

Patriot Act Reauthorized – Is Your Company Prepared?

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On March 9, 2006, the president signed into law the USA PATRIOT Improvement and Reauthorization Act of 2005. Among other things, the PATRIOT Improvement Act makes permanent several key investigative powers that were, under the original PATRIOT Act, scheduled to sunset in December 2005. Congressional critics fought, unsuccessfully, to allow the provisions to sunset. Fourteen of the 16 sunset provisions became permanent, while the remaining two received a four-year extension.¹ The PATRIOT Improvement Act did, however, address some of the privacy concerns echoed by critics since the original Act became law in 2001. Most critics agree that the "improvements" continue to fall short of addressing many other privacy issues and government "overreaching."

These privacy concerns may directly impact your company. Your company must be aware of the investigative tools that are, under the original Act and the new Act, at the government's disposal. Under the original Act, the government could, among other things, readily access various business records; eavesdrop on communications, including computer traffic; prevent a company from seeking the advice of counsel under certain circumstances; and gather certain information without notice (or delayed notice) to the target. The PATRIOT Improvement Act addressed some of the privacy concerns found in the original Act concerning § 215 (Business Record Access), § 206 (Roving Surveillance under FISA (Foreign Intelligence Surveillance Act)), § 213 ("Sneak and Peak" Warrants), National Security Letter requests and "providing expert

advice and assistance" to terrorists.

The PATRIOT Improvement Act clarifies portions of § 215, which allows the government access to business records, by preventing § 215 Orders from being issued unless the information is relevant to an "authorized national security investigation."² The new Act also provides greater protection for sensitive documents (e.g. library, bookstore, medical, tax return and gun sale records) sought by the government. Now, applications for § 215 Orders seeking such information must be signed by the Director or Deputy Director of the FBI.³ The Attorney General is also tasked with developing procedures that limit the retention and dissemination of information received under § 215 Orders. Recipients of § 215 Orders may now seek judicial review and assistance from lawyers and others in responding to such requests.⁴

¹ Section 206 (Roving FISA Surveillance) and 215 (Business Record Access) were extended until 2009. Section 102 of the PATRIOT Improvement Act.

² Section 106 of the PATRIOT Improvement Act.

³ *Id.*

⁴ *Id.*



The PATRIOT Improvement Act made § 213 "Sneak and Peek" warrants permanent. The new Act also sets a limit on the government's ability to delay giving notice of "sneak and peek" warrants issued under § 213 in order to avoid endangering the life or physical safety of an individual. A presumptive limit of a 30-day delay is set for the initial warrant, with the possibility of a 90-day extension.⁵

Roving surveillance orders under § 206, which allow electronic surveillance to apply to a particular individual instead of a particular phone or computer, were also clarified under the new Act. The new Act requires a greater level of detail to obtain such orders when a target is only identified by description instead of by name.⁶ The government is also now required to provide, within 10 days, notice to the FISA court if surveillance is directed at a new facility or place.⁷

Various provisions of the original Act have also been challenged in federal courts, and some provisions have been declared unconstitutional. These unconstitutional provisions directly impact your company's policies and procedures when responding to government requests under cover of a § 505 National Security Letter ("NSL") or if interacting with entities that the government has deemed a threat to national security.

In September 2004, the Southern District of New York held § 505 facially unconstitutional as violating the First and Fourth Amendments.⁸ The court found § 505 violated the First Amendment because it prohibited recipients of NSLs, including the recipient's officers, employees, and agents, from revealing the existence of an NSL inquiry by the FBI, in perpetuity.⁹ The court also found the section violated the Fourth Amendment because it barred any judicial challenge to the propriety of an NSL request.¹⁰

The PATRIOT Improvement Act has addressed some of the privacy concerns associated with NSLs. The new Act allows explicit judicial review of NSLs and any associated government nondisclosure orders.¹¹ Nondisclosure of NSLs is no longer automatic. Recipients may now seek the assistance of an attorney for legal advice in responding to requests.¹² However, knowing and willful disclosure of the existence of an NSL for the purposes of obstructing an investigation or judicial proceeding could result in a criminal penalty.¹³

Section 805(a)(2)(B) of the original Act prohibits providing material support in the form of "expert advice or assistance" to organizations designated by the U.S. government as foreign terrorists. In March 2004, the Central District of California held § 805(a)(2)(B) unconstitutionally vague—violating the First and Fifth Amendments.¹⁴ The court concluded that the definition of "expert advice or assistance" was so vague that it was not "sufficiently clear so as not to cause persons' of common intelligence...necessarily [to] guess at its meaning and [to] differ as to its applications."¹⁵

⁵ Section 114 of the PATRIOT Improvement Act.

⁶ Section 108 of the PATRIOT Improvement Act.

⁷ *Id.*

⁸ *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

⁹ *Id.* at 471.

¹⁰ *Id.*

¹¹ Section 115 of the PATRIOT Improvement Act.

¹² Section 116 of the PATRIOT Improvement Act.

¹³ Section 117 of the PATRIOT Improvement Act.

¹⁴ *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004).

¹⁵ 309 F. Supp. 2d at 1198.



Following this case, § 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA")¹⁶ sought to amend and clarify the broad language of 805(a)(2)(B). Section 6603 amends the definitions of "material support or resources," "training," "expert advice or assistance" and "personnel." "Training" is now defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."¹⁷ "Expert advice or assistance" is defined as "advice or assistance derived from scientific, technical or other specialized knowledge."¹⁸ Section 6603 goes on to state that these provisions will not affect the rights guaranteed by the First Amendment. The section also modified the definition of "material support or resources" by removing the catch-all phrase "and other physical assets" and stating that the definition refers to services and other intangible property.¹⁹ The new definition of material support also requires knowledge of an organization's designation as a terrorist organization or its involvement in terrorist activities or terrorism.

Section 6603 has not held up well with courts. The Central District of California has said that § 6603 did not cure the unconstitutional vagueness associated with the definitions of "training," and "expert advice or assistance."²⁰ The Court found § 6603 added language to the "service" definition prohibiting support or resources to be unconstitutionally vague and the First Amendment protection language to be insufficient.²¹

The modifications contained in § 6603 of the IRTPA were to sunset on December 31, 2006. The PATRIOT Improvement Act removed that sunset provision, thus making the section permanent.²²

As you can see, the provisions described above could have a significant impact on your company's business and resources. The more you know, the more you can plan for in advance.

¹⁶ Pub.Law No. 108-458, 118 Stat. 3762-764 (Dec. 17, 2004).

¹⁷ Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004.

¹⁸ *Id.*

¹⁹ *Id.* The original definition under 18 U.S.C. 2339(a) included a mixture of tangible and intangible things that could be construed as benefits or services.

²⁰ *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, 1148-1151 (C.D. Cal. July 25, 2005).

²¹ *Id.* at 1151-1152.

²² Section 104 of the PATRIOT Improvement Act.

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