



## U.S. Department of Justice

National Security Division

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### **Recent Efforts to Strengthen FISA Compliance**

The Foreign Intelligence Surveillance Act (FISA) is the central statutory framework governing how the U.S. government collects foreign intelligence information regarding new and emerging national security threats – from the operational tactics used by terrorists to plot attacks to the strategic motivations of our adversaries like Russia and China. Section 702, in particular, enables the government to target non-U.S. persons located outside the United States to acquire foreign intelligence information. Importantly, Section 702 cannot be used to target a U.S. citizen, any other U.S. person (e.g., a permanent resident or a corporation that is incorporated in the United States), or any person known to be located in the United States.

In 2021, after the Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI) identified additional compliance incidents involving the querying of raw FISA information by the Federal Bureau of Investigation (FBI), FBI worked with DOJ and ODNI to institute remedial measures that have since significantly strengthened compliance. Notably, the number of U.S. person queries run against unminimized Section 702 collection dramatically decreased after FBI implemented certain remedial measures in the summer of 2021 at DOJ's direction. The following memorandum summarizes the oversight mechanisms currently in place, recent remediation efforts to further strengthen compliance, and the assessment of those ongoing efforts to date.

#### *Oversight Mechanisms*

All information collected pursuant to FISA authorities is subject to rigorous oversight by all three branches of government. With respect to Section 702 of FISA, the Intelligence Community must strictly adhere to legal procedures – targeting, minimization, and querying procedures – adopted by the Attorney General and approved by the Foreign Intelligence Surveillance Court (FISC), that govern how the collection is acquired and handled. These procedures contain detailed privacy-protective rules regarding topics such as the types of targets that can be collected against under Section 702, who can access Section 702 collection, when the collection can be queried, the length of time collection can be kept by the government, including the circumstances under which collection must be destroyed, and when information about U.S. persons can be shared and with whom.

The Department of Justice provides independent oversight of the Intelligence Community's implementation of FISA authorities. With regard to the Section 702 program in particular, DOJ conducts regular and comprehensive oversight with ODNI. As part of this oversight, DOJ and ODNI review every decision to initiate Section 702 collection to ensure compliance with the applicable procedures and the statute. The Department of Justice and ODNI also review certain intelligence reports based on Section 702 information, as well as select

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queries of unminimized Section 702 information, to assess their compliance with FISA and the Section 702 minimization and querying procedures.

### *Recent Remediation Efforts*

Department of Justice and ODNI leadership across Administrations have been focused on ensuring robust compliance with Section 702. Where compliance incidents have been identified, as in the case of the FBI's queries of unminimized FISA information, DOJ has directed development of new, remedial measures to strengthen compliance. For example, on August 31, 2020, Attorney General Barr issued a memorandum, *Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation*, which directed the FBI to establish an Office of Internal Auditing (OIA) and undertake a variety of auditing, assessment, compliance, and oversight measures applicable to its national security authorities. The FBI established OIA in 2020. That office is developing multiple auditing programs in connection with FBI's national security activities and has executed audits of queries of unminimized FISA and FISA Section 702 collection conducted by FBI personnel.

On April 22, 2021, Attorney General Garland issued a memorandum, *Further Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation*, directing the FBI to submit to the Deputy Attorney General a detailed work plan regarding its implementation of Attorney General Barr's August 2020 memorandum and to set specific, measurable goals for implementing each of the items in the 2020 memorandum. The April 2021 memorandum further directed the FBI to create performance metrics to reduce FISA compliance error rates and establish a timeline for completing specified program audits.

In keeping with Attorney General Garland's memorandum, the FBI submitted its work plan to the Deputy Attorney General in May 2021. Subsequently, the Deputy Attorney General directed additional augmentation of the FBI's internal compliance functions to ensure, for example, that the FBI designate a single senior leader within the office of the Associate Deputy Director to ensure the FBI's internal compliance and oversight efforts are integrated and effective across the FBI. In response, the FBI designated a senior official for this role. To improve compliance, the Deputy Attorney General also directed certain FBI system changes, guidance, and mandatory training. The following are some of the measures the FBI implemented to facilitate compliance with the FISA query requirements. These include:

- **Requiring FBI Personnel to "Opt-In" to Query Unminimized Section 702 Information:** In June 2021, the FBI changed the default settings in the systems where it stores unminimized Section 702 information so that FBI personnel with access to unminimized FISA Section 702 information need to affirmatively "opt-in" to querying such information. This system change was designed to address the large number of inadvertent queries of unminimized Section 702 information DOJ had identified in its reviews, in which FBI personnel did not realize their queries would run against such collection. Historically, users were automatically opted-in to querying unminimized Section 702 information in these databases if they had been authorized to access unminimized Section 702 information.

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- **Ensuring Heightened Approvals on Large Batch Job FISA Queries:** Also in June 2021, the FBI instituted a policy requiring FBI attorney approval prior to conducting a “batch job” that would result in 100 or more queries. The term “batch job” refers to a capability in one of the FBI’s systems that allows FBI personnel to more efficiently run queries involving large numbers of query terms. Historically, there had been some compliance incidents with the use of this tool that involved a large number of queries. The FBI attorney pre-approval requirement is designed to ensure that there is additional review in situations where one incorrect decision could potentially have a greater privacy impact due to the large number of query terms.
- **Supplemental Guidance and Mandatory Training on Query Requirements:** In November 2021, DOJ, ODNI, and the FBI issued new comprehensive guidance to all FBI FISA users on the proper application of the query rules, and in December 2021, the FBI instituted new mandatory training on that guidance, which personnel were required to complete by the end of January 2022. The FBI expanded and updated this training at the end of 2022. On an annual basis, all FBI personnel with access to unminimized FISA information are required to complete the expanded and updated query training or lose access to FISA systems. The guidance and mandatory training directly address misunderstandings about the rules applicable to queries of unminimized FISA information and instruct personnel on how to properly apply the query rules. In addition, the text of FBI’s Section 702 querying procedures was revised to more clearly spell out the query standard to FBI personnel.
- **Requirement for Case-Specific Justifications for U.S. Person Query Terms in FBI Systems:** In the fall of 2021, at the direction of the FISC, the FBI modified its systems containing unminimized Section 702 information to require a case-specific justification for every query using a U.S. person query term before accessing any content retrieved by such a query from unminimized Section 702 information. Previously, personnel were permitted to use a pre-populated common justification, when applicable, for the query. These case-specific justifications are subject to review and audit by DOJ as part of its regular oversight reviews.
- **New Restrictions and Oversight of Sensitive Queries:** In March 2022, the FBI instituted a new policy requiring enhanced pre-approval requirements for certain “sensitive” queries, such as those involving elected officials, members of the media, members of academia, or religious figures. Under the new policy, an FBI attorney must review these queries before they are conducted. The FBI’s Deputy Director must also *personally approve* certain queries before they can be conducted. This measure was designed to ensure that there is additional review at a leadership level of queries that reflect particular investigative sensitivities.

### *Results and Assessment*

As noted above, DOJ conducts reviews of FBI’s compliance with its query procedures. DOJ has continued to conduct such query reviews with a particular focus on evaluating the

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impact of the above measures. DOJ and ODNI are using the results of these reviews to assess empirically and qualitatively the effectiveness of these new remedial measures and to determine whether additional remedial steps are needed. FBI OIA's audits of queries of unminimized Section 702 information will also be instrumental in these assessments.

While those reviews are continuing, DOJ and ODNI have already developed concrete data and metrics that indicate that the remedial measures that have been put in place have yielded significant compliance benefits. As noted above, the number of U.S. person queries run against unminimized Section 702 collection dramatically decreased after FBI implemented its reforms beginning in the summer of 2021. ODNI plans to publicly release metrics on such U.S. person queries in its next Annual Statistical Transparency Report in April 2023. The reduction in U.S. person queries appears to stem in part from the implementation of the "opt-in" change, which has not only decreased the number of U.S. person queries overall but has also greatly reduced the number of inadvertent queries of unminimized Section 702 information. In addition, based on DOJ's recent reviews, FBI appears to be conducting fewer "batch job" queries, which has further reduced the number of U.S. person queries. Among the batch query jobs resulting in 100 or more queries that have been approved by FBI attorneys post-FBI's reforms and reviewed as part of recent compliance reviews, DOJ and ODNI have not observed any compliance incidents involving misapplications of the substantive query standard.

Separately, the FBI's new pre-approval requirements for sensitive queries have created a process that has facilitated increased engagement between FBI field personnel and FBI attorneys and leadership regarding Section 702 query requirements and provides additional checks on U.S. person queries that raise investigative sensitivities. DOJ and ODNI also are encouraged by the many FBI personnel who are demonstrating an improved understanding of the query standard and applicable rules. Nonetheless, DOJ and ODNI will continue to focus on identifying and addressing instances where FBI personnel have misapplied the query standard and related requirements. For example, FBI personnel who conduct noncompliant queries are routinely provided supplemental training and guidance on the proper application of the query requirements.

In addition to the DOJ and ODNI reviews, a recent FISC opinion has recognized the compliance benefits of the new approach. As the FISC noted in an April 2022 Section 702 opinion that will shortly be released by ODNI, "the Court is encouraged by the amendments to the FBI's querying procedures and the substantial efforts to improve FBI querying practices, including heightened documentation requirements, several system changes, and enhanced guidance, training, and oversight measures. There are preliminary indications that some of these measures are having the desired effect." *See* Mem. Op. & Order at 49 (FISA Ct. Apr. 21, 2022).

Rigorous FISA compliance and oversight continues to be a priority. DOJ, ODNI, and the FBI are steadfastly committed to ensuring that these remedial measures have their desired effect. The FBI is also assessing the findings from its internal reviews, as well as those from DOJ's reviews, and will continue to make further changes to its processes and training as appropriate to ensure that it complies with the legal rules relating to how it acquires, analyzes, and uses FISA information.

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