

October 4, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Re: Sections 215 and 505 of the Patriot Act

Dear Senator Specter:

The undersigned organizations write to express our support for reforms to Sections 215 and 505 of the Patriot Act which allow the federal government to require voluminous and often sensitive records from American businesses, without judicial oversight or other meaningful checks on the government's power.

First, the business community stands with all Americans in the war on terror, and we remain prepared to do our part to keep the nation safe. We also believe that our country's commitment to freedom and free enterprise has resulted in our collective prosperity as a people. That said, we are concerned that the rights of businesses to confidential files--records about our customers or our employees, as well as our trade secrets and other proprietary information--can too easily be obtained and disseminated under investigative powers expanded by the Patriot Act. It is our belief that these new powers lack sufficient checks and balances.

Without sufficient factual and legal checks against the government's demands for company records, a costly burden will be imposed on businesses to litigate (when possible under the current Act) unwarranted or overly burdensome requests that could have been appropriately honed with proper standards and oversight *ex ante*.

Additionally, we are concerned about the expensive and time-consuming burden that compliance with document requests from the government places upon affected businesses. These costs are in addition to the legal costs and internal obligations (here and abroad) that affected businesses must navigate to protect confidential information and the personal privacy of their employees, customers and suppliers.

We believe that the Patriot Act is an important tool that has helped keep our country safe, and as Congress considers reauthorization of the Patriot Act this fall, we feel it is vital that modest reforms to the business records provisions be considered. Specifically:

- Section 215 of the Act currently allows the Justice Department to obtain secret orders for business records and other tangible items from the Foreign Intelligence Surveillance Court. We support the revision in the Senate bill that requires a statement of fact and some linkage between the records sought and an individual suspected of being a terrorist or spy. As written, the government merely has to certify that the records sought are relevant to an authorized investigation, without stating any underlying facts for the court

or judge or showing any nexus with an actual suspect of investigation. As a result, the current Act does not impose any limit on the breadth of records sought, or protect records that are privileged or proprietary. Without such facts, let alone any probable cause of wrongdoing, an unreasonable burden and expense is imposed on businesses to supply potentially large quantities of information that are difficult to collect and transmit, including trade secrets or other sensitive information.

Accordingly, the Patriot Act reauthorization should include the Senate bill's provision of a meaningful right to challenge the order when the order is unreasonable, oppressive, or seeks privileged information, as well as the right to challenge the permanent gag order attached to the demand.

- Section 505 of the current Act provides a process for the FBI to obtain business records--including credit reports, customer records of communication service providers, and records of financial institutions -- without any court approval or oversight through a "national security letter" (NSL). The definition of financial institutions has now been broadened to include a host of businesses, big and small, that range from real estate closing firms, car dealerships, pawnbrokers, boat dealers, insurance companies, casinos and any other business designated by the Treasury Secretary. Ideally, this section should be revised to require individual suspicion linking the records to a terrorist, spy or other foreign agent--unfortunately neither pending bill makes this needed revision.

In addition, any reauthorization bill should provide a meaningful right to challenge the records demand under Section 505. Both the Senate and House versions of the bill do provide for this. Unfortunately the House bill also contains a criminal penalty for any company employee who discusses the NSL when that communication is not necessary to comply with the order, even without any intent to obstruct an investigation. Therefore, we support the Senate version of this section. Similarly, any effort to expand the Patriot Act to allow the FBI the ability to demand any record from any business in America without a factual predicate and without court approval through "administrative subpoenas" must be rejected.

Making these reforms to the business records provisions of the Patriot Act is a vital issue for American business. The provisions in question require a careful balancing of the government's efforts to protect and secure our nation weighed against the burdens placed on businesses and the potential violations of privacy and the civil liberties of employees and customers. We are concerned that the primary determinant of the proper balance is weighted heavily towards the agency of government that wishes to ensure national security. We suggest that our judiciary should continue to serve as a vital check over the government's powers because it can equitably weigh the government's interests against the interests of individuals and businesses whose livelihoods, legal responsibilities, and civil liberties are in question.

Furthermore, businesses must meet the stringent and demanding document retention and privacy requirements of every jurisdiction in which they do business (some of which are required by other Congressional laws), as well the expectations of their stakeholders of a return on

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investment. Businesses may face a loss of reputation, or litigation--here or abroad-- for violating the privacy rights of others by complying with these provisions of the Patriot Act. Even if U.S. law provides immunity for complying with business records demands in national security investigations, the increasingly global business environment suggests that companies may face civil liability or legal sanctions abroad for violating privacy rules in the US.

American businesses are dedicated to assisting government agencies in their tireless efforts to identify suspected terrorists and to prevent acts of terrorism. Reforming the Patriot Act is an important step to ensure that powerful law enforcement tools are focused on those who would do us harm and that privacy rights and businesses interests are protected by the checks and balances our Constitution demands.

Thank you for your hard work on this important legislation.

Sincerely,

Association of Corporate Counsel

Business Civil Liberties, Inc.

The Financial Services Roundtable

National Association of Manufacturers

National Association of REALTORS

United States Chamber of Commerce

cc: Patriot Act Conferees