



FISA Section 702 Sunset, Authorization, and Potential Extension

April 17, 2024

Title VII of the [Foreign Intelligence Surveillance Act of 1978 \(FISA\)](#)—as amended by the [FISA Amendments Act of 2008 \(FAA\)](#), [FISA Amendments Act of 2017](#), and [National Defense Authorization Act for Fiscal Year 2024 \(NDAA FY2024\)](#)—will [sunset on April 19, 2024](#). Title VII includes [Section 702](#), which governs electronic surveillance targeting non-U.S. persons who are reasonably believed to be outside of the United States to obtain foreign intelligence information. This Legal Sidebar provides a short description of (1) Section 702, (2) applicable sunset and transition provisions, (3) the effects of the Foreign Intelligence Surveillance Court’s (FISC’s) recent authorization of government foreign intelligence acquisitions under Section 702, and (4) proposed legislation that would extend Section 702, including provisions that would modify querying procedures.

FISA Section 702

Electronic surveillance under FISA [traditionally requires](#) the government to [apply to the FISC](#) for an order approving such surveillance against an authorized target for purposes of collecting foreign intelligence. That application generally must include information about, among other things, the identity of the target and the applicant’s reasons for believing that the target is a foreign power or an agent of a foreign power. The application must also establish that the facilities at which surveillance will be directed are being used, or are about to be used, by a foreign power or agent of a foreign power.

Section 702 offers [an alternative](#) to the traditional approach for acquiring foreign intelligence information when the target is a non-U.S. person reasonably believed to be outside the United States. The provision [provides that](#) the Attorney General (AG) and the Director of National Intelligence (DNI) may submit a joint certification to the FISC that includes targeting procedures, minimization procedures, and querying procedures that the government intends to use to govern the selection of targets and the retention, dissemination, use, and querying of collected information. If the FISC finds that the joint certification meets the statutory requirements, then the AG and DNI may jointly authorize the acquisition of foreign intelligence information, pursuant to the court-approved procedures, for up to one year from the effective date of the FISC’s authorizing order.

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Unlike traditional FISA procedures, Section 702 does not require the FISC to make probable-cause determinations with respect to individual targets. Rather, the provision allows the FISC to broadly authorize certain government surveillance and acquisitions for a defined period of time. [As one federal court explained](#), “judicial review of Section 702 functions as a form of programmatic pre-clearance.”

Section 702 also requires the AG and DNI to propose, and the FISC to approve, querying procedures which regulate how and when the government may search information collected under Section 702. Additionally, if the Federal Bureau of Investigation (FBI) seeks to access the contents of communications acquired under Section 702 that were retrieved through a query using a U.S.-person query term for a criminal investigation unrelated to national security, the agency generally must obtain an order from the FISC authorizing such access.

Sunset and Transition Provisions

The [FAA](#) provides that Title VII of FISA, including Section 702, will sunset and cease having legal effect on December 31, 2023. The [NDAA FY2024](#) delayed the sunset of Title VII until April 19, 2024.

If Title VII sunsets, Congress has delineated transition procedures in the [FAA](#) that will control government foreign intelligence acquisitions under Title VII. These transition procedures provide that any order, authorization, or directive issued pursuant to Title VII shall remain in effect until its stated expiration date. Consequently, if Title VII sunsets, the government can continue acquiring foreign intelligence under Section 702 until any existing FISC authorization expires, and the FISC can continue administering previously authorized acquisition procedures under Section 702.

Recent FISC Authorization

News outlets have [reported](#) that, on April 5, 2024, the FISC authorized government foreign intelligence acquisitions under Section 702 for one year. If reports are accurate, the effect of this authorization is that the government can continue foreign intelligence acquisitions under Section 702 until the authorization expires one year from when it was issued, regardless of whether Title VII sunsets on April 19, 2024. In addition, the FISC can continue administering authorized acquisition procedures under Section 702 until the authorization expires.

Proposed Legislation Renewing Section 702

Congress is considering various bills to extend Title VII of FISA. In addition to extending the sunset date for Title VII, these bills include numerous substantive reforms of FISA and other government surveillance authorities. With respect to Section 702, many of the proposed reforms address how government officials may conduct queries of information that has been acquired under Section 702. The lengths of reauthorization and the approaches to Section 702 query reform vary across the different bills, as described below.

H.R. 7888

On April 12, 2024, the House passed [H.R. 7888](#), the Reforming Intelligence and Securing America Act (RISAA), which would extend Title VII of FISA two years from the date of enactment. RISAA would modify current Section 702 query provisions to require queries using U.S.-person query terms to be approved by an FBI supervisor, except where the query may assist in mitigating or eliminating a threat to life or of serious bodily harm. FBI political appointees would be barred from approving queries of Section 702-acquired information. RISAA would impose additional approval requirements for particularly sensitive categories of queries. For example, the FBI Deputy Director would be required to approve

queries using terms that identify a U.S. elected official, presidential appointee, political candidate, political organization, or media organization. An FBI attorney would be required to approve queries using terms that would identify a religious organization or that use batch job technology (i.e., technology that conducts automatic searches using sets of queries). RISAA also would expressly permit the querying of information collected under Section 702, using non-U.S. person query terms, to vet all non-U.S. persons who are being processed for travel to the United States.

If any query term is reasonably believed to be the name or other identifier of a Member of Congress, RISAA would require the FBI to notify the Speaker of the House, Senate Majority Leader, House Minority Leader, Senate Minority Leader, and the chairs and ranking minority members of the Senate and House intelligence committees, as delineated in [50 U.S.C. § 3093\(c\)](#) and commonly referred to as the “Gang of Eight.” The FBI would also be required to notify the Member who is the subject of the query, though the FBI Director could waive such notification if it would impede an ongoing national security or law enforcement investigation. RISAA would not permit the FBI to perform a query using the name or certain other personal information of a Member of Congress in order to supplement a defensive briefing about a counterintelligence threat to that Member unless the Member consents to such a query or the FBI Director determines that exigent circumstances exist to justify the query. The FBI would need to notify the Gang of Eight within three days of any request for a Member’s consent or any query performed under exigent circumstances.

RISAA would prohibit FBI queries of information acquired under Section 702 that are solely designed to find and extract evidence of criminal activity, with exceptions for queries that may assist in mitigating or eliminating a threat to life or serious bodily harm and for queries that are necessary to comply with the government’s criminal litigation discovery obligations.

S. 3961

[S. 3961](#), the Security and Freedom Enhancement Act of 2024 (SAFE Act), would extend Title VII of FISA through 2027. The SAFE Act includes query restrictions generally prohibiting any federal officer or employee from querying communication contents collected under Section 702 to find certain information about U.S. persons or persons who are in the United States at the time the information was collected or queried, unless the target of the query is the subject of a probable cause-based surveillance order or search warrant; the query is performed to prevent or mitigate emergency threats of death or serious bodily harm; the target consents to the query; or the query uses a known cybersecurity threat signature. The SAFE Act would also prohibit such queries that are not reasonably likely to return foreign intelligence information, except based on the emergency, consent, or cybersecurity exceptions described above, or if the query is necessary for the government to fulfill its litigation discovery obligations.

The SAFE Act would impose specific restrictions on queries performed by the FBI. Before performing any query, FBI personnel would be required to complete an annual training on the querying procedures. Like RISAA, the FBI Deputy Director would be required to approve queries using terms that identify a U.S. elected official, presidential appointee, political candidate, political organization, or media organization. An FBI attorney would be required to approve queries using terms that would identify a religious organization or that use batch job technology.

S. 3351

[S. 3351](#), the FISA Reform and Reauthorization Act of 2023 (FRRA), would extend Title VII through 2035 while amending some of its provisions. The FRRA would prohibit queries of information acquired under Section 702 that are solely designed to find and extract evidence of criminal activity, with exceptions for queries that may assist in mitigating or eliminating a threat to life or serious bodily harm and for queries that are necessary to comply with the government’s criminal litigation discovery obligations. The FRRA

also specifically permits queries for which the subject has provided consent and the use of non-U.S. person query terms to vet all non-U.S. persons who are being processed for travel to the United States. In addition to these generally applicable provisions, the FRRRA includes several provisions specifically addressing queries by the FBI, such as requiring FBI personnel to successfully complete relevant training and obtaining prior approval from an FBI attorney before conducting batch queries.

Like RISAA and the SAFE Act, several FRRRA provisions address queries using terms that would reasonably identify certain sensitive categories of targets. For example, in cases where the FBI has conducted a query using terms that are reasonably likely to identify a Member of Congress, FRRRA would require the FBI Director to promptly notify those Members as well as the Gang of Eight. Such notification may be delayed if the FBI Director determines that it would impede an ongoing national security or law enforcement investigation.

Similarly, except in the case of exigent circumstances, the FRRRA would require FBI personnel to obtain prior approval from the FBI Director, Deputy Director, or the Executive Assistant Director for the National Security Branch before using a query term reasonably believed to identify a U.S. elected official, a presidential or gubernatorial appointee, a political candidate, a political organization or prominent individual in such organization, news media or a member of the news media, or a religious organization or prominent individual in such an organization.

S. 3234

S. 3234, the Government Surveillance Reform Act of 2023 (GSRA), would extend Title VII through September 30, 2027. Like the SAFE Act, the GSRA would generally prohibit any federal officer or employee from querying communication contents collected under Section 702 to find certain information about U.S. persons or persons who are in the United States at the time the information was collected or queried, unless the target of the query is the subject of a probable-cause-based surveillance order or search warrant; the query is performed to prevent or mitigate emergency threats of death or serious bodily harm; the target consents to the query; or the query uses a known cybersecurity threat signature.

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