

## TITLE II. PROTECTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS

This title contains four substantive sections. Sections 201 and 202 address liability relief for electronic communication service providers who have been alleged in various civil actions to have assisted the U.S. Government between September 11, 2001, and January 17, 2007, when the Attorney General announced the termination of the Terrorist Surveillance Program. Relating as they do to a particular past matter, these sections are not made a permanent part of FISA. Sections 203 and 204 will enact provisions of a new Title VIII of FISA. They are intended to be permanent provisions for implementing statutory defenses for electronic communication service providers and others who assist the Government in accordance with precise, existing legal requirements, and for providing for federal preemption of state investigations.

### *Section 201. Definitions*

Section 201 establishes definitions for Section 202. Several are of particular importance.

The term “assistance” is defined to mean the provision of, or the provision of access to, information, facilities, or another form of assistance. The word “information” is itself described in a parenthetical to include communication contents, communication records, or other information relating to a customer or communications. “Contents” is defined by reference to its meaning in Title I of FISA. By that reference, it includes any information concerning the identity of the parties to a communication or the existence, substance, purpose, or meaning of it.

The term “covered civil action” has two key elements. It is defined as a civil action filed in a federal or state court which (1) alleges that an electronic communication service provider furnished assistance to an element of the intelligence community and (2) seeks monetary or other relief from the electronic communication service provider related to the provision of the assistance. Both elements must be present for the lawsuit to be a covered civil action.

### *Section 202. Limitations on civil actions for electronic communication service providers*

Section 202 provides that, notwithstanding any other provision of law, a covered civil action shall not lie or be maintained in a federal or state court and shall promptly be dismissed if the Attorney General makes a certification to the court that sets forth the elements required by Section 202.

First, the Attorney General must certify that the assistance alleged to have been provided by the electronic communication service provider was in connection with an intelligence activity involving communications that was (1) authorized by the President between September 11, 2001 and January 17, 2007 and (2) designed to detect or prevent a terrorist attack or preparations for one against the United States.

Second, the Attorney General must also certify that the assistance was described in a written request or directive from the Attorney General or the head (or deputy to the head) of an element of the intelligence community to the electronic communication service

provider indicating that the activity was (1) authorized by the President and (2) determined to be lawful.

Alternatively, the Attorney General may certify that the electronic communication service provider did not provide the alleged assistance.

The Attorney General's certification is subject to judicial review for abuse of discretion.

If the Attorney General files a declaration that disclosure of a certification would harm national security, the court shall review the declaration in camera and ex parte, which means with only the Government present. A public order following that review shall not disclose whether the certification was based on a written request or directive to the electronic communication service provider for assistance or on the ground that the electronic communication service provider furnished no assistance. The purpose of this requirement is to protect the classified national security information involved in the identification of providers who assist the Government.

*Section 203. Procedures for implementing statutory defenses*

Section 203 adds two sections of a new Title VIII of FISA.

Section 801 provides for definitions. One, the definition of "assistance," is the same as in Section 201. Another, a definition of "person" (the universe of those protected by Section 802) is necessarily broader than only the definition of electronic communication service provider. This is so because Title VIII applies to all who may be ordered to provide assistance under FISA, such as custodians of records who may be directed to produce records by the FISA Court under Title V of FISA or landlords who may be required to provide access under Title I or III of FISA, not just to electronic communication service providers.

Section 802 establishes procedures for implementing statutory defenses. Notwithstanding any other provision of law, no civil action may lie or be maintained in a federal or state court for assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General makes a certification to the court. The certification must state either that the assistance was not provided or if it was furnished, that it was provided pursuant to a specific existing statutory requirement. The underlying statutory requirements are themselves specifically stated in Section 802: an order of the FISA Court directing assistance, a certification in writing under sections 2511(2)(a)(ii)(B) or 2709(b) of Title 18, or directives to electronic communication service providers under particular sections of FISA or the Protect America Act.

As under Section 202, the Attorney General's certification is subject to judicial review for abuse of discretion. Also, if the Attorney General files a declaration that disclosure of a certification would harm national security, the court shall review it in camera and ex parte. A public order shall not disclose whether the certification was based on an order, certification, or directive, or on the ground that the electronic communication service provider furnished no assistance.

*Section 204. Preemption of state investigations*

Section 204 adds a Section 803 to the new Title VIII. It addresses investigations that a number of state regulatory commissions

have or might begin to investigate cooperation by state regulated carriers with U.S. intelligence agencies. Section 803 preempts these state investigations by prohibiting them and authorizing the United States to bring suit to enforce the prohibition.

*Section 205. Technical amendments*

Section 205 amends the table of contents of the first section of FISA.

TITLE III. OTHER PROVISIONS

*Section 301. Severability*

Section 301 provides that if any provision of this Act or its application is held invalid, the validity of the remainder of the Act and its application to other persons and circumstances are unaffected.

*Section 302. Effective date; Repeal; Transition procedures*

Subsection 302(a) provides that except as provided in the transition procedures, the amendments made by the Act shall take effect immediately.

Subsection 302(b) provides for the repeal of the Protect America Act, except (as provided in subsection 303(c)(1) in the transition procedures) for the immunity established in that Act for the provision of assistance pursuant to a directive under that Act.

Subsection 303(c) establishes five transition procedures in addition to the continuation of immunity for assistance provided under the Protect America Act.

Subsection 303(c)(2)(A) continues in effect orders issued under FISA or under section 6(b) of the Protect America Act in effect on the date of enactment on this new Act, and for their reauthorization under the provisions of FISA in effect on the day before the Protect America Act, except for the exclusive means, reporting, streamlining, and other amendments added by sections 102 through 109 of this new Act (which will be deemed to be part of FISA for such purposes).

Subsection 303(c)(2)(B) provides that any order of the FISA Court issued under Title VII in effect on December 31, 2013, the sunset of Title VII, shall continue in effect until the date of the expiration of such order.

Subsection 303(c)(3)(A) provides that any authorizations or directives of the Attorney General and the Director of National Intelligence in effect on the date of the enactment of this Act issued pursuant to the Protect America Act or any amendment made by that Act shall remain in effect until the date of the expiration of the authorization or directive, and, except as provided by subsection 303(c)(4) of this Act, any acquisition pursuant to such authorization or directive shall be deemed not to be electronic surveillance as that term is defined in 101(f) of FISA, as construed in accordance with section 105A. However, subsection 303(c)(4) establishes that information acquired from an authorization conducted under the Protect America Act shall be deemed to be information acquired from an electronic surveillance pursuant to Title I of FISA for purposes of section 106 of that Act, except for purposes of subsection (j) of such section.