Section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008 (FAA).

Section 702 (50 U.S.C. §1881a)

Procedures for targeting certain persons outside the United States other than United States persons

- Permits the USG to acquire foreign intelligence information by targeting non-U.S. persons (non-USPERs) reasonably believed to be located outside the United States, when the acquisition involves the assistance of an electronic communication service provider, without the need for individualized P180 Orders.

History of Section 702

- President's Terrorist Surveillance Program (TSP) disclosed during a radio address
- Targeting non-USPERs located outside the U.S.
- English; recognition that communications by non-USPERs outside the U.S. have little or no protections

Elements of Section 702

- "Significant Purpose" for the Section 702 coverage must be to acquire foreign intelligence information.

AG/DNI-submitted/FISC-approved:

- Targeting Procedures - how the USG will determine target's USPER status & location
- Standard Minimization Procedures - how the USG will handle the data
Elements of Section 702

"Foreign Intelligence Information"

Same definition from traditional FISAs applies:
(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—
(A) the national defense or the security of the United States; or
(B) the conduct of the foreign affairs of the United States.

Elements of Section 702

"Non-USPERs"

Non-USPER — standard FISA definition
- USPER
  - U.S. citizen
  - Legal permanent resident alien ("green card holder")
  - Association substantially composed of members from the first two categories
  - A U.S. corporation that is not a foreign power

Elements of Section 702

"Reasonably Believed to Be Outside U.S."

- Reasonably Believed to Be Located Outside U.S.
  - “Foreignness”
Elements of Section 702

"Without the need for Individualized FISC Orders"

- In the absence of a compliance issue, nothing is filed with the FISC with regards to 702 collection on a facility
- If the facility passes the Targeting Procedures, collection commences without going to the FISC

Noteworthy Aspects of Section 702

- No Probable Cause required
- No Foreign Power requirement for target
- Target only needs to provide PI Info
- FI Info about a Foreign Power or agent of FP
- Target need not be "acting" in the U.S.
- Particularly relevant for Counterintelligence cases

Noteworthy Aspects of Section 702

- No FISA application
- Slightly less documentation
- FISI notification—field will document FI purpose, non-USPER states, and "foreignness"
- No Woods requirements
- No security review
- No renewals
- Coverage rolls over with each cert renewal
- Consult legal (CISG or ISLA)

Benefits of Section 702

- "Filling the Gaps"
  - Section 702 can fill certain pleading "gaps" in FISA
  - Target need not be a FP or agent of FP
  - Target need not act in the U.S.
    - Particularly relevant in Counterintelligence cases
  - No Probable Cause required
Benefits of Section 702

- "Sampling"
  - Section 702 coverage is easy to start and stop

- Reduces administrative burdens
  - No Woods requirement or accuracy review
  - No renewals
  - Coverage continues with renewal of cert

Costs of Section 702

- Must monitor take for signs of U.S. travel

- Litigation risks
  - Uncertainty re ability to use in court

Scenario #1

Scenario #2

Scenario #3

Scenario #4

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