

FEDERAL BUREAU OF INVESTIGATION

Precedence: PRIORITY

Date: 04/07/2006

To: All Divisions

From: Office of the General Counsel

Contact:

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Approved By: Caproni Valerie E

Drafted By:

b7E

Case ID #:

Title: (U) USA PATRIOT ACT RENEWAL - NEW LEGISLATIVE CHANGES TO FCI/IT LEGAL AUTHORITIES.

Synopsis: (U) Summarizes recent changes to national security legal authorities as a result of the "USA PATRIOT Improvement and Reauthorization Act of 2005 (Public Law 109-177) and the "USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006" (Public Law 109-178), and describes the preliminary implementation procedures.

Details: The President signed the "USA PATRIOT Improvement and Reauthorization Act of 2005" (USA PATRIOT IRA) and the "USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006" on March 9, 2006. The USAPA IRA makes permanent many of the sunseting provisions of the USA PATRIOT Act.¹ Additionally, both laws make significant changes to many national security legal authorities, including National Security Letters (NSLs) and certain FISA-related provisions, and impose new reporting requirements. Moreover, the new laws make changes in several substantive criminal laws, some of which may have implications in national security investigations.

The National Security Law Branch of the Office of General Counsel is issuing preliminary guidance on those portions of the two laws relating to national security operations. The following summarizes authorities contained in sections of the bills, to include a summary of potential changes in FBI operational procedures. Recipients should note that this is only initial guidance; more detailed explanations and procedures may follow in subsequent communications.

¹ The USA PATRIOT Act refers to the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," which was signed into law on October 26, 2001.

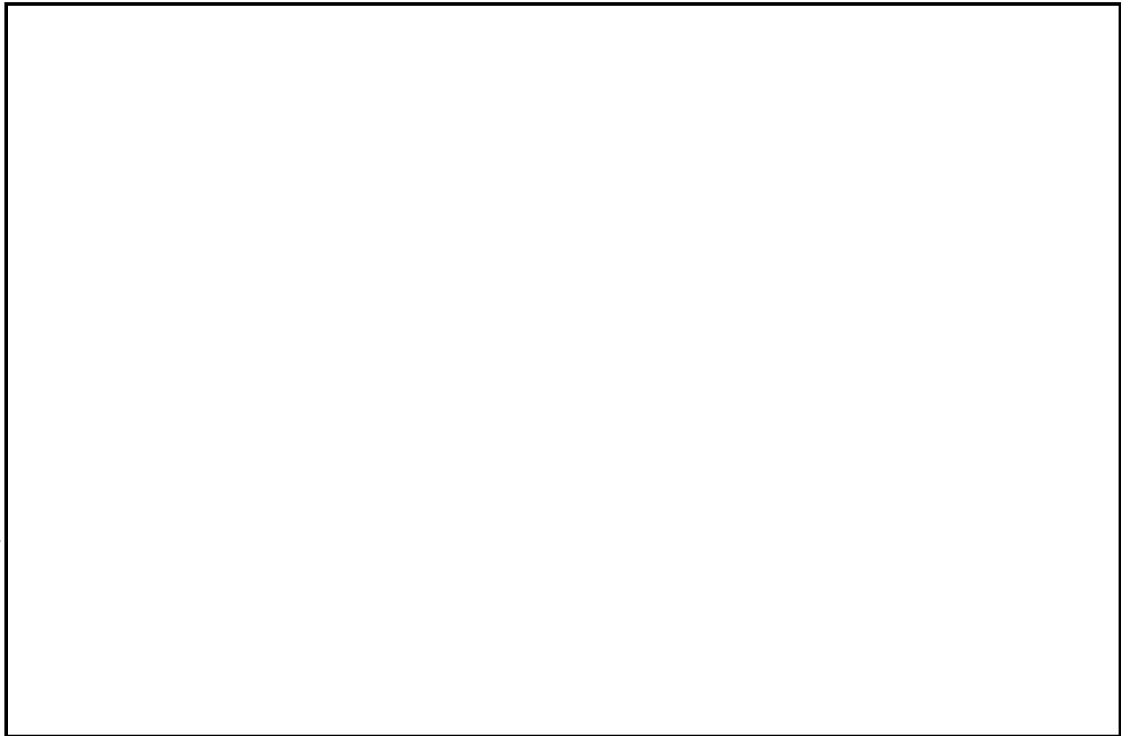
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The USA PATRIOT Act Improvement and Reauthorization Act of 2005 is organized into the seven titles. Title I, which carries the same title as the overall bill, contains the significant changes to the FBI's national security tools.² Titles II through VII contain several other Acts and miscellaneous provisions:

• **Title I - USA PATRIOT Improvement and Reauthorization Act**

Title I makes most of the original sunset provisions of the original USA PATRIOT Act permanent, though it creates new sunsets for the authorities in section 206 (FISA roving authority) and section 215 (FISA access to business records) of the USA PATRIOT Act, and section 6001 (Lone Wolf provision) of the Intelligence Reform and Terrorism Prevention Act of 2004. It also extends the duration of several FISA tools. Additionally, it makes significant changes to the National Security Letter statutes. Finally, the USAPA IRA requires new Congressional reporting of the use of national security tools.

Outside the Scope



² Congress drafted the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 after the USA PATRIOT Improvement and Reauthorization Act of 2005. Congress used the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 to make additional adjustments to the nondisclosure provisions of FISA Business Records and National Security Letters contained in the USA PATRIOT IRA, and to add the "Privacy Protections for Library Patrons."

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TITLE I - USA PATRIOT IMPROVEMENT and REAUTHORIZATION ACT of 2005.

This EC will not address the new sections of the USAPA IRA in sequence; instead, the sections will be organized by national security tools.

SUNSET PROVISIONS

Sec. 102. USA PATRIOT Act Sunset Provisions.

Section 102 repeals section 224 of the USA PATRIOT Act, making most of the original sunset provisions permanent. This section adopts a new 4-year sunset (December 31, 2009) for sections 206 (roving authority) and 215 (business records) of the USA PATRIOT Act. The now permanent provisions of the USA PATRIOT Act are the following:



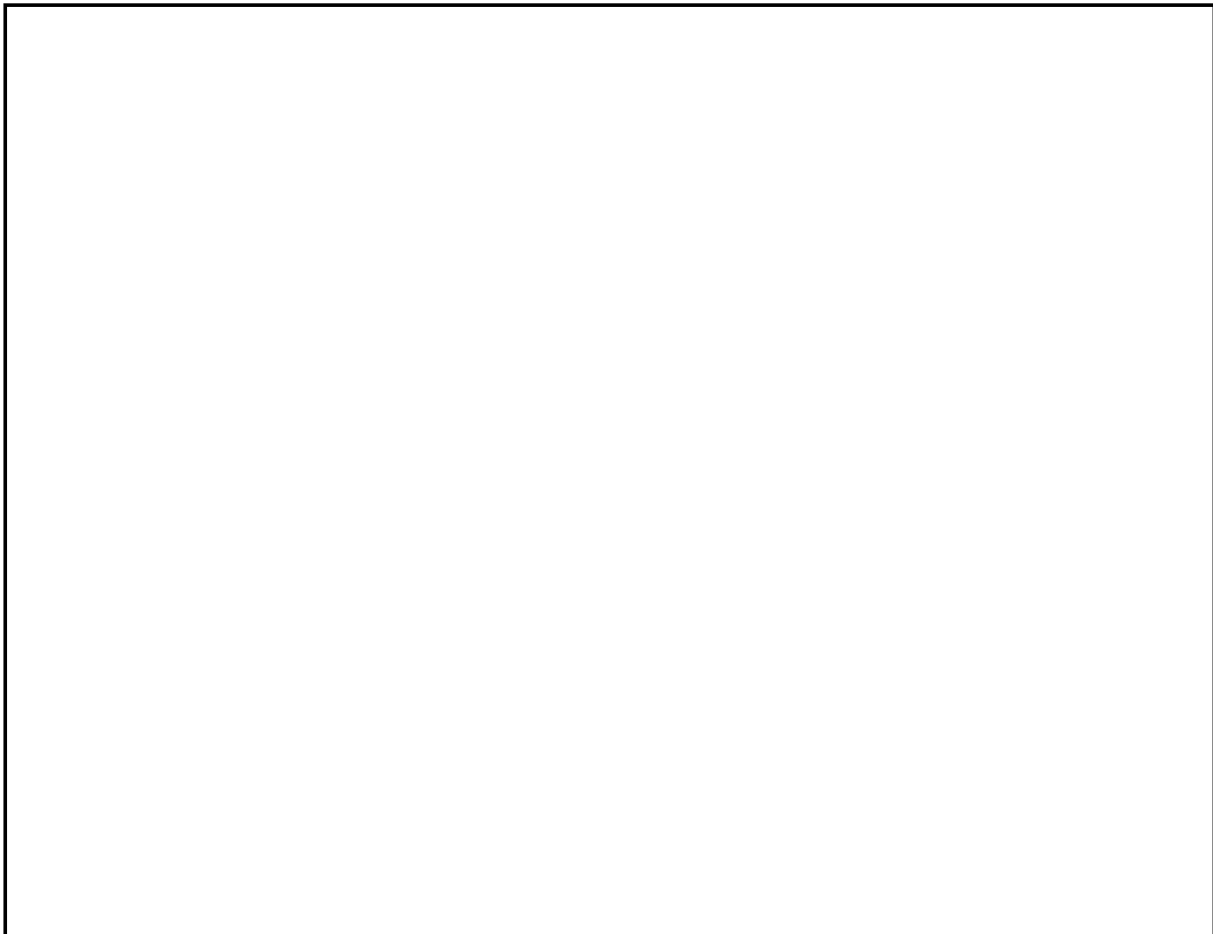
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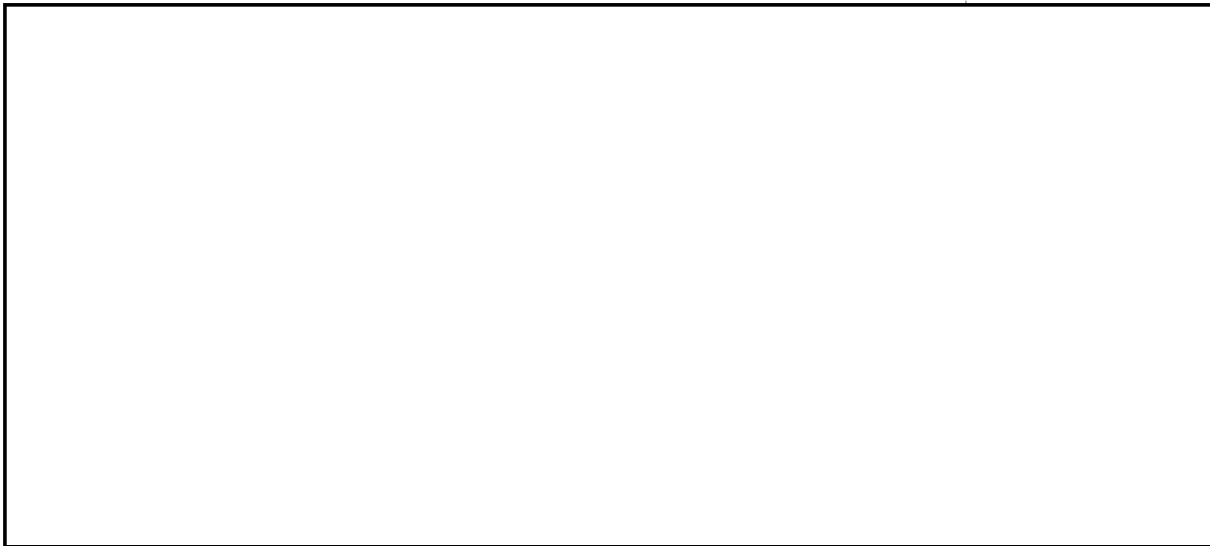
Provision	New Sunset Date
[Redacted]	
FISA Business Records Authority	December 31, 2009



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FISA BUSINESS RECORD CHANGES³

Sec. 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act.

Section 106 makes the following changes to Sections 501 and 502 of the Foreign Intelligence Surveillance Act (FISA) regarding access to 215 Business Records.

Procedural Changes Related to FISA Business Records: FISA Business Records, which have been the subject of much debate, have been modified to contain more safeguards to protect civil liberties and privacy. These safeguards include special procedures and approvals for certain types of tangible things (i.e., library records), a directive to develop “minimization procedures,” the recipient’s right to seek judicial review of an order, and a recipient’s right to disclose an order for the purpose of obtaining legal advice or for assistance in complying with the order. The following charts summarize significant provisions in the new law.

Scope of FISA Business Records authority.	<ul style="list-style-type: none">• This authority may be used to obtain “any tangible things (including books, records, papers, documents, and other items).” This authority is broad, similar in scope to a criminal grand jury subpoena.• This authority requires additional procedures for certain special categories of records (see below).
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³ The changes included in this section also include the changes made by section 3 and 4 of the “USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.”

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Special Categories of Tangible Things	Congress designated particular categories of records for special procedures and approvals. The FBI will adjust procedures to account for the special designation.
• Special Categories:	Library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, and medical record containing information that would identify a person.
• Approval Level for special categories:	The Director of the FBI may delegate the authority to either – <ul style="list-style-type: none"> • the Deputy Director of the FBI; or • the Executive Assistant Director (EAD) for National Security (or any successor position). <p>No further delegation is allowed.</p>
• Congressional Oversight of special categories:	Attorney General must provide annual report (April) to the House Judiciary Committee (HJC), the House Permanent Select Committee on Intelligence (HPSCI), the Senate Judiciary Committee (SJC), and the Senate Select Committee on Intelligence (SSCI). <ul style="list-style-type: none"> • Number of FISA business record orders granted, modified, or denied for the special categories of tangible things.
FISA Business Record Standard- Relevance:	The FBI's facts must show that there are "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation. "
• Presumptive Relevance Test:	The tangible things are presumptively relevant if the facts show they pertain to – "(i) a foreign power or an agent of a foreign power; (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigations..."
FISA Business Record Order:	<ul style="list-style-type: none"> • The order must describe the tangible things with sufficient particularity to permit them to be fairly identified. • Date for return - the order will contain a date on which the tangible things must be provided. • Recipient must have a reasonable period of time to produce. • The Order may only require production of tangible things that would be available with a grand jury subpoena or a District Court order (in other words, privileges under the law will apply to Business Record orders).

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FISA Business Record Non-Disclosure Provision:	No person shall disclose the fact that the FBI has sought tangible things.
• Exceptions to non-disclosure:	A recipient may disclose a FISA Business Record Order to – (1) persons to whom disclosure is necessary to comply; (2) an attorney to obtain legal advice or assistance with respect to the production; (3) a person as permitted by the FBI Director (or designee).
• Extension of nondisclosure to others:	<ul style="list-style-type: none">• If the recipient discloses to another person (see exceptions above), the recipient shall notify the person of the nondisclosure requirement.• The person to whom disclosure is made shall be subject to the nondisclosure requirement.• The FBI director (or designee) may ask the recipient to identify the other persons to whom disclosure of the Business Record order will be made (except that the recipient does not have to identify the attorney).
Judicial Challenge of FISA Business Record authority:	The recipient of a FISA Business Record order may challenge the legality of the order in the Foreign Intelligence Surveillance Court.
• Challenging the order:	<ul style="list-style-type: none">• Recipient may move to modify or set aside the order.• FISC may grant the motion only if the order does not meet the requirements of FISA or is otherwise unlawful.

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<ul style="list-style-type: none"> • Challenging the non-disclosure provision: 	<ul style="list-style-type: none"> • Not less than 1 year after the order, the recipient may move to modify or set aside the nondisclosure order. • FISC may grant such a motion only if there is no reason to believe that disclosure may endanger the national security of the U.S., interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person. • The FISC will treat as conclusive a certification by the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI that a disclosure may endanger the national security of the U.S. or interfere with diplomatic relations.
<ul style="list-style-type: none"> • Security: 	<ul style="list-style-type: none"> • Filings shall be under seal • Chief Justice of the U.S., in consultation with the AG and the DNI, will establish security measures.

Minimization Procedures for FISA Business Records:	Within 180 days of enactment, the Attorney General shall adopt specific minimization procedures governing the retention and dissemination of FISA Business Record information.
<ul style="list-style-type: none"> • U.S. Person information: 	The minimization procedures should minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting U.S. persons consistent with the U.S. intelligence community need to obtain, produce and disseminate foreign intelligence information.
<ul style="list-style-type: none"> • Evidence of a crime: 	The procedures should allow for the retention and dissemination of information that is evidence of a crime.

Procedural Changes Related to Congressional Oversight of FISA Business Records: The new law beefs up the Congressional reporting requirements for the FISA Business Record authority. OIPR will have the responsibility for reporting the FISA Business Record statistics to Congress.

Reporting Cycle:	Attorney General will report on an annual basis (April of each year).
Congressional Committees:	<ul style="list-style-type: none"> • House Permanent Select Committee on Intelligence • House Judiciary Committee • Senate Select Committee on Intelligence • Senate Judiciary Committee

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Reporting Categories:	(1) Total number of applications for FISA Business Records. (2) Total number of orders granted, modified, or denied. (3) Total number of orders granted, modified, or denied for the special categories of tangible things. <ul style="list-style-type: none"> • Library circulation records, library patron lists, book sales records, or book customer lists. • Firearms sales records. • Tax return records. • Educational records. • Medical records containing information that would identify a person.
Additional unclassified report:	Annually (April of each year), the Attorney General shall make an unclassified report on the total number of FISA Business Records applications, and the total number of orders granted, modified, or denied.

Sec. 106A Audit on Access to Certain Business Records for Foreign Intelligence Purposes.

Section 106A directs the Inspector General of the Department of Justice to perform a comprehensive audit of the effectiveness and use, including improper or illegal use, of the FISA Business Records authority. The audit will take place in two phases, covering the years of 2002 to 2006.

Procedural Changes Related to the Audit of FISA Business Records: The Inspector General's Office of the Department of Justice (DOJ IG) started the audit process in January 2006, in anticipation of the new USA PATRIOT Improvement and Reauthorization Act. It will be incumbent upon the FBI to cooperate with the DOJ IG to complete the two-phased audit. Per established procedures, the FBI's Inspection Division will be the primary point of contact for the DOJ IG. Additional guidance may be published as the audit process continues.

Scope of Audit:	The IG will perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority.
Timing of Audit:	For 2002, 2003, and 2004, the audit should be completed within one year of enactment (March 9, 2007).
	For 2005 and 2006, the audit should be completed by December 31, 2007.
Report results to Congress:	The IG shall submit the audit reports to – <ul style="list-style-type: none"> • House Judiciary Committee. • House Permanent Select Committee on Intelligence. • Senate Judiciary Committee. • Senate Select Committee on Intelligence.

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Examine effectiveness of the tool:	Audit will look at the following for effectiveness – <ul style="list-style-type: none">• Categories of records obtained.• The importance to the FBI and the IC of the information obtained.• The manner in which the information is collected, retained, analyzed, and disseminated by the FBI (this will include an examination of the access to “raw data” provided by the FBI to other agencies of the Federal, State, local, or tribal governments, or private sector agencies).• The minimization procedures adopted by the AG.• Whether, and how often, the FBI used information to produce analytical intelligence products for the FBI, the IC, or other Federal, State, local, or tribal government agencies.• Whether, and how often, the FBI provided the information to law enforcement authorities for criminal proceedings.
Examine the process:	The audit process will look at the following: <ul style="list-style-type: none">• How often the FBI requested DOJ to submit an application and the request was not submitted to the court (including the basis for the decision).• Whether the court granted, modified, or denied the application.• The justification for the failure of the AG to issue implementing procedures governing the requests in a timely fashion, including whether the delay harmed national security.• Whether bureaucratic or procedural impediments prevent the FBI from fully using the authority.

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Outside the Scope

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The National Security Law Branch (202-324-3951) is available to answer questions about this legislation. In addition, materials relating to the new legislation will be posted on the NSLB FBI Intranet website, which can be found through the FBI Office of General Counsel website.

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