



Office of the Attorney General
Washington, D. C. 20530

April 18, 2024

The Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

Dear Leader Schumer and Leader McConnell:

As I testified yesterday, I urge the Senate to reauthorize Section 702 of the Foreign Intelligence Surveillance Act (FISA) before it expires on Friday. Section 702 is indispensable to our work to protect the American people from cyber, nation state, terrorist, and other threats.

Section 25 of H.R. 7888 includes language modifying the definition of “electronic communication service provider” (ECSP). As I testified yesterday, this is a technical amendment to address the changes in internet technology in the 15 years since Section 702 was passed. It is narrowly tailored and is in response to the Foreign Intelligence Surveillance Court’s identification of a need for a legislative fix.

The attached April 17, 2024, letter from Assistant Attorney General Carlos Felipe Uriarte, including the Department of Justice’s representations regarding the ECSP provision, reflects my views and my strong support for the passage of H.R. 7888.

Sincerely,

Merrick B. Garland
Attorney General

cc: The Honorable Mark Warner, Chairman, Select Committee on Intelligence, United States Senate

The Honorable Marco Rubio, Vice Chairman, Select Committee on Intelligence, United States Senate

The Honorable Richard J. Durbin, Chair, Committee on the Judiciary, United States Senate

The Honorable Lindsey O. Graham, Ranking Member, Committee on the Judiciary, United States Senate



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

The Honorable Mark Warner
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Chairman Warner:

We are grateful that the Senate is continuing to work on a bipartisan basis to extend Title VII of the Foreign Intelligence Surveillance Act (FISA), including Section 702, for an additional two years. Section 702 provides critical and unique foreign intelligence at a speed and reliability that the Intelligence Community cannot replicate with any other authority. The Intelligence Community relies on Section 702 in almost every aspect of its work, and the authority is essential to our national security.

We urge the Senate to pass H.R. 7888 by Friday, April 19. Doing so will prevent the lapse of this critical national security tool and will impose the most comprehensive set of reforms in the history of the Section 702 program.

As you are aware, Section 25 of H.R. 7888 includes technical language modifying the definition of “electronic communication service provider” (ECSP) to address unforeseen changes in electronic communications technology. As Attorney General Merrick Garland testified, this change “is a technical change. It’s a consequence of internet technology changing in the 15 years since FISA 702 was passed. It’s narrowly tailored. It is actually a response to a suggestion from the FISA court to make—to seek this kind of legislative fix. It does not in any way change who can be a target of Section 702.”¹ This definition has not been updated since 2008 when Congress first enacted Section 702. The technical modification is intended to fill a critical intelligence gap—which was the subject of litigation before the Foreign Intelligence Surveillance Court (FISC)—regarding the types of communications services used by non-U.S. persons outside the United States.

¹ *A Review of the President’s Fiscal Year 2025 Budget Request for the U.S. Department of Justice: Hearing Before the Commerce, Justice, Science, and Related Agencies Subcomm. to the S. Appropriations Comm., 118th Cong. (Apr. 17, 2024) (testimony of Attorney General Merrick Garland).*

To address concerns some have raised about this amendment to the ECSP definition, the Department of Justice (Department) provides the following representations:

1. This technical change to the definition of ECSP does not affect the overall structure of Section 702 or the protections imposed on all aspects of the 702 program, including the court-imposed legal procedures. The targeting procedures under Section 702 strictly prohibit targeting persons or entities inside the United States or Americans anywhere in the world. The procedures further prohibit “reverse targeting,” which is collecting on foreigners outside the United States for the purpose of obtaining the communications of a person inside the United States or of a U.S. person.
Accordingly, it would be unlawful under Section 702 to use the modified definition of ECSP to target any entity inside the United States including, for example, any business, home, or place of worship. It would also be unlawful to compel any service provider to target the communications of any person inside the United States, regardless of whether such a person is in contact with a non-U.S. person outside the United States. Some critics have falsely suggested that the amended definition of ECSP could be used to conduct surveillance at churches or media companies in the United States—this activity would be legally barred under the rules governing targeting under Section 702 and the prohibition against targeting anyone inside the United States.
2. **Further, the Department commits to applying this definition of ECSP exclusively to cover the type of service provider at issue in the litigation before the FISC—that is, technology companies that provide the service the FISC concluded fell outside the current definition.** The number of technology companies providing this service is extremely small, and we will identify these technology companies to Congress in a classified appendix. To protect sensitive sources and methods, the ECSP provision in H.R. 7888 was drafted to avoid unnecessarily alerting foreign adversaries to sensitive collection techniques.
3. As you are aware, the government provides Congress with a copy of all Section 702 directives issued to U.S. electronic communication service providers. **To facilitate appropriate oversight and transparency of the government’s commitment to apply any updated definition of ECSP only for the limited purposes described above, the Department will also report to Congress every six months regarding any applications of the updated definition.** This additional reporting will allow Congress to ensure the government adheres to our commitment regarding the narrow application of this definition.

The Honorable Mark Warner
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Congress plays a critical role in the ongoing oversight of the government's use of Section 702. We look forward to continuing to work with Congress to reauthorize this critical national security tool to protect our national security while safeguarding privacy and civil liberties.

Sincerely,

CARLOS
URIARTE

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Carlos Felipe Uriarte
Assistant Attorney General

cc:

The Honorable Marco Rubio
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510