

TITLE II—PROTECTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS

SEC. 201. PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), as amended by section 101, is further amended by adding after title VII the following new title:

“TITLE VIII—PROTECTION OF PERSONS ASSISTING THE GOVERNMENT

“SEC. 801. DEFINITIONS.

“In this title:

“(1) ASSISTANCE.—The term ‘assistance’ means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.

“(2) CONTENTS.—The term ‘contents’ has the meaning given that term in section 101(n).

“(3) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term ‘electronic communication service provider’ means—

“(A) a telecommunications carrier, as that term is defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

“(B) a provider of electronic communication service, as that term is defined in section 2510 of title 18, United States Code;

“(C) a provider of a remote computing service, as that term is defined in section 2711 of title 18, United States Code;

“(D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored;

“(E) a parent, subsidiary, affiliate, successor, or assignee of an entity described in subparagraph (A), (B), (C), or (D); or

“(F) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).

“(4) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term ‘element of the intelligence community’ means an element of the intelligence community as specified or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

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In this title:¶

(1) ASSISTANCE.—The term “assistance” means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.¶

(2) CONTENTS.—The term “contents” has the meaning given that term in section 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).¶

(3) COVERED CIVIL ACTION.—The term “covered civil action” means a civil action filed in a Federal or State court that—¶

(A) alleges that an electronic communication service provider furnished assistance to an element of the intelligence community; and¶

(B) seeks monetary or other relief from the electronic communication service provider related to the provision of such assistance.¶

(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term “electronic communication service provider” means—¶

(A) a telecommunications carrier, as that term is defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);¶

(B) a provider of an electronic communication service, as that term is defined in section 2510 of title 18, United States Code;¶

(C) a provider of a remote computing service, as that term is defined in section 2711 of title 18, United States Code;¶

(D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored;¶

(E) a parent, subsidiary, affiliate, successor, or assignee of an entity described in subparagraph (A), (B), (C), or (D); or¶

(F) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).¶

(5) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term “element of the intelligence community” means an element of the intelligence community specified in or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).¶

SEC. 202. LIMITATIONS ON C[...] [1]

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~~“(5) PERSON.—The term ‘person’ means—~~

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~~“(A) an electronic communication service provider; or~~

~~“(B) a landlord, custodian, or other person who may be authorized or required to furnish assistance pursuant to—~~

~~“(i) an order of the court established under section 103(a) directing such assistance;~~

~~“(ii) a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code; or~~

~~“(iii) a directive under section 102(a)(4), 105B(e), as in effect on the day before the date of the enactment of the FISA Amendments Act of 2008 or 703(h).~~

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~~“(6) STATE.—The term ‘State’ means any State, political subdivision of a State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States, and includes any officer, public utility commission, or other body authorized to regulate an electronic communication service provider.~~

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“SEC. 802. PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES.

~~“(a) General Requirement for Certification.— Notwithstanding any other provision of law, no civil action may lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the court that—~~

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“(1) IN GENERAL.—

~~“(1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;~~

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~~“(2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;~~

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~~“(3) any assistance by that person was provided pursuant to a directive under sections 102(a)(4), 105B(e), as in effect on the day before the date of the enactment of the FISA Amendments Act of 2008, or 703(h) directing such assistance; or~~

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~~“(4) the person did not provide the alleged assistance.~~

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~~“(b) Additional Limitation.— Notwithstanding any other provision of law, no civil action may lie or be maintained in a Federal or State court against an eligible electronic communication service provider for furnishing assistance to an element of the intelligence community, and shall be promptly dismissed, if—~~

~~“(1) the Attorney General certifies to the court that the assistance alleged to have been provided by the electronic communication service provider was—~~

~~“(A) in connection with an intelligence activity involving communications that was—~~

~~(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and~~

~~(ii) designed to detect or prevent a terrorist attack, or activities in preparation~~

for a terrorist attack, against the United States; and

“(B) described in a written request or directive, or a series of such requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was—

“(i) authorized by the President; and

“(ii) determined to be lawful; and

(2) the court determines, on the basis of the certification provided in paragraph (1)—

(A) the written request or directive, or the series of such requests or directives, substantially satisfies the certification requirements of 2511(2)(a)(ii)(B) of title 18, United States Code; or

(B) a reasonable person in the position of the electronic communication service provider would not have known under the totality of the circumstances that compliance with the written request or directive or series of such requests or directives issued during the period beginning on September 11, 2001, and ending on January 17, 2007, was unlawful.

“(c) An eligible communication service provider in subsection (b) is an electronic communication service provider that submits a declaration to the Court under section 1746 of Title 28 of the U.S. Code that—

(A) it furnished the assistance it was alleged to have provided pursuant to the written request or directive described in subsection (b)(1)(B), or a series of such requests or directives;

(B) it furnished the assistance it was alleged to have provided with the reasonable belief that compliance with the written request or directive described in subsection (b)(1)(B), or the series of such requests or directives, was lawful; and

(C) describes the basis for its belief that compliance with the written request or directive described in subsection (b)(1)(B), or the series of such requests or directives, was lawful.

“(d) JUDICIAL REVIEW.—

“(1) REVIEW OF CERTIFICATIONS.— A certification made pursuant to subsection (a) or (b) shall be reviewed for [abuse of discretion or a determination whether the certification is otherwise not in accordance with law][a determination of whether the certification is unsupported by substantial evidence or otherwise not in accordance with law],

“(2) REVIEW OF DECLARATIONS.— A declaration made pursuant to subsection (c) shall be reviewed for a determination of whether it contains all the required elements.

“(3) SUPPLEMENTAL MATERIALS.— In its review of the certifications in subsections (a) and

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(b), the court may examine the court order, certification, or directive described in subsection (a) or the written request or directives, or series of such requests or directives, described in subsection (b)(1)(B).

“(e) Limitations on Disclosure.—If the Attorney General files a declaration under section 1746 of title 28, United States Code, that disclosure of a certification or declaration made pursuant to subsection (a), (b) or (c) would harm the national security of the United States, the court shall—

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“(1) review such certification or declaration in camera and ex parte; and

“(2) limit any public disclosure concerning such certification or declaration, including any public order following such an ex parte review, to a statement that the conditions of section 802 have been met and a description of the legal standards that govern the order, without disclosing the subsection that is the basis for the order.

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“(f) Role of the parties. —

(1) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—If an electronic communication service provider submits a declaration to the court under subsection (c), the court may permit the electronic communication service provider to participate in any ex parte proceedings, at the request of the Government, to the extent required by the court for the consideration of the declaration under subsection (c).

(2) PARTIES.—The court may ask any party to submit arguments on relevant issues of law, if deemed appropriate by the court.

“(g) Nondelegation.—The authority and duties of the Attorney General under this section shall be performed by the Attorney General (or Acting Attorney General) or a designee in a position not lower than the Deputy Attorney General.

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“(h) Appeal.— The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts of the United States granting or denying a motion to dismiss under this section.

“(i) Removal.—A civil action against a person for providing assistance to an element of the intelligence community that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable under section 1441 of title 28, United States Code.

“(j) Relationship to Other Laws.—Nothing in this section may be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.

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“(k) Applicability.—This section shall apply to a civil action pending on or filed after the date of enactment of the FISA Amendments Act of 2008.

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“SEC. 803. PREEMPTION.

Deleted: SEC. 204. PREEMPTION OF STATE INVESTIGATIONS. ¶ Title VIII of the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.), as amended by adding at the end the following new section: ¶

“(a) In General.—No State shall have authority to—

“(1) conduct an investigation into an electronic communication service provider’s alleged assistance to an element of the intelligence community;

“(2) require through regulation or any other means the disclosure of information about an electronic communication service provider’s alleged assistance to an element of the

intelligence community;

“(3) impose any administrative sanction on an electronic communication service provider for assistance to an element of the intelligence community; or

“(4) commence or maintain a civil action or other proceeding to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community.

“(b) Suits by the United States.—The United States may bring suit to enforce the provisions of this section.

“(c) Jurisdiction.—The district courts of the United States shall have jurisdiction over any civil action brought by the United States to enforce the provisions of this section.

“(d) Application.—This section shall apply to any investigation, action, or proceeding that is pending on or filed after the date of enactment of the FISA Amendments Act of 2008.”.

“SEC. 804. REPORTING

“(a) Semiannual Report.—Not less frequently than once every 6 months, the Attorney General shall fully inform, in a manner consistent with national security, the congressional intelligence committees, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives, concerning the implementation of this title.

“(b) Content.—Each report made under subparagraph (a) shall include—

“(1) any certifications or declarations made under section 802;

“(2) a description of the judicial review of the certifications or declarations made under section 802; and

“(3) any actions taken to enforce the provisions of section 803.

“(c) Definition.—In this section, the term ‘congressional intelligence committees’ means—

“(1) the Select Committee on Intelligence of the Senate; and

“(2) the Permanent Select Committee on Intelligence of the House of Representatives.”.

SEC. 202. TECHNICAL AMENDMENTS.

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The table of contents in the first section of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), as amended by section 101(b), is further amended by adding at the end the following:

“TITLE VIII—PROTECTION OF PERSONS ASSISTING THE GOVERNMENT

“Sec.801.Definitions.

“Sec.802.Procedures for implementing statutory defenses.

“Sec.803.Preemption,

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“Sec.804.Reporting.”.

DEFINITIONS.

In this title:

(1) ASSISTANCE.—The term “assistance” means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.

(2) CONTENTS.—The term “contents” has the meaning given that term in section 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

(3) COVERED CIVIL ACTION.—The term “covered civil action” means a civil action filed in a Federal or State court that—

(A) alleges that an electronic communication service provider furnished assistance to an element of the intelligence community; and

(B) seeks monetary or other relief from the electronic communication service provider related to the provision of such assistance.

(4) ELECTRONIC COMMUNICATION SERVICE PROVIDER.—The term “electronic communication service provider” means—

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(E) a parent, subsidiary, affiliate, successor, or assignee of an entity described in subparagraph (A), (B), (C), or (D); or

(F) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).

(5) ELEMENT OF THE INTELLIGENCE COMMUNITY.—The term “element of the intelligence community” means an element of the intelligence community specified in or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS.

(a) Limitations.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a covered civil action shall not lie or be maintained in a Federal or State court, and shall be promptly dismissed, if the Attorney General certifies to the court that—

(A) the assistance alleged to have been provided by the electronic communication service provider was—

(i) in connection with an intelligence activity involving communications that was—

(I) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(II) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(ii) described in a written request or directive from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was—

(I) authorized by the President; and

(II) determined to be lawful; or

(B) the electronic communication service provider did not provide the alleged assistance.

(2) REVIEW.—A certification made pursuant to paragraph (1) shall be subject to review by a court for abuse of discretion.

(b) Review of Certifications.—If the Attorney General files a declaration under section 1746 of title 28, United States Code, that disclosure of a certification made pursuant to subsection (a) would harm the national security of the United States, the court shall—

(1) review such certification in camera and ex parte; and

(2) limit any public disclosure concerning such certification, including any public order following such an ex parte review, to a statement that the conditions of subsection (a) have been met, without disclosing the subparagraph of subsection (a)(1) that is the basis for the certification.

(c) Nondelegation.—The authority and duties of the Attorney General under this section shall be performed by the Attorney General (or Acting Attorney General) or a designee in a position not lower than the Deputy Attorney General.

(d) Civil Actions in State Court.—A covered civil action that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable under section 1441 of title 28, United States Code.

(e) Rule of Construction.—Nothing in this section may be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.

(f) Effective Date and Application.—This section shall apply to any covered civil

action that is pending on or filed after the date of enactment of this Act.

SEC. 203.