On: 20320108

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Before the
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“FISA Amendments Act Reauthorization”

Presented on
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(U) Introduction

(U) Chairman Rogers, Ranking Member Ruppertsberger, distinguished members of the Committee, thank you for the opportunity to testify today about the FISA Amendments Act (FAA). The Director of National Intelligence (DNI) submitted in March the Administration’s request to extend the sunset for Title VII of FISA to June 1, 2017.

(S) The FAA allows the Intelligence Community to collect information about international terrorists and other targets overseas. It has proven to be one of the most important legal authorities we have. These provisions will expire at the end of this year unless reauthorized by Congress. Reauthorization is a top legislative priority of the Attorney General and the DNI.

NSA (S) We begin by discussing section 702 of FISA, the provision that permits surveillance [REDACTED]
(b)(1), [REDACTED] directed at foreign targets overseas with the assistance of U.S. electronic
(b)(3) communication service providers. We summarize how section 702 works, how the Intelligence

Community has implemented it, and the extensive oversight we conduct of its use. Second, we describe the importance of section 702 to our national security, and give examples of its value in protecting against international terrorism, weapons proliferation, cyber intrusions, and other threats. Third, we consider briefly the other changes made to FISA by the FAA, including section 704, which requires an order from the Foreign Intelligence Surveillance Court (FISC) before the Government may engage in certain kinds of intelligence collection targeting U.S. persons overseas. Previously, the Attorney General could authorize such collection without the need to obtain a court order. Whereas section 702 expands the Government's ability to collect information about non-U.S. persons overseas, section 704 provides additional protections for Americans. Fourth, we describe the important Congressional oversight required by the FAA. Finally, we explain how important section 702 has been to protecting the national security and why the Administration strongly encourages Congress to reauthorize the FAA.

(U) This Committee held a hearing on the reauthorization of the FAA in December of last year. We are grateful for the Committee's leadership on reauthorization, and we appreciate the opportunity to further discuss this subject with you and to answer your questions.

(U) I. Overview of Section 702

(U) Legal Requirements

(S) Many terrorists and other foreign targets abroad use communications services based in this country, especially those provided by U.S.-based Internet service providers (ISPs). [REDACTED] the communications of a target overseas may otherwise transit this country. Before the enactment of section 702, when the Intelligence Community wanted to collect these communications, it was often confronted with a dilemma. It could either undertake potentially risky, costly, and often less effective covert collection overseas, or, if it wanted to collect the communications from a provider in the United States, it had to obtain a court order under the electronic surveillance and physical search provisions of FISA. These provisions require a finding of probable cause that the target is a foreign power or an agent of a foreign power and that the target is using or about to use the targeted facility, such as a telephone number or e-mail account. The Attorney General, and subsequently the FISC, must approve each individual application. In effect, the Intelligence Community had to treat non-U.S. person targets located overseas like persons in the United States solely because providers in this country carried their communications. The Constitution does not require this practice, and it proved to be extraordinarily burdensome.

NSA
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(b)(3)

(S) Section 702 remedies this shortcoming and permits the Government to acquire, safely and efficiently from providers in the United States, communications of non-U.S. persons located abroad that are of foreign intelligence importance. At the same time, it provides a comprehensive regime of oversight by all three branches of Government to protect the constitutional and privacy interests of Americans.

(FOUO) Under section 702, instead of issuing individual orders, the FISC approves annual certifications submitted by the Attorney General and the DNI that identify broad categories of

foreign intelligence targets. First, the Attorney General and the DNI must certify that a significant purpose of an acquisition is to obtain foreign intelligence information. Second, an acquisition may only intentionally target non-U.S. persons. Third, it may not intentionally target any person known at the time of the acquisition to be in the United States. Fourth, it may not target someone outside the United States for the purpose of targeting a particular, known person in this country. Fifth, section 702 prohibits the intentional acquisition of “any communication as to which the sender and all intended recipients are known at the time of the acquisition” to be in the United States. Finally, of course, any acquisition must be consistent with the Fourth Amendment. The certifications are the legal basis for targeting specific individuals overseas and, based on the certifications, the Attorney General and the DNI can direct communications providers in this country to provide these targets’ communications.

(U) To ensure compliance with these provisions, section 702 requires targeting procedures, minimization procedures, and acquisition guidelines. The targeting procedures are designed to ensure that an acquisition targets persons outside the United States, and also that it does not intentionally acquire domestic communications. The minimization procedures govern how the Intelligence Community treats the identities of any U.S. persons whose communications might be incidentally intercepted and regulate the handling of any nonpublic information concerning U.S. persons that is acquired. Finally, the acquisition guidelines seek to ensure compliance with all of the limitations of section 702 described above, and to ensure that the Government files a traditional FISA application when required. The FISC reviews the targeting and minimization procedures for compliance with the requirements of both the statute and the Fourth Amendment. Although the FISC does not approve the acquisition guidelines, it receives them, as does this Committee and other appropriate Congressional committees. By approving the certifications submitted by the Attorney General and the DNI as well as by approving the targeting and minimization procedures, the FISC plays a major role in ensuring that acquisitions under section 702 are conducted in a lawful and appropriate manner.

(U) Implementation

FBI (b)(1), (b)(3) (b)(7)(E)
NSA (b)(1), (b)(3)
CIA (b)(1), (b)(3)

(S//NF) [REDACTED]

NSA (b)(1), (b)(3)

(S//NF) [REDACTED] NSA’s targeting procedures require that there be an appropriate foreign intelligence purpose for the acquisition and that the selector be used by a non-U.S. person reasonably believed to be located outside the United States. [REDACTED]

[REDACTED]

FBI
(b)(1), (b)(3)
(b)(7)(E)
NSA
(b)(1), (b)(3)

(S) [REDACTED]

FBI
(b)(1), (b)(3)
(b)(7)(E)
NSA
(b)(1), (b)(3)
CIA
(b)(1), (b)(3)

(S//NF) [REDACTED]

FBI
(b)(1), (b)(3)
(b)(7)(E)
NSA
(b)(1), (b)(3)

(TS//SI//NF) [REDACTED]

(TS//SI//NF) In addition to collection directly from ISPs, NSA also collects telephone and electronic communications as they transit the Internet "backbone" within the United States. This is known as "upstream" collection. NSA works directly with U.S. telecommunications companies to conduct upstream collection.

NSA
(b)(1), (b)(3)

[REDACTED]

NSA
(b)(1), (b)(3)

(TS//SI//NF) [REDACTED] It also enables NSA to collect electronic communications that contain the targeted e-mail address in the body of a communication between two third parties, even if the communication is not to or from the targeted e-mail address. This collection, often referred to as "abouts" collection, allows NSA to acquire valuable foreign intelligence about a target that it would otherwise miss.

[REDACTED]

FBI
(b)(1), (b)(3)
(b)(7)(E)
NSA
(b)(1), (b)(3)
CIA
(b)(1), (b)(3)

~~(S//SI//NF)~~ [REDACTED]

(S) Each agency has its own minimization procedures and must both retain and disseminate communications acquired under section 702 only in accordance with those procedures. In general, before an agency may disseminate information identifying a U.S. person, the information must reasonably appear to be foreign intelligence or evidence of a crime, or necessary to understand or assess foreign intelligence information. When the Attorney General first adopted the section 702 minimization procedures, the FISC found that the protection afforded to U.S. persons “nearly replicates the protection afforded such persons in cases involving search or surveillance intentionally targeting U.S. persons.” It went on to say that “[p]rocedures that have been found to be reasonably designed for the purpose of surveillance targeting U.S. persons should be reasonable for the acquisition of communications targeting non-U.S. persons abroad.” [REDACTED]

NSA
(b)(1), (b)(3)

(U) Compliance and Oversight

(U) We are committed to ensuring that the Intelligence Community’s use of section 702 is consistent with the law, the FISC’s orders, and the protection of the privacy and civil liberties of Americans. The Intelligence Community, the Department, and the FISC all oversee the use of this provision. This Committee and other Congressional committees also carry out essential oversight, which is discussed separately in section IV below.

~~(S)~~ First, components in each agency, including Inspectors General, oversee activities conducted under section 702. The targeting procedures seek to ensure that an acquisition targets non-U.S. persons outside the United States and that it does not intentionally acquire domestic communications. NSA’s targeting procedures, for example, require the Signals Intelligence Directorate and the Office of General Counsel to provide training; the training covers the targeting and minimization procedures, and the rules [REDACTED] Within NSA, all section 702 targeting decisions are reviewed at least twice—by an analyst and adjudicator before tasking and by the Signals Intelligence Directorate afterwards. NSA has also established, with the strong support of Congress, a compliance office, which is responsible for developing and overseeing a comprehensive mission compliance program.

NSA
(b)(1), (b)(3)

~~(S//NF)~~ Agencies using section 702 authority must report promptly to the Department of Justice and to the Office of the Director of National Intelligence (ODNI) incidents of noncompliance with the targeting or minimization procedures or the acquisition guidelines. Attorneys in the National Security Division (NSD) of the Department routinely review the agencies’ targeting decisions. Additionally, ODNI reviews a sampling of the targeting decisions. [REDACTED]

CIA
(b)(1), (b)(3)

[REDACTED] These reviews are normally conducted on-site by a joint team from NSD and from [REDACTED]

ODNI's Offices of Civil Liberties Protection and Intelligence Integration. The team evaluates and (where appropriate) investigates each potential incident of noncompliance, and conducts a detailed review of agencies' targeting and minimization decisions. Oversight of section 702 activities by the Department and ODNI has been deep and broad

(S) Using the reviews by Department and ODNI personnel, the Attorney General and the DNI assess semi-annually, as required by section 702, compliance with the targeting and minimization procedures and the acquisition guidelines. The most recent assessment found an overall compliance incident rate of 0.40%, expressed as the percentage of compliance incidents per average number of selectors on task. If we were to exclude incidents where the agencies fully complied with the procedures, but there was a delay of several days in reporting certain matters to the Department and ODNI, this compliance incident rate drops to only 0.21%. More generally, the assessment found that agencies have "continued to implement the procedures and follow the guidelines in a manner that reflects a focused and concerted effort by agency personnel to comply with the requirements of Section 702." The number of compliance incidents has been small, with no indication of "any intentional or willful attempt to circumvent or violate" legal requirements. Rather, agency personnel "are appropriately focused on directing their efforts at non-United States persons reasonably believed to be located outside the United States." *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence, Reporting Period: June 1, 2011 – November 30, 2011 at 2-3, 5, 21-22 (May 2012).*

(U) The Intelligence Community and the Department use the reviews and oversight to evaluate whether changes are needed to the procedures or guidelines, and what other steps may be appropriate under section 702 to protect the privacy of Americans. We also provide the joint assessments, the major portions of the semi-annual reports, and a separate quarterly report to the FISC. We believe that we have established and maintain a strong oversight regime for this authority.

(U) II. The Importance of Section 702 Collection

(S) Collection conducted under section 702 has produced and continues to produce intelligence that is vital to protect the nation against international terrorism and other threats. [REDACTED]

NSA
(b)(1),
(b)(3)

(S) **The Administration believes that a failure to renew this authority would result in a significant loss of critical foreign intelligence, which cannot practicably be obtained through other methods.** To require an individualized court order before acquiring the communications of a foreign terrorist or other target overseas would have serious adverse consequences. First, in some cases it would likely prevent the acquisition of important foreign intelligence information. The Intelligence Community may not have probable cause that many individuals targeted under Section 702 are "agents of a foreign power." Probable cause should not be required in such cases because non-U.S. persons outside the United States ordinarily do

not enjoy the protections of the Fourth Amendment. Second, even as to those targets who we have probable cause to believe are agents of foreign powers, eliminating section 702's more flexible targeting system would significantly slow the Intelligence Community's ability to acquire important foreign intelligence information. Third, because of the number of selectors tasked, it is simply not practical to obtain individualized orders on a routine basis. Finally, such a requirement would redirect the oversight resources of the Intelligence Community, the Department, and the FISC from the protection of Americans and those in this country, their appropriate focus, to the protection of non-U.S. persons overseas. In sum, section 702 increases the Government's ability to acquire important intelligence information and to act quickly against appropriate foreign targets, without sacrificing constitutional protections.

~~(TS//SI//NF)~~ Another major benefit of section 702 is that it has made collection against foreign targets located outside the United States possible at the optimal collection point. Without section

NSA
(b)(1), (b)(3)

702, [REDACTED]

FBI
(b)(1)(b)(3)
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~~(TS//SI//NF)~~ [REDACTED]

CIA
(b)(1), (b)(3)

NSA
(b)(1), (b)(3)

(U) [REDACTED]

NSA
(b)(1), (b)(3)

~~(TS//SI//REL TO USA, FVEY)~~ [REDACTED]

CIA
(b)(1), (b)(3)

~~(TS//SI//REL TO USA, FVEY)~~ [REDACTED]

NSA
(b)(1), (b)(3)

NSA (TS//SI//REL TO USA, FVEY) [REDACTED]
(b)(1),
(b)(3)

NSA (TS//SI//NF) [REDACTED]
(b)(1),
(b)(3) (TS//SI//OC/NF) [REDACTED]

NSA (TS//SI//OC/NF) [REDACTED]
(b)(1),
(b)(3)

NSA (TS//SI//OC/NF) [REDACTED]
(b)(1),
(b)(3)

CIA (TS//SI//NF) [REDACTED]
(b)(1),
(b)(3) (TS//SI//OC/NF) [REDACTED]
NSA (b)(1),
(b)(3)

NSA (TS//SI//NF) [REDACTED]
(b)(1), (b)(3)

CIA ~~(TS//SI//OC/NF)~~

(b)(1),
(b)(3)

NSA
(b)(1),
(b)(3)

[REDACTED]

NSA ~~(TS//SI//OC/NF)~~

(b)(1),
(b)(3)

[REDACTED]

NSA ~~(TS//SI//NF)~~

(b)(1),
(b)(3)

[REDACTED]

FBI ~~(S)~~

(b)(1),
(b)(3),
(b)(7)(E)

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NSA
(b)(1),
(b)(3)

[REDACTED]

FBI
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[REDACTED]

FBI
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NSA
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(S) [REDACTED]
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FBI
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NSA
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CIA (b)(1),
(b)(3)

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NSA
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(S) [REDACTED]
(S//NF) [REDACTED]

(U) III. Other Provisions of the FAA

(U) In contrast to section 702, which focuses on foreign targets, section 704 provides additional protection for U.S. persons targeted for collection overseas. Prior to the enactment of the FAA, and continuing to this day, section 2.5 of Executive Order 12333 requires the Attorney General

to approve the use for intelligence purposes against U.S. persons abroad “any technique for which a warrant would be required if undertaken for law enforcement purposes,” based on a determination by the Attorney General that probable cause exists to believe the U.S. person is a foreign power or an agent of a foreign power. In addition to the Attorney General’s approval, section 704 now requires an order from the FISC. It applies in circumstances in which the target has “a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes.” Section 704 also requires probable cause that the targeted U.S. person is “a foreign power, an agent of a foreign power, or an officer or employee of a foreign power.” By requiring the approval of the FISC, section 704 provides additional civil liberties protection, and we support its reauthorization as part of a larger reauthorization of the FAA.

(U) In addition to sections 702 and 704, the FAA added several other provisions to FISA. Section 701 provides definitions for the Act. Section 703 allows the FISC to authorize an application targeting a U.S. person outside the United States where the acquisition is conducted in this country. Like section 704, section 703 requires probable cause that the target is a foreign power, an agent of a foreign power, or an officer or employee of a foreign power. Section 705 allows the Government to obtain various authorities simultaneously. Section 709 clarifies that nothing in the FAA is intended to limit the Government’s ability to obtain authorizations under other parts of FISA. We support the reauthorization of these provisions.

(U) IV. Congressional Oversight

(U) We appreciate the regular and meaningful Congressional oversight of the use of section 702 and the other provisions of the FAA. Twice a year, the Attorney General must “fully inform, in a manner consistent with national security,” the Intelligence and Judiciary Committees about the implementation of the FAA. In addition to this general obligation, the FAA imposes specific requirements. With respect to section 702, the report must include copies of certifications and directives and copies of significant pleadings and orders. It also must describe compliance matters, any use of emergency authorities, and the FISC’s review of the Government’s pleadings. With respect to sections 703 and 704, the report must include the number of applications made, and the number granted, modified, or denied by the FISC.

(U) Section 702 also requires the Attorney General and the DNI to provide to the Intelligence and Judiciary Committees an assessment of compliance with the targeting and minimization procedures and the acquisition guidelines, described above. Title VI of FISA augments the other reporting obligations by requiring a summary of significant legal interpretations of FISA in matters before the FISC or the Court of Review. The requirement extends to interpretations presented in applications or pleadings filed with either court by the Department. In addition to the summary, the Department must provide copies of judicial decisions that include significant interpretations of FISA within 45 days.

(U) The Department and the Intelligence Community have taken a number of other steps to keep Congress informed. We inform the Intelligence and Judiciary Committees of acquisitions authorized under section 702. We have reported, in detail, on the results of the reviews and on

compliance incidents and remedial efforts. In addition, we have made all written reports on these reviews available to the Committees. Finally, we have provided classified and unclassified briefing papers on the FAA to be made available to all Members, to further inform the elected representatives of the American people not only about the value of the FAA to their national security, but also about the FAA's strong civil liberties and privacy protections.

(U) V. The Need for Reauthorization

(U) The Administration strongly supports the reauthorization of Title VII of FISA. The FAA was the product of bipartisan effort, and its enactment was preceded by extensive public debate. There is now a lengthy factual record on the Government's need for the FAA to acquire foreign intelligence information critical to the national security. There is also a lengthy record documenting the effectiveness of the oversight process in protecting the privacy and civil liberties of Americans. This extensive record demonstrates the proven value of these authorities, and the commitment of the Government to their lawful and responsible use.

(U) Reauthorization will ensure continued certainty for the rules used by agency employees and our private partners. The Intelligence Community has invested significant human and financial resources to enable its personnel and technological systems to acquire and review vital data quickly and lawfully. Our adversaries, of course, seek to hide the most important information from us. It is at best inefficient and at worst unworkable for agencies to develop new technologies and procedures and train employees, only to have a statutory framework subject to wholesale revision. This is particularly true at a time of limited resources. We are always considering whether there are changes that could be made to improve the law in a manner consistent with the privacy and civil liberties interests of Americans. Our first priority, however, is reauthorization of these authorities in their current form. It is essential that these authorities remain in place without interruption—and without the threat of interruption—so that those who have been entrusted with their use can continue to protect our nation from its enemies.