S. 139 — FISA Amendments Reauthorization Act of 2017 (Rep. Nunes, R-CA)

CONTACT: Nicholas Rodman, 202-226-8576

FLOOR SCHEDULE:

Scheduled for consideration on January 11, 2018, subject to a rule.

The rule provides that an amendment in the nature of a substitute consisting of a Rules Committee Print based on the text of H.R. 4478, as reported by the Permanent Committee on Intelligence, be considered as adopted.

The rule provides for 40 minutes of debate controlled by chair and ranking minority member of the Permanent Select Committee on Intelligence and 20 minutes controlled by the chair and ranking minority member of the Committee on the Judiciary.

The rule makes in order one amendment in the nature of a substitute consisting of the text of H.R.4124, the USA RIGHTS Act. The rule provides for 20 minutes of debate on the amendment.

TOPLINE SUMMARY:

S. 139, the FISA Amendments Reauthorization Act of 2017, would reauthorize Title VII of the Foreign Intelligence Surveillance Act (FISA), including section 702 which authorizes the Attorney General and the Director of National Intelligence to target persons reasonably believed to be located outside the United States to acquire foreign intelligence information by using specified surveillance programs. The provisions would be authorized for six years until 2023.

COST:

No Congressional Budget Office (CBO) estimate is available for S. 139 as amended.

However, a CBO estimate is available for H.R. 4478, the House Permanent Select Committee on Intelligence's previous version of the bill which would authorize section 702 for four years. CBO estimates that implementing the unclassified provisions of H.R. 4478 would cost $3 million over the 2018-2022 period, subject to the availability of appropriated funds.

CBO does not provide estimates for classified programs; therefore, this estimate addresses only the unclassified aspects of the bill.

CONSERVATIVE CONCERNS:

Some conservatives may be concerned by a reauthorization of section 702 without any major reforms to protect and ensure the 4th amendment rights of American citizens. Some conservatives believe that elements of the program could be deemed unconstitutional due to its granted authority potentially infringing upon the 4th amendment. Some conservatives have expressed concerns that the bill would codify about collection and fails to curtail the practice of backdoor searches.

However, some conservatives believe that section 702 does ensure the protection of privacy rights with the implementation of certain procedures put in place during a query. Some conservatives argue that the reauthorization of section 702 is vital to national security and has prevented several high profile attempted terrorist attacks. Additionally, the program has been reauthorized under previous Congresses and Administrations and has been litigated and ruled on as constitutional in the U.S. Circuit Court of Appeals.

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

Section 101 of S. 139 would require the Attorney General, in consultation with the Director of National Intelligence, to adopt querying procedures consistent with the requirements of the fourth amendment to the Constitution of the United States for collected information, and to ensure that the adopted procedures include a technical procedure whereby a record is kept of each United States person query term used for a query. The adopted procedures would be subject to judicial review.

The Federal Bureau of Investigation (FBI) would be prohibited from accessing the contents of acquired communications that were retrieved pursuant to a query made using a United States person query term that was not designed to find and extract foreign intelligence information unless the FBI applies for an order of the court; and the court enters an order approving the application. The Foreign Intelligence Surveillance Court would have jurisdiction to review an application and to enter an order approving the access.

Each application for an order would be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction, and would require the approval of the Attorney General based upon the Department of Justice's finding that the application satisfies specific criteria and requirements that include: the identity of the Federal officer making the application; and an affidavit or other information containing a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant that the contents of communications covered by the application would provide evidence of criminal activity; contraband, fruits of a crime, or other items illegally possessed by a third party; or property designed for use, intended for use, or used in committing a crime. The requirement for a court order would not apply if the FBI determines there is a reasonable belief that the contents of the communications could assist in mitigating or eliminating a threat to life or serious bodily harm.

The bill would also provide that the requirements above may not be construed as limiting the authority of the FBI to conduct lawful queries of information acquired using the authorities provided by Section 702; review without a court order the results of any query of information acquired using the authorities provided by Section 702 that was reasonably designed to find and extract foreign

intelligence information, regardless of whether such foreign intelligence information could also be considered evidence of a crime; or access the results of queries conducted when evaluating whether to open an assessment or predicated investigation related the national security of the United States. This rule of construction would apply to all certifications submitted to the Foreign Intelligence Surveillance Court after January 1, 2018.

Section 101 would define the term "query" to mean the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of communications of or concerning United States persons obtained through authorized acquisitions under Section 702.

Section 102 would provide that any information concerning a United States person acquired under Section 702 could not be used in evidence against that United States person in any criminal proceeding unless the FBI obtained an order of the Foreign Intelligence Surveillance Court to access such information pursuant to section 702(f)(2) (as added by Section 101 of the bill described above); or the Attorney General determines that the criminal proceeding affects, involves, or is related to the national security of the United States; or the criminal proceeding involves death; kidnapping; serious bodily injury, conduct that constitutes a criminal offense that is a specified offense against a minor, as defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20911); incapacitation or destruction of critical infrastructure; cybersecurity, transnational crime, including transnational narcotics trafficking and transnational organized crime; or human trafficking. This determination by the Attorney General would not be subject to judicial review.

The bill would amend section 603 (50 U.S.C. 1873) by amending a reporting requirement for the Director of National Intelligence to annually make publicly available on an Internet Web site a report that identifies the number of criminal proceedings in which the United States or a State or political subdivision provided notice of the intent of the government to enter into evidence or otherwise use or disclose any information obtained or derived from electronic surveillance, physical search, or a conducted acquisition.

Section 103 would amend section 702(b) (50 U.S.C. 1881a(b)) by provide that an authorized acquisition may not intentionally acquire communications that contain a reference to, but are not to or from, a facility, place, premises, or property at which an authorized acquisition is directed or conducted, except by following the process provided under this bill described below.

The NSA had indicated in April 2017 following an in-house review in which NSA discovered several inadvertent compliance lapses, that they will "no longer collect certain internet communications that merely mention a foreign intelligence target," known as "about" communications in "upstream" internet surveillance. The bill would reverse this decision and instead codify the collection of about communications.

The section would define the term "abouts communication" as a communication that contains reference to, but is not to or from, a facility, a place, premises, or property at which an acquisition authorized under section 702(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a(a)) is directed or conducted.

The section would require that if the Attorney General and the Director of National Intelligence intend to implement the authorization of the intentional acquisition of abouts communications, they submit to Congress a written notice of the intent to implement the authorization of such an acquisition and any supporting materials. The bill would additionally require Congress to hold

hearings and briefings as appropriate for a 30-day period and otherwise obtain information in order to fully review the written notice., During this 30-day congressional review period, the Attorney General and the Director of National Intelligence would be prohibited from implementing the authorization of the intentional acquisition of abouts communications until the end of the review period. The bill provides an exception to this prohibition described below.

Some Members may believe that the most appropriate period for Congress to review the policy of abouts collection would be when the House is considering a six-year authorization of the underlying Title VII of FISA, not a 30-day period after the Congress would have already explicitly codified the abouts collection policy into law.

If the Attorney General and the Director of National Intelligence make a determination with respect to the intentional acquisition of abouts communications, the Attorney General and the Director of National Intelligence would be required to notify Congress as soon as practicable, but not later than 7 days after the determination is made. If the Foreign Intelligence Surveillance Court approves a certification that authorizes the intentional acquisition of abouts communications before the end of the 30-day period, the Attorney General and the Director of National Intelligence may authorize the immediate implementation or continuation of that certification if the Attorney General and the Director of National Intelligence jointly determine that exigent circumstances exist such that without such immediate implementation or continuation intelligence important to the national security of the United States may be lost or not timely acquired.

The section would require the head of each element of the intelligence community involved in the acquisition of abouts communications to fully and currently inform Congress of a material breach, meaning significant noncompliance with applicable law or an order of the Foreign Intelligence Surveillance Court concerning any acquisition of abouts collection.

Section 104 would direct the Director of National Intelligence, in consultation with the Attorney General, to conduct a declassification review of any minimization procedures adopted or amended, and consistent with such review, and not later than 180 days, make such minimization procedures publicly available to the greatest extent practicable, which may be in redacted form.

Section 105 would amend section 705 (50 U.S.C. 1881d) governing joint applications and concurrent authorizations, by allowing the Attorney General to authorize the targeting of a United States person for the purpose of acquiring foreign intelligence information while such United States person is reasonably believed to be located outside the United States without a separate order under section 703 or 704, if the Attorney General authorized the emergency employment of electronic surveillance or a physical search pursuant to section 105 or 304. If an application submitted to the Foreign Intelligence Surveillance Court pursuant to section 104 or 304 is denied, all information obtained or evidence derived from such acquisition would be handled in accordance with section 704(d)(4).

Section 106 would authorize a Foreign Intelligence Surveillance Court to compensate an amicus curiae or technical experts.

Section 107 would amend a requirement for the Attorney General to report to Congress on electronic surveillance and the use of pen registers or trap and trace devices.

Section 108 would make several modifications to the Privacy and Civil Liberties Oversight Board to allow members of the board to exercise the authority of the chairman if the position of chairman of

the Board is vacant so long as such authority is exercised by a unanimous vote of the serving members of the Board and would allow the Board to hold closed meetings.

Section 109 would require the National Security Agency (NSA) and FBI to maintain privacy and civil liberties officers, codifying the requirement.

Section 110 would increase whistleblower protections for intelligence community contractors. Under the bill, any employee of a contractor or subcontractor of a covered intelligence community element who has authority to take any personnel action, would be prohibited to take or fail to take a personnel action with respect to any contractor employee as a reprisal for a lawful disclosure of information by the contractor employee to the Director of National Intelligence, the Inspector General of the Intelligence Community, the head of the contracting agency, the appropriate inspector general of the contracting agency, a congressional intelligence committee, or a Member of a congressional intelligence committee, which the contractor employee reasonably believes evidences: a violation of any Federal law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. These protections and regulations would apply to FBI employees as well.

Section 111 would require the Attorney General to brief the House and Senate Intelligence and Judiciary Committees on how the Department of Justice interprets the "derived from" standard in FISA.

Section 112 would require the Inspector General of the Department of Justice to submit a report to Congress containing a review by the Inspector General of the interpretation of, and compliance with, the querying procedures adopted pursuant to section 702 by the Federal Bureau of Investigation.

Section 201 would reauthorize title VII of FISA, including section 702 until December 31, 2023.

Section 202 would amend section 1924(a) of title 18, United States Code by increasing the penalties for the unauthorized removal and retention of classified documents or material from one year to five years.

Section 203 would require a report to Congress on current and future challenges to the effectiveness of foreign surveillance activities.

Section 204 would require the Government Accountability Office to conduct a study of the classification system of the United States and the methods by which the intelligence community protects classified information.

Section 205 makes technical changes to FISA.

Section 206 would provide a severability clause to specify that if any provision of the bill is held invalid, the validity of the remainder of the bill and of the application of such provisions to other persons and circumstances would not be affected.

A section-by-section and one-pager provided by the committee can be found here and here respectively. Three additional fact sheets on section 702 from the committee can be found here, here and here. A legislative history of the bill and a document related to the targeting of a terrorist using 702 authority provided by the committee can be found here and here.

A comparative print of how the legislation would modify the Foreign Intelligence Surveillance Act of 1978 in compliance with clause 12(a) of rule XXI of the Rules of the House of Representatives can be found here.

Background on Section 702 of the Foreign Intelligence Surveillance Act:

Section 702 of the Foreign Intelligence and Surveillance Act (FISA) authorizes the Attorney General and the Director of National Intelligence to target persons reasonably believed to be located outside the United States to acquire foreign intelligence information for up to 1 year. Under current law, targeting may not intentionally target any person known or reasonably believed at the time of acquisition to be located in the United States; may not intentionally target a United States person reasonably believed to be located outside the United States; may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

In order to comply with targeting guidelines, the Attorney General and the Director of National Intelligence are required to provide to the Foreign Intelligence Surveillance Court a written certification and any supporting affidavit, under oath and under seal confirming that there are procedures in place that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court that are reasonably designed to ensure that an authorized acquisition is limited to targeting persons reasonably believed to be located outside the United States; and prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

Section 702 additionally requires the Attorney General, in consultation with the Director of National Intelligence, to adopt targeting procedures that are reasonably designed to ensure that any authorized acquisition is limited to targeting persons reasonably believed to be located outside the United States; and prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States. These procedures are subject to judicial review. This authorization is set to expire on December 31, 2017.

More information in favor of the reauthorization of section 702 can be found here and here from the Heritage Foundation. Information providing privacy and constitutional concerns regarding the reauthorization of section 702 can be found here from FreedomWorks. A Congressional Research Service report on Surveillance of Foreigners outside the United States under Section 702 of the Foreign Intelligence Surveillance Act (FISA) can be found here.

AMENDMENTS:

- Amash (R-MI) (Amendment in the Nature of a Substitute): would substitute the bill with the "USA Rights Act". The amendment would amend section 702(b) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a(b)) by prohibiting an officer or employee of the United States from conducting a query of acquired information in an effort to find communications of or about a particular United States person or a person inside the United States. The prohibition would not apply to a query for communications related to a particular United States person if such United States person or person inside the United States is the

subject of an order or emergency authorization authorizing electronic surveillance or physical search, as well as other specified conditions.

The amendment would include a provision prohibiting reverse targeting when a significant purpose of an acquisition is to acquire the communications of a particular, known person reasonably believed to be located in the United States. The amendment would further prohibit the acquisition of communications to target certain persons outside the United States that do not include authorized targeted persons under section 702. The amendment would also prohibit the acquisition of entirely domestic communications and impose limitations on the use of information obtained under section 702 relating to United States persons. No communication to or from, or information about, a person acquired under section 702 who is either a United States person or is located in the United States may be introduced as evidence against the person in any criminal, civil, or administrative proceeding or used as part of any criminal, civil, or administrative investigation, except with the prior approval of the Attorney General. The amendment would impose a series of reforms to the Privacy and Civil Liberties Oversight Board and the Foreign Intelligence Surveillance Court and would clarify that in any claim in a civil action brought in a court of the United States relating to surveillance, the person asserting the claim has suffered an injury in fact if the person has a reasonable basis to believe that the person's communications will be acquired under section 702; and has taken objectively reasonable steps to avoid surveillance.

The amendment would clarify that information or evidence is 'derived' from an electronic surveillance, physical search, use of a pen register or trap and trace device, production of tangible things, or acquisition when the Government would not have originally possessed the information or evidence but for that electronic surveillance, physical search, use of a pen register or trap and trace device, production of tangible things, or acquisition, and regardless of any claim that the information or evidence is attenuated from the surveillance or search, would inevitably have been discovered, or was subsequently reobtained through other means. Section 19 of the amendment would reauthorize section 403(b) of the FISA Amendments Act of 2008 (Public Law 110–261) for four years until September 30, 2021.

A House Permanent Selection Committee on Intelligence one-pager in opposition to the USA Rights Act can be found here. A press release from the Senator Wyden, the sponsor of the Senate's version of the USA Rights Act can be found here.

Outside Groups: FreedomWorks Key Vote Yes

OUTSIDE GROUPS:

Groups in Support:

- Heritage Foundation

Groups in opposition:

- FreedomWorks: Key Vote No
- Project On Government Oversight (against H.R. 4478)
- Cato Institute
- Campaign for Liberty

COMMITTEE ACTION:

S. 139 in its previous form was introduced on January 12, 2017, and was referred to the Senate Judiciary Committee. On May 16, 2017, the bill passed the Senate without amendment by unanimous consent.

ADMINISTRATION POSITION:

The Statement of Administration Policy is available here. According to the statement, "if the House Amendment to S. 139 were presented to the President in its current form, his advisors would recommend that he sign the bill into law."

CONSTITUTIONAL AUTHORITY:

Statements of constitutional authority are not required for Senate bills.
