Office of the Inspector General
U.S. Department of Justice

A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008

September 2012

(Re-released with some previously redacted information unredacted)

Oversight and Review January 2016

REDACTED – FOR PUBLIC RELEASE

NOTE

In connection with Freedom of Information Act litigation brought by *The New York Times* in the Southern District of New York, the OIG's September 2012 report "A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the *Foreign Intelligence Surveillance Act Amendments Act of 2008*," has been re-released with additional information declassified by agencies with the authority to do so. The following pages in this version of the report contain information that was previously redacted:

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~~TOP SECRET//SI//NOFORN/FISA~~

(U) A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008

Oversight and Review Division
Office of the Inspector General
September 2012

~~TOP SECRET//SI//NOFORN/FISA~~

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(U) EXECUTIVE SUMMARY[1]

I. (U) Introduction

~~(~~U//FOUO) The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FAA) was signed into law on July 10, 2008. The FAA was enacted as part of Congress's effort to modernize the Foreign Intelligence Surveillance Act of 1978 (FISA), codified at 50 U.S.C. §§ 1801-1885.

~~(TS//SI//NF)~~ The FAA followed earlier efforts to enhance the nation's ability to gather signals intelligence in the wake of the terrorist attacks of September 11, 2001. In October 2001, the President authorized a highly classified program, known as the President's Surveillance Program, to conduct electronic surveillance of certain communications into and out of the United States without seeking orders from the Foreign Intelligence Surveillance Court (FISA Court).[2] Beginning in 2004, this program was transitioned in stages to FISA Court supervision through a series of FISA orders. However, according to a former senior Justice Department official familiar with these events, in May 2007, the FISA Court imposed rigorous procedural requirements on the government's foreign surveillance authority, causing the National Security Agency (NSA) to place fewer foreign selectors under coverage than it wanted to.[3] To address concerns that [redacted] (TS) [redacted] Congress enacted the Protect America Act of

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[1] (U//FOUO) At the FBI's request, we provided a previous draft of this report to the FBI so that it could conduct a privilege review before the draft report was circulated to other agencies. Unless otherwise indicated, redactions to this final report are based on the Department of Justice's assertions of the attorney-client privilege. The FBI has also requested the following notice:

> (U//FOUO) This report contains FBI information that belongs to the FBI and may not be disseminated further without express authorization by the FBI. If authorized, any dissemination of this information must be made on a strictly need-to-know basis and is not considered a release to the public. Information determined to be exempt under FOIA (5 U.S.C. § 552 as amended by the OPEN Government Act of 2007), or any other privilege, including, but not limited to information protected by the deliberative process privilege, remains exempt or privileged under a limited release to other members of the Intelligence Community ("IC") and Congress. As the report is classified TS/SCI, the report or any portion thereof can be released only to individuals with the requisite national security clearance and a need to know.

[2] (U//FOUO) The FISA Court was established under the FISA statute to review the government's applications to exercise FISA authority and grant orders approving such applications. 50 U.S.C. § 1803.

[3] ~~(S//NF)~~ A "selector" is either a telephone number or an identifier used for Internet communications, such as an e-mail account.

2007 (PAA), a temporary legislative measure designed to streamline collection of foreign intelligence from targets located outside the United States. The PAA expired on February 16, 2008, and Congress thereafter enacted the FAA, key provisions of which are set to expire on December 31, 2012.

~~(S//NF)~~ Section 702 of the FAA generally governs the acquisition of foreign intelligence information from or with the assistance of an electronic communications service provider by targeting non-United States persons reasonably believed to be located outside the United States. Acquisitions under Section 702 are conducted through electronic surveillance or a search of stored communications.[4]

(U//FOUO) This report describes the Office of the Inspector General's (OIG) review of the Federal Bureau of Investigation's (FBI) activities under Section 702 of the FAA. The OIG assessed the FBI's policies and procedures for conducting targeting and post-targeting activities under Section 702 from September 2008 through early 2010. As required by Section 702(*l*)(2) and (3), the OIG also reviewed the number of targets that were later determined to be located in the United States at the time of acquisition and the number of disseminated intelligence reports containing a reference to a U.S. person identity, including identities disseminated in response to requests for U.S. person identities not referred to in the original reporting.

(U//FOUO) To conduct its review, the OIG interviewed approximately 45 individuals, including FBI personnel who administer the 702 Program and senior FBI officials in the Counterterrorism Division and Office of General Counsel. We also interviewed attorneys in the Department of Justice's National Security Division (NSD), and officials in the National Security Agency (NSA) and the Office of the Director of National Intelligence. In addition, we reviewed thousands of documents related to the FBI's 702 activities and conducted various statistical and other analyses based on data provided to us by the FBI and other agencies.

[4] ~~(S//NF)~~ As used throughout this Executive Summary and the report, "electronic surveillance" generally refers to the interception of electronic communications as they are transmitted. A search of "stored communications" generally refers to the acquisition of electronic communications that are in electronic storage, such as on an Internet service provider's (ISP) servers.

II. (U) Background

A. (U//FOUO) Section 702 of the FISA Amendments Act of 2008

(U//FOUO) Section 702(a) of the FAA authorizes the targeting of persons reasonably believed to be located outside of the United States to acquire foreign intelligence information, without an individualized FISA Court order.[5]

(U//FOUO) The affirmative authorization contained in Section 702(a) is limited by several prohibitions set forth in Section 702(b). The chief prohibition is that an acquisition authorized under Section 702(a) may not intentionally target a United States person.[6] Section 702(b) also prohibits the intentional targeting of any person "known at the time of acquisition to be located in the United States," and the intentional targeting of a person "reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States" – the prohibited practice commonly referred to as "reverse targeting."

(U//FOUO) The requirements of Section 702 that the acquisition target non-United States persons reasonably believed to be located outside the United States at the time of acquisition form what the Intelligence Community commonly refers to as the "foreignness" requirement. The foreignness requirement is designed to ensure that all persons located in the United States, and United States persons located anywhere, are afforded the protections and procedural requirements for acquisitions under other sections of the FAA and the individualized court order provisions of traditional FISA.

(U//FOUO) Section 702(c) requires that acquisitions made pursuant to Section 702(a) must conform to targeting and minimization procedures adopted by the Attorney General, in consultation with the Director of National Intelligence. The targeting procedures must be reasonably designed to meet the foreignness requirements of Section 702, and the minimization procedures must meet the statutory rules in FISA that apply to information acquired

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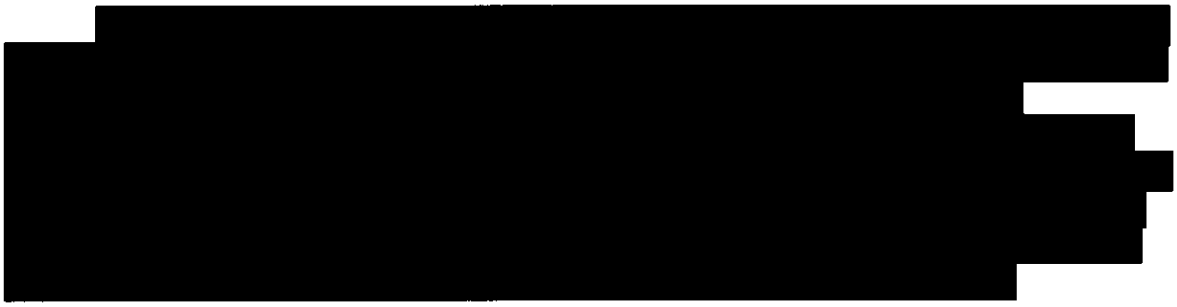
[5] (U//FOUO) Section 701(a) incorporates the same definition of "United States person" as provided in Title I of FISA:

> (U) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.
>
> (U) 50 U.S.C. § 1801(i).

[6] (U//FOUO) The procedures for targeting United States persons outside the United States under the FAA are set forth in Sections 703 and 704 of the Act.

through electronic surveillance and physical search. Section 702(g) requires the Attorney General and the Director of National Intelligence to file written certifications with the FISA Court attesting to the fact that appropriate targeting and minimization procedures are in place, with copies of the procedures attached.[7] These certifications are subject to judicial review and provide the primary mechanism by which the FISA Court conducts its judicial oversight of the implementation of Section 702.



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(TS)

(U//FOUO) Section 702 also requires extensive reporting and oversight concerning activities authorized under the statute. Section 707(b)(1) requires the Attorney General to provide Congress with a Section 702 Semiannual Report that includes:

- (U//FOUO) all certifications submitted during the reporting period;
- (U//FOUO) the reasons for the exercise of any exigent circumstances authority under Section 702(c)(2);
- (U//FOUO) any directives issued during the reporting period and a description of any action taken to enforce them;
- (U//FOUO) a description of any judicial review of the certifications and any targeting and minimization procedures during the reporting period;
- (U//FOUO) copies of any compliance review conducted by the Attorney General;
- (U//FOUO) copies of any procedures implementing Section 702; and
- (U//FOUO) a description of any incidents of noncompliance by the Intelligence Community or by the providers.

[7] (U//FOUO) Unlike traditional FISA applications seeking authority to conduct electronic surveillance within the United States, the certifications are "not required to identify the specific facilities, places, premises, or property at which an acquisition authorized under subsection (a) will be directed or conducted." Section 702(g)(4).

Section 702(*l*)(1) requires the Attorney General and the Director of National Intelligence to conduct semiannual assessments of the FBI's compliance with its targeting and minimization procedures. Section 702(*l*)(2)(B) and (C) requires the Inspector General to review certain FBI activities related to U.S. persons. Section 702(*l*)(3)(A) requires the Director of the FBI to also conduct annual reviews of certain FBI activities concerning U.S. persons.

B. ~~(S//NF)~~ Roles of the FBI, the NSA, and the CIA in the 702 Program

~~(S//NF)~~ The FBI and the NSA are the only agencies authorized to acquire foreign intelligence information under Section 702. The Central Intelligence Agency (CIA) participates in Section 702 targeting activities by submitting its targeting requests to the NSA. The NSA is the lead agency in the 702 Program and during the OIG's review period was the only agency with the formal authority to initiate electronic surveillance [redacted] under FISA Court-approved FAA procedures. Thus, during our review period, the NSA initiated all such electronic surveillance [redacted] searches, although sometimes the NSA did so on behalf of the CIA or at the request of the FBI. B1 B3 B7E (S)

~~(S//NF)~~ The basic roles and division of responsibilities among the FBI, the NSA, and the CIA are set forth in a Memorandum of Understanding that the three agencies entered into in April 2008, after the PAA expired and before the FAA was enacted.

~~(S//NF)~~ The FBI conducts two general activities under Section 702. First, it approves the NSA's requests to acquire [redacted] (S)

[redacted] B1 B3 B7E

Before approving the NSA's requests, the FBI must review information about the foreignness of the presumed user of the designated account to ensure that the targeted user is a non-U.S. person reasonably believed to be located outside the United States. When the NSA seeks to acquire the [redacted] communications of designated targets, the FBI provides technical assistance only, and plays no role in approving the NSA's targeting decisions. Second, the FBI acquires both [redacted] from the participating providers and routes the raw unminimized data to the NSA and, at the NSA's direction, to the CIA and to the FBI's [redacted]

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[8] ~~(S//NF)~~ As noted, a "selector" is either a telephone number or an identifier used for Internet communications, such as an e-mail account. Because the FBI's targeting activities under the 702 Program are limited to acquiring [redacted] from domestic electronic communications service providers (usually Internet service providers), the term "selector," as used throughout this report, refers to an identifier for Internet communications, such as an e-mail address. B1 B3 B7E (S)

(S) [redacted] The FBI retains a portion of the raw data for analysis and dissemination as finished intelligence products. B1 B3 B7E

~~(S//NF)~~ These two basic activities, which are discussed below and in detail in Chapters Three and Four of the OIG's report, are carried out by personnel in the Counterterrorism Division's [redacted] These personnel are drawn primarily from the [redacted] wo of five units within [redacted] We refer to these personnel as the 702 Team. The 702 Team is supported by the FBI's [redacted] and the [redacted] The 702 Team also works closely with attorneys from the FBI Office of General Counsel (OGC), including attorneys we refer to in this report as the Operations Attorney and the Policy Attorney.

III. (U) The FBI's Targeting Activities Under Section 702

(S//NF) The FBI's primary role in the 702 Program is to acquire the (S) [redacted] This process begins with the NSA's determination, based on intelligence from other agencies and its own analysis of signals intelligence already collected, that the [redacted] of a selector (typically an e-mail address) may yield foreign intelligence information. The NSA applies its FISA Court-approved targeting procedures to determine that the account is used by a non-U.S. person reasonably believed to be located outside the United States. B1 B3 B7E

~~(TS//SI//NF)~~ The NSA may apply its targeting procedures to target a selector for electronic surveillance, nominate a selector to the FBI [redacted] (TS) When the NSA targets a selector for electronic surveillance, the FBI, through [redacted], provides technical assistance only. When the NSA nominates a selector [redacted] the 702 Team must first apply the FBI's own targeting procedures before conducting the [redacted] B1 B3 B7E

~~(S//NF)~~ The NSA [redacted] nominations are forwarded to the 702 Team in two ways: (1) by "selector sheets" that are e-mailed to the 702 Team each day, and (2) through an FBI system called PRISM, [redacted] (The CIA receives PRISM information [redacted].) [redacted] (S) B1 B3 B7E

[redacted] (S)

A. (U//FOUO) The FBI's Targeting Procedures

~~(S//NF)~~ The 702 Team's analysts are responsible for applying the FBI's FISA Court-approved targeting procedures to the nominated selectors. The work of these analysts is reviewed by supervisory special agents or the [redacted] Unit Chief, and in some instances, by attorneys in the Office of General Counsel and officials in the NSD, for a final determination as to whether a (S) [redacted] can proceed. To implement the general requirements of its targeting procedures, the FBI developed [redacted] for [redacted] (S) (S) [redacted] which provide the 702 Team step-by-step procedures for processing NSA [redacted] (S) b1, b3, b7E

~~(S//NF)~~ [redacted] (S) the FBI has two primary obligations under its targeting procedures. First, the FBI must review and evaluate the sufficiency of the NSA's explanation for its reasonable belief that the user of the nominated account is located outside of the United States, and the information that the NSA provides concerning the user's non-United States person status. The targeting procedures state that this sufficiency review will be done "in consultation with" the NSA. b1, b3, b7E

~~(S//NF)~~ The second of the FBI's two primary obligations under its targeting procedures [redacted] (S) The targeting procedures require the FBI to conduct [redacted] S) b1, b3, b7E

~~(S//NF)~~ The targeting procedures do not obligate the FBI to conduct an independent, *de novo* analysis of a target's U.S. person status and location. Rather, unless the FBI [redacted] (S) the FBI's targeting procedures state that "the FBI will acquire [redacted] In addition, the (S) targeting procedures state that the "NSA will . . . be responsible for determining that a significant purpose of the acquisition is to obtain foreign intelligence b1, b3, b7E

information." In view of these provisions, the 702 Team approaches its targeting responsibilities with considerable deference to the NSA's targeting judgments.

(U//FOUO) We concluded that overall the FBI's 702 Team has implemented its targeting procedures with commendable deliberation, thoroughness, and professionalism. Our more specific findings regarding the FBI's targeting activities are summarized below.

1. ~~(S//NF)~~ Findings and Recommendations Relating to the FBI's Review and Evaluation of the Sufficiency of the NSA's Foreignness Determinations

~~(S//NF)~~ The FBI's review and evaluation of the sufficiency of NSA's foreignness determinations is a critical step in the FBI's [redacted] approval process because for approximately two-thirds of all NSA nominations in the OIG's review period, the FBI uncovered no information [redacted] (S) [redacted] about the account or its presumed user, and thus approved NSA nominations based solely on the NSA's foreignness determinations. B1 B3 B7E

[redacted] (S) B1 B3 B7E

a. ~~(S//NF)~~ The [redacted] Factor (S)

~~(TS//SI//NF)~~ The OIG determined that approximately 8 percent of nominations submitted to the FBI during the OIG's review period were based on the [redacted] factor, which is defined in the FBI's SOPs as follows: [redacted] (TS) B1 B3 B7E

[9] ~~(S//NF)~~ After reviewing a draft of this report, the NSA objected to this characterization of the FBI's [redacted] authority to the extent it suggests that the NSA lacks the fundamental authority to acquired [redacted] pursuant to Section 702.

[redacted] (TS) b1, b3, b7E

[redacted] TS) b1, b3, b7E

(~~TS//SI//NF~~) However, the OIG reviewed pleadings, memoranda, transcripts, and court opinions provided by the NSD establishing that, in multiple contexts other than the FAA, the FISA Court has previously approved [redacted] (TS) b1, b3, b7E

(~~TS//SI//NF~~) The documents we reviewed also included an August 2008 filing with the FISA Court in support of the first FAA certification demonstrating that the FISA Court was aware of the NSA's use of [redacted] (TS) [redacted] to establish foreignness. NSD officials told the OIG that they are confident the FISA Court is aware that, using the [redacted] factor in the (TS) context of the [redacted] (TS) [redacted] to establish its reasonable belief that the user of a designated account is located outside the United States at the time of acquisition. b1, b3, b7E

[redacted] (S) b1, b3, b7E

[10] (~~S//NF~~) The NSA's targeting procedures remained unchanged throughout the OIG's review period.

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ Notably, senior members of the 702 Team suggested that the FBI may interpret [redacted] factor more strictly if it uses this factor to (S) b1, b3, b7E support its own nominations in the future. The OIG agrees that the FBI should carefully consider how it intends to use the [redacted] factor, if at all, when (S) it assumes the responsibility of nominating its own selectors for 702 coverage.

b. ~~(S//NF)~~ [redacted] [redacted] Explanations b7E

~~(S//NF)~~ The OIG also determined that approximately one percent of NSA nominations were predicated on foreignness explanations that used data older than one year. FBI witnesses generally agreed that foreignness information that was at least one year old raised questions about the sufficiency of the NSA's foreignness determination, yet the OIG found no indication that the 702 Team ever contacted the NSA for additional, possibly more recent information when asked to approve such nominations.

~~(S//NF)~~ Both the NSA and the FBI told the OIG that the information on the NSA's selector sheets represents the most current information available to the NSA at the time of nomination. However, we determined that the NSA sometimes develops more recent information about a targeted user's eligibility for 702 coverage after the nomination has been submitted but [redacted] (S) b1, b3, b7E [redacted] We therefore recommend that the FBI consider issuing guidance advising when the 702 Team should seek more current information from the NSA about a targeted user's eligibility for Section 702 coverage. This guidance should ensure that the FBI's requests to the NSA for more current information will be made in a consistent manner.

2. ~~(S//NF)~~ Findings and Recommendations Relating to the FBI's [redacted] (S) b1, b3, b7E

~~(S//NF)~~ The second of the FBI's two primary obligations under its targeting procedures is to [redacted] (S) [redacted] The targeting procedures require b1, b3, b7E the FBI to conduct these [redacted] (S) [redacted] FBI Targeting Procedures, ¶ 4.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(~~S//NF~~) The [redacted] (S) set forth detailed procedures for the 702 Team to follow in conducting its [redacted] Each step of the process is [redacted]. (S) b1, b3, b7E

Generally, the [redacted] (S) require the 702 Team's analysts to [redacted] (S)

[redacted]

(~~S//NF~~) [redacted] (S) b1, b3, b7E

(~~S//NF~~) [redacted] (S) b1, b3, b7E

(~~S//NF~~) [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

a. [redacted] (S) b1, b3, b7E

~~(S//NF)~~ [redacted] (S)

b1, b3, b7E

According to the Lead Program Coordinator for the 702 Team, this enhanced [redacted] has (S) been incorporated into the training that 702 Team personnel must complete before they may conduct [redacted] and will be added to a forthcoming (S) updated version of the [redacted] (S)

b. (U//FOUO) Documentation of Targeting Activities

~~(S//NF)~~ [redacted] (S) [redacted] along with the selector sheet and the completed checklist, in a selector file. As discussed below, the contents of the selector file form the basis for the decision whether to approve the NSA's request to conduct [redacted] for the (S) nominated selector. The OIG found the 702 Team's documentation of its targeting activities to be extremely thorough and well-organized.

b1, b3, b7E

c. ~~(S//NF)~~ Gap in [redacted] (S) b1, b3, b7E

~~(S//NF)~~ We identified one gap in the 702 Team's procedure for [redacted] (S) [redacted] that we believe can readily be remedied to improve the quality of the FBI's targeting activities at very little cost in terms of time or resources. Under the [redacted] (S) (S) S) (S) (S) b1, b3, b7E

[redacted] S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ Taking into account the volume of selectors nominated by the NSA and the complexity of the FBI's [redacted] we concluded that the FBI's [redacted] generally were conducted with the reasonableness required by the targeting procedures, and that the FBI met this standard of diligence consistently throughout our review period. (S) b1, b3, b7E (S)

3. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

4. (U//FOUO) Planned Implementation of FBI Nomination Activities

~~(S//NF)~~ As discussed in Chapter Two of the OIG's report, the FBI plans to greatly expand its role in the 702 Program in 2012 by nominating selectors for Section 702 coverage.

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ [redacted] (S) b1, b3, b7E

~~(S//NF)~~ During the OIG's review period, several procedural and technical issues remained to be worked out before the FBI could begin nominating selectors, which witnesses told us was expected to begin in early 2013. While finalizing this report the OIG learned that the FBI began nominating its first selectors in April 2012.

B. ~~(S//NF)~~ Findings and Recommendations Relating to Selectors Used by Persons Who Have Traveled in the United States

~~(S//NF)~~ The OIG's review of the FBI's application of its targeting procedures included an assessment of how the FBI processed nominations [redacted] The FBI's targeting procedures (S) b1, b3, b7E impose no obligations on the FBI regarding accounts used by persons who are found to have traveled in the United States prior to a [redacted] (S) [redacted] However, in late 2007 the ODNI Civil Liberties Protection

Officer raised concerns that the [redacted]

~~(S//NF)~~ To address these concerns, the FBI implemented a special review process for nominations involving targeted users who have [redacted] B1 B3 B7E [redacted] (S) During the OIG's review period, the FBI's OGC consulted with attorneys in the NSD when conducting these reviews.

~~(TS//SI//NF)~~ The OIG identified approximately [redacted] that had been subject to some level of FBI analysis for [redacted] our review (TS) period. We determined that the FBI never rejected a nominated selector based explicitly on [redacted] concerns during the review period. We also conducted a careful review of selector files and concluded that although the OGC collected all the information relevant to making a [redacted] B1 B3 B7E determination for each selector it reviewed, there did not appear to be a discernable set of principles guiding the FBI OGC's analysis of [redacted] However, we believe that the FBI's [redacted] process was not a meaningless exercise. The NSA withdrew several selectors after learning that the FBI had found recent [redacted] by the target and would be submitting the nomination to the FBI OGC for review.

~~(TS//SI//NF)~~ The OIG also analyzed nominations for [redacted] (TS) [redacted] involving targets who had [redacted] B1 B3 B7E [redacted]

[redacted] (TS) b1, b3, b7E

~~(S//NF)~~ The FBI and other participating agencies have initiated a reassessment of the FBI's review process for nominations involving selectors used by persons who have [redacted] The OIG believes that this reassessment should continue, and that the FBI should consider the following factors. (S) b1, b3, b7E

~~(S//NF)~~ First, we believe that the review process need not be inflexibly invoked for all nominations that involve [redacted] (S) Second, meaningful FBI OGC scrutiny should be applied to nominations involving targeted users with a [redacted] (S) Third, FBI OGC review should be required as part of any FBI plan to nominate accounts for a [redacted] (S) under Section 702 where it has been determined that the presumed users [redacted] (S) b1, b3, b7E

~~(S//NF)~~ The OIG therefore recommends that the FBI continue to conduct additional reviews of nominations involving targeted users who have [redacted] and that the FBI document the guiding principles for conducting these reviews. The FBI should also use these reviews to evaluate the issues previously raised by the OGC with regard to [redacted] including the appropriateness of [redacted] (S) b1, b3, b7E

C. (U//FOUO) Findings and Recommendations Relating to Statutory Reporting Requirements for FBI Targeting Activities

(U//FOUO) Section 702(l)(2)(C) provides that, "with respect to acquisitions authorized under subsection (a), [the OIG] shall review the number

of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed[.]"

~~(S//NF)~~ The FBI is also required to conduct an annual review of the identical information. See Section 702(*l*)(3)(A)(iii). As of February 2012, when a draft of this report was given to the FBI for its review, the FBI had submitted one annual report that covered the period of September 1, 2008, through August 31, 2009 (the 2009 reporting period), effectively the first year of FBI operations under the FAA.[11] In that report the FBI stated that it "did not discover . . . [and] did not receive any reports from either NSA or CIA during the relevant reporting period indicating that the FBI had acquired subsection 702(a)-derived [redacted] of a person who was later (S) determined to be located in the United States at the time of the acquisition." b1, b3, b7E

~~(S//SI//NF)~~ However, in conducting its statutorily mandated review, the OIG determined that during our review period for targeting activities, [redacted] (S) [redacted] including several acquisitions where we are confident based on the information available to us that the incidents met the FBI's statutory reporting criteria. For example, we found several instances in which the FBI acquired [redacted] communications on the same day that the NSA (S) determined through analysis of intercepted communications that the person was in the United States. We found other instances in which the NSA reviewed the contents of [redacted] communications and similarly determined (S) that the targeted user was in the United States when the acquisition occurred. b1, b3, b7E

~~(S//NF)~~ Most of these [redacted] acquisitions occurred during the FBI's 2009 reporting period, and for that reason we believe that the FBI's annual report was deficient. [redacted] (S) b1, b3, b7E

~~(S//SI//NF)~~ The OIG made these determinations by reviewing reports that the NSA is required to submit to the NSD by its targeting procedures whenever it acquires the communications of a person who is later determined to be in the United States or a U.S. person at the time of acquisition. We compared these reports to FBI records of its acquisitions of [redacted] (S) [redacted] As noted, for several of these acquisitions, the NSA b1, b3, b7E

[11] (U//FOUO) On May 22, 2012, the FBI transmitted two annual reports to Congress that covered the periods of September 1, 2009, to August 31, 2010, and September 1, 2010, to August 31, 2011, respectively. The OIG received copies of these documents but was unable to fully assess their contents prior to releasing this report.

information shows that the user of the targeted selector was in the United States on the day the user's [redacted] were acquired. For other acquisitions, the data contains a strong indication that the user was likely in the United States on the day the user's communications were acquired, but the information available to the OIG was not sufficient to determine with certainty that each of the incidents in fact met the FBI's statutory reporting criteria. We believe that the FBI's expertise in analyzing presumed users' [redacted] in the targeting context can be applied to determine whether a user was in the United States at the time an acquisition occurred, and therefore ineligible for coverage under Section 702. B1 B3 B7E (TS)

~~(S//NF)~~ In July 2011, the OIG met with senior FBI Counterterrorism Division, OGC, and Inspection Division officials to present our preliminary findings and the methodology we used to reach them. The FBI officials stated at that time that the FBI was still exploring how to compile the requisite information for its 2010 reporting period. They also expressed concern about being required to report on acquisitions for particular selectors that may also be the subject of separate reporting by the NSA, resulting in what they characterized as [redacted] B1 B3 B7E (S)

~~(S//NF)~~ The OIG does not believe there is any merit to this concern. First, the statute unambiguously requires this accounting from "the head of each element of the intelligence community conducting an acquisition under [Section 702(a)]." See Section 702(*l*)(3). The FBI and the NSA both conduct acquisitions under Section 702, and therefore both agencies are required to submit these reports. [redacted] (S)

[redacted] B1 B3 B7E these distinctions, it is understandable that Congress would want to assess these acquisitions separately. Third, to the extent there are reportable acquisitions for both agencies arising from the conduct of electronic surveillance [redacted] for the same selector, that fact can be noted in the FBI's annual reports.

(U//FOUO) The OIG recommends that the FBI amend its 2009 annual report and ensure that it fulfills its reporting obligations under Section 702(*l*)(3)(A)(iii) without delay.

~~(S//SI//NF)~~ [redacted] B1 B3 B7E (S)

[redacted] (S)

b1, b3, b7E

We therefore recommend that the FBI consult with the NSA about whether and under what circumstances the FBI should receive information developed after the NSA has requested a [redacted] of a selector. At a minimum, we believe that the FBI should request that the NSA provide it with copies of all reports required under [redacted] (S) and that the FBI should use these reports when meeting the statutory reporting requirements of Section 702(l)(3)(A)(iii).

IV. (U//FOUO) The FBI's Post-Targeting Activities Under Section 702

~~(TS//SI//NF)~~ The second basic activity that the FBI conducts in the 702 Program is to [redacted] (TS) route them in the form of raw unminimized data to the NSA and, at the NSA's direction, to the FBI and the CIA. The acquisition and routing of 702 data from the providers on behalf of the Intelligence Community is conducted by [redacted] (TS) See FISA Court Memorandum Opinion, October 3, 2011, p. 71. [redacted] (TS)

b1, b3, b7E

~~(S//NF)~~ [redacted] routes all the Section 702 data it acquires from the [redacted] (S) providers to the NSA and at the NSA's direction, [redacted] (S) On October 14, 2009, the FBI began to request that a portion of the raw 702-acquired data also be "dual routed" to the FBI so that it could retain this data for analysis and dissemination in intelligence reports. Prior to

b1, b3, b7E

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12 [redacted] (TS) These acquisitions are referred to as "upstream collection" because they occur at NSA collection sites located "upstream" from the domestic providers. Upstream collection is conducted without the technical involvement of the FBI.

b1, b3, b7E

October 2009, none of the Section 702 data that the FBI acquired for the NSA was dual routed to and retained by the FBI.

~~(S//NF)~~ Section 702 data that is dual routed to the FBI is maintained in the [redacted] along with other FISA-acquired information. [redacted] administered by the [redacted] The FBI is required to acquire, retain and disseminate Section 702 information in accordance with its FISA Court-approved Standard Minimization Procedures (SMPs). B1 B3 (S) B7E

A. (U//FOUO) The FBI's Standard Minimization Procedures

~~(S//NF)~~ As required by the FISA statute, the FBI's SMPs are "specific procedures that are reasonably designed in light of the purpose and technique of the particular surveillance or physical search to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." See 50 U.S.C. §§ 1801(h) & 1821(4). Though initially designed to apply to information of or concerning a United States person that was collected under traditional FISA, the SMPs were adapted to Section 702 through Attorney General-approved language that conforms relevant provisions to Section 702. The FBI has also developed various internal guidance documents to explain how 702-acquired data must be handled by FBI personnel.

~~(S//NF)~~ The SMPs provide that the FBI may only acquire 702 information in accordance with its targeting procedures, and must purge from its systems any communication it has acquired and retained that is inconsistent with the targeting and acquisition limitations set forth in Section 702(b).

~~(S//NF)~~ The retention provisions of the SMPs restrict access to 702-acquired information to authorized users who have been trained on the requirements of the SMPs and Section 702. The SMPs provide that authorized users may access raw FISA-acquired information on a continuing basis only as necessary to determine whether it reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime (the SMP minimization standards). Once information has been assessed as meeting SMP minimization standards, it may be disseminated – that is, made more broadly available outside of [redacted] However, if the information is "of or concerning" a United States person, the FBI's SMP Policy Implementation Guidelines (SMP

Guidelines) require that the information first be electronically "marked" [redacted] as having met SMP minimization standards before it may be disseminated.[13] B1 B3 B7E (S)

~~(S//NF)~~ Under the FBI's SMP Guidelines, only case coordinators in [redacted] (where the 702 Team is located) are authorized to mark 702-acquired information in [redacted]. In practice, however, the burden is on the operators in the field to apply SMP minimization standards to the information they wish to have marked. Thus, the 702 Team case coordinators defer considerably to the knowledge and judgment of the requesting agents and analysts concerning which marking to apply and why the marking is justified.

B. ~~(S//NF)~~ FBI Retention of Section 702-Acquired Information

~~(S//NF)~~ For the FBI to retain 702-acquired data for its own analysis, it must first request the NSA to allow the data to be "dual routed" to the FBI. The OIG examined the evolution of the FBI's Section 702 dual routing and retention policies and practices through April 2010, as well as how the data is maintained in and purged from FBI systems.

1. ~~(S//NF)~~ Findings Relating to Early Dual Routing and Retention Issues

~~(S//NF)~~ The FBI did not begin to request dual routing of 702 data until October 14, 2009, [redacted] B1 B3 B7E (S)

[redacted] B1 B3 B7E (S)

[13] (U//FOUO) If the information of or concerning a U.S. person does not meet the SMP minimization standards, the FBI must "strike or substitute a characterization" for the person's identity before the information may be disseminated. SMPs, Section III.C.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b6, b7C b7E

[14] (S//~~NF~~) The NSA is required by its targeting procedures to conduct post-targeting analysis of data acquired under Section 702, whereas the FBI is not explicitly required by its SMPs to review the 702 data that it retains.

[15] (U//FOUO) Art Cummings, the Executive Assistant Director for the National Security Branch at the time of the policy change, retired from the FBI in April 2010. He declined the OIG's request for an interview.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ The OIG concluded that the careful design and implementation of the means by which 702 data would be housed, accessed, and tagged was not matched with a clear, timely, and well-considered policy from FBI executive managers concerning the FBI's dual routing and retention of this data. It was not until after the automatic dual routing request process was in place for several weeks that the FBI's executive management first began to focus in earnest on whether the FBI should amass 702 counterterrorism data in [redacted] (S) rather than on a selector-specific basis. We believe these policy issues should have been more fully considered in advance of initiating the dual routing and retention process in October 2009. b1, b3, b7E

2. ~~(S//NF)~~ Findings Relating to Access to and Purging of 702-Acquired Data Retained in [redacted] (S) b1, b3, b7E

~~(S//NF)~~ Section 702-acquired data that the FBI retains for analysis is stored in [redacted], which is administered by [redacted] When the FBI first prepared to retain 702 data, the 702 Team worked with [redacted] and the FBI OGC to make sure that the 702 data would be labeled as 702-acquired to distinguish it from the traditional FISA data that is also housed in [redacted] (S) The FBI also controlled access rights to the 702 data by [redacted] In addition, the FBI required [redacted] Authorized users of [redacted] are required to [redacted] along with each 702-acquired communication when the communication is used outside of [redacted] such as in a disseminated intelligence report, so the data can be traced in the event it must later be purged. (S) b1, b3, b7E

~~(S//NF)~~ The 702 Team is responsible for tracking 702 data that must be purged from FBI systems. The FBI typically learns that 702-acquired data must be purged when the NSA determines through post-targeting analysis that

the targeted communicant was in the United States or a U.S. person at the time of acquisition, and therefore not eligible for 702 collection. The NSA conveys this information to the FBI through purge reports. The 702 Team tracks the tainted data by consulting with [redacted], which maintains access logs of each authorized user's activity in [redacted] (S) and then follows up with authorized users who may have included the data in disseminations to ensure that the data has been destroyed. [redacted] is responsible for purging the data from [redacted] (S) The OIG found that the 702 Team was diligent and thorough in tracking tainted 702 data and notifying authorized users and [redacted] personnel to destroy it.

b1, b3, b7E

C. ~~(S//NF)~~ FBI Dissemination of Section 702-Acquired Information

~~(S//NF)~~ The FBI defines "dissemination" to mean "providing information to foreign officials and entities, and federal, state, local, and tribal officials and entities, as well as sharing within the FBI when (or at the time) the FISA-acquired information is uploaded into a FBI system which allows for broad access in the FBI [redacted] SMP Guidelines, App. B. The FBI (S) provided the OIG with all disseminated intelligence reports containing 702 information from the inception of the program through April 2010. Each intelligence report was in the form of an [redacted] that (S) had been uploaded into [redacted] (S)

b1, b3, b7E

1. ~~(S//NF)~~ Findings Relating to Storage of Section 702 Intelligence Reports in [redacted] (S)

b1, b3, b7E

~~(S//NF)~~ In addition to having exclusive authority to mark 702-acquired data in [redacted] as meeting SMP minimization standards, the 702 Team is also (S) responsible for maintaining disseminated intelligence reports that contain 702 data. The 702 Team maintains these reports through an administrative case filing system in [redacted] using one administrative subfile for reports containing (S) 702-acquired U.S. person information and another subfile for reports that do not. Each disseminated report must identify the correct subfile in the text of the report so that the document can be found through a text [redacted] for (S) auditing and oversight purposes. The OIG found that relatively few disseminated intelligence reports were either misfiled, mislabeled, or both, potentially affecting NSD's oversight and the FBI's reporting to Congress, both of which rely on accurate filing in [redacted]. (S)

b1, b3, b7E

2. (U//FOUO) Findings Relating to Application of the Standard Minimization Procedures to Disseminated Intelligence Reports

(U//FOUO) The NSD and ODNI jointly conduct reviews to assess the FBI's compliance with its SMPs. During our review period, these compliance assessments concluded that "all references to United States persons reviewed were consistent with the applicable minimization procedures."[16]

~~(S//NF)~~ [redacted] (S)

b1, b3, b7E

he OIG found that operators in the field generally gave careful consideration to how the information met the minimization standard.

3. ~~(S//NF)~~ Findings and Recommendations Relating to Treatment of 702-Acquired Metadata in Disseminated Intelligence Reports

~~(S//NF)~~ [redacted] (S)

b1, b3, b7E

[16] ~~(S//NF)~~ However, the joint NSD/ODNI assessment team identified four disseminations that did not include the FISA warning statement (or "FISA caveat") required by 50 U.S.C. § 1825(c) and [redacted] The warning statement advises that FISA-acquired information may only be used in a criminal proceeding with the advance authorization of the Attorney General. (S) b1, b3, b7E

b1, b3, b7E

(S)

(S)

b1, b3, b7E

(S)

b1, b3, b7E

D. (U//FOUO) Findings and Recommendations Relating to Statutory Reporting Requirements for FBI Dissemination Activities

(U//FOUO) Section 702(*l*)(2)(B) provides that, "with respect to acquisitions authorized under subsection (a), [the OIG] shall review the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting[.]"

~~(S//NF)~~ The FBI is also required to conduct an annual review that provides an "accounting" of the identical information. See Section 702(*l*)(3)(A)(i)

and (ii). As noted above, the FBI submitted one annual report that covered the period of September 1, 2008, through August 31, 2009 (the 2009 reporting period). Because the FBI did not begin retaining 702-acquired data until after the 2009 reporting period, it reported that it "did not disseminate any intelligence reports containing a reference to a United States-person identity derived from acquisitions conducted under [Section 702(a)]" during that period. For the same reason, the FBI also reported that it did not disseminate any U.S. person identities that were not referred to by name or title in original reporting.

~~(S//NF)~~ In conducting its statutorily mandated review, the OIG reviewed the [redacted] intelligence reports that the FBI disseminated between December 2009 and April 2010. These reports would fall within the FBI's annual reporting period for September 1, 2009, through August 31, 2010. However, as of February 2012, the FBI had not conducted this statutorily required annual review.[17] B1 B3 (S) B7E

~~(S//NF)~~ The OIG read its mandatory review provision broadly to include any reference to a U.S. person identity in a disseminated intelligence report that was materially related to a Section 702 acquisition – even if the reference to the U.S. person's identity was not directly acquired under authority of Section 702. [redacted] Even though the communications or identities of these U.S. persons were not acquired directly under Section 702, we believe that the references were "with respect to" 702 acquisitions within the meaning of the reporting provisions of Section 702. B1 B3 B7E (S)

~~(S//NF)~~ [redacted] b1 b3 b7E (S)

[17] ~~(S//NF)~~ The FBI submitted its annual reports for September 1, 2009, through August 31, 2010, and September 1, 2010, through August 31, 2011, on May 22, 2012.

[redacted] (S)

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b3
b7E

(U//FOUO) The OIG determined that the FBI did not develop a strategy for meeting its annual reporting requirement to provide "an accounting of the number of disseminated intelligence reports containing a reference to a United States-person identity." In fact, beyond generally acknowledging that this reporting requirement applies to a broader spectrum of information than the SMPs and minimization guidance apply to, it appeared to the OIG that FBI personnel gave very little thought to this important statutory obligation. Several witnesses, including the Operations Attorney, told the OIG that guidance was needed to provide direction on how to comply with the reporting requirements of Section 702(*l*)(3)(A)(i) and (ii).

~~(S//NF)~~ The OIG recommends that the FBI OGC promptly issue guidance for meeting its annual reporting requirements under Section 702(*l*)(3)(A)(i) and (ii). In drafting this guidance, the FBI should develop a reasonable interpretation of that section's "with respect to" language that ensures that the FBI's reports to Congress fully and accurately convey the information Congress seeks, keeping the following principles in mind. The guidance should explain that that the reporting criteria extends broadly to disseminated intelligence reports containing a reference to a U.S. person identity that is "with respect to" to a Section 702 acquisition, and may therefore include reports in which the U.S. person is identified through a source other than the 702-acquired material.[18] The guidance should also explain that a "reference to a United States-person identity" for statutory reporting purposes is broader than the application of the SMPs to "nonpublicly available information concerning unconsenting United States persons," and that a reference to a U.S. person identity also may appear in metadata, such as in an e-mail address.[19] Lastly, we believe that the FBI should create a system

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[18] [redacted] (S)

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Per FBI

[19] [redacted] (S)

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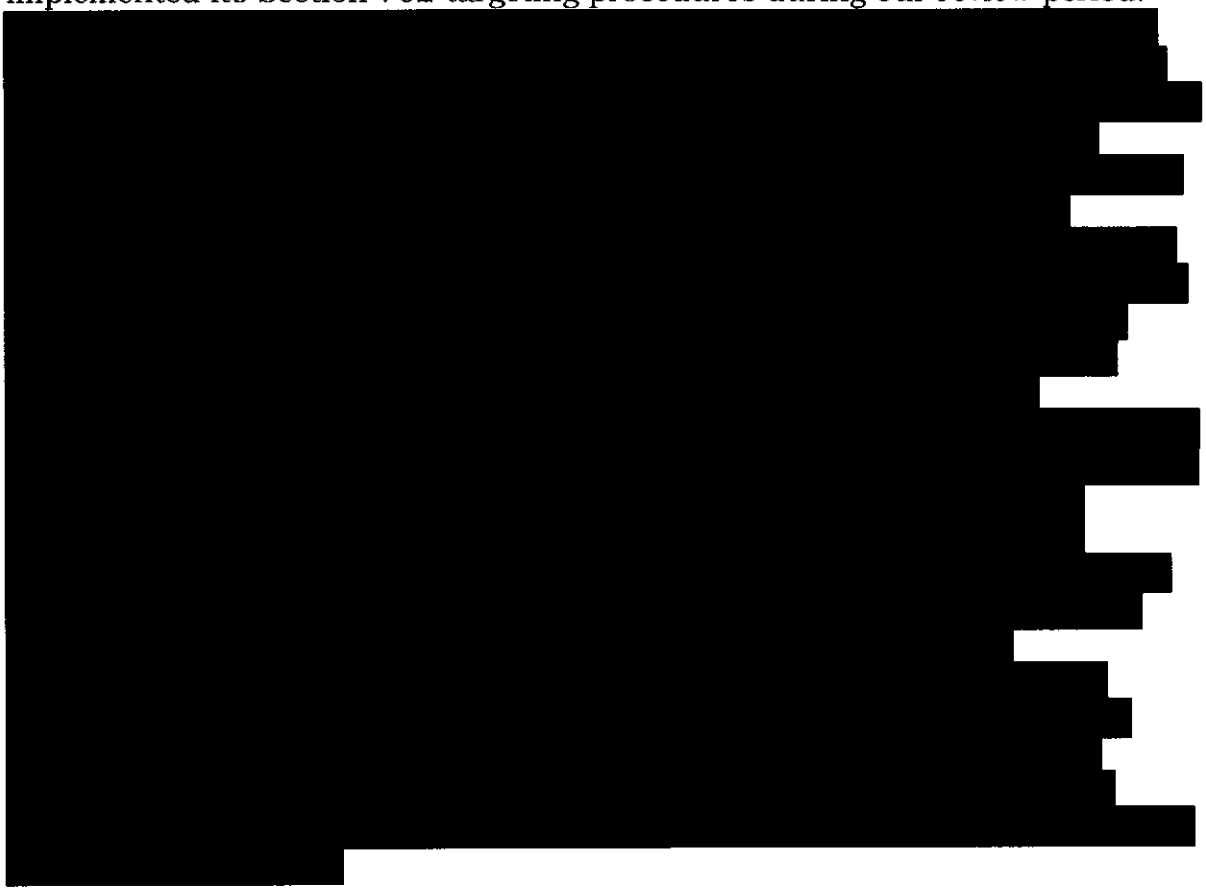
Per FBI
(Cont'd.)

for tracking intelligence reports that meet the reporting criteria as the reports are disseminated (or as the FBI disseminates U.S. person identities previously not identified in such reports) so that its annual accountings can be issued in a timely manner.

V. (U) Conclusion

~~(S//NF)~~ The OIG believes that in general the FBI responsibly implemented its Section 702 targeting procedures during our review period.



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Per FBI

(S)

~~(S//NF)~~ The OIG found that the FBI generally conducted its post-targeting activities responsibly as well, and approached its authority to retain and disseminate 702-acquired data with deliberation and foresight from the standpoint of ensuring compliance with the requirements and limitations of Section 702.

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b3
b7E
Per FBI

(S)

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b1
b3
b7E
Per FBI

(S)

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ Lastly, we found that the FBI has not met all of its statutory annual reporting requirements under Section 702. As of February 2012, the FBI had issued one annual report that covered various Section 702 activities from September 2008 through August 2009. However, the OIG found that this report was deficient because it did not provide the number of targets whose stored communications were acquired and who were later determined to be in the United States at the time of acquisition, as required by the statute. We also determined that through at least February 2012, the FBI had failed to provide Congress with subsequent annual reports about its Section 702 activities. In addition, we concluded that the FBI lacked the guidance necessary to ensure that the personnel who will be responsible for compiling these annual reports are able to do so with a consistent understanding of the reporting requirements of Section 702. We recommend that the FBI promptly correct deficiencies in its first annual report, and that FBI OGC issue guidance necessary for meeting its annual reporting requirements in a timely manner.

(U//FOUO) Based on our findings, we made seven recommendations designed to improve the FBI's conduct of its activities under Section 702. The FBI and the National Security Division have provided comments to these recommendations, which are appended to this report. The OIG intends to closely monitor the FBI's progress in implementing these recommendations.

(U) CHAPTER ONE
INTRODUCTION

(U//FOUO) The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FAA) was signed into law on July 10, 2008. The FAA was enacted as part of Congress's effort to modernize the Foreign Intelligence Surveillance Act of 1978 (FISA), codified at 50 U.S.C. §§ 1801-1885.

~~(TS//SI//NF)~~ The FAA followed earlier efforts to enhance the nation's ability to gather signals intelligence in the wake of the terrorist attacks of September 11, 2001. In October 2001, the President authorized a highly classified program, known as the President's Surveillance Program, to conduct electronic surveillance of certain communications into and out of the United States without seeking orders from the Foreign Intelligence Surveillance Court (FISA Court).[20] This program was transitioned in stages to FISA Court supervision beginning in 2004.

~~(TS//SI//NF)~~ However, according to a former senior Justice Department official familiar with these events, in May 2007, the FISA Court imposed rigorous procedural requirements on the government's foreign surveillance authority, causing the National Security Agency (NSA) to place fewer foreign selectors under coverage than it wanted to.[21] To address concerns that the Intelligence Community was unable to swiftly collect critical foreign intelligence, Congress thereafter enacted two major amendments to the original FISA statute. The first of these amendments was the Protect America Act of 2007 (PAA), a temporary legislative measure that expired on February 16, 2008. It was followed by the FAA, key provisions of which are set to expire on December 31, 2012.

(U//FOUO) The FAA authorizes the collection of foreign intelligence information from persons reasonably believed to be located outside of the United States. This portion of the FAA contains separate sections authorizing such collection under three different circumstances: targeting non-U.S. persons outside the United States (Section 702); acquisitions inside the United States targeting U.S. persons outside the United States (Section 703); and other acquisitions targeting U.S. persons outside the United States (Section 704).

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[20] (U//FOUO) The FISA Court was established under the FISA statute to review the government's applications to exercise FISA authority and grant orders approving such applications. 50 U.S.C. § 1803.

[21] ~~(S//NF)~~ A "selector" is either a telephone number or an identifier used for Internet communications, such as an e-mail account.

(U//FOUO) Section 702, which is the focus of this report, allows the Attorney General and the Director of National Intelligence to jointly authorize, for up to 1 year, the targeting of non-U.S. persons reasonably believed to be located outside the United States. To exercise this authority, the Attorney General and the Director of National Intelligence must adopt targeting and minimization procedures that govern how targets are determined to be non-U.S. persons outside the United States and how the information acquired may be retained and disseminated. The statute places limitations on the government's targeting authority by prohibiting the intentional targeting of persons known to be in the United States at the time of acquisition, and the targeting of persons outside the United States where the purpose of the acquisition is to obtain the communications of "a particular, known person reasonably believed to be in the United States" (a practice known as "reverse targeting"). The targeting and minimization procedures adopted by the Attorney General and the Director of National Intelligence are subject to FISA Court review and approval.

~~(S//NF)~~ Section 702 also requires the government to certify that "the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider." Under Section 702, foreign intelligence is obtained from these U.S.-based electronic communications service providers (U.S. providers) either by conducting electronic surveillance of communications as they are transmitted, or by conducting a search of communications that are in electronic storage after they have been transmitted.

~~(S//NF)~~ The Federal Bureau of Investigation (FBI) and the National Security Agency (NSA) are the only agencies authorized to acquire foreign intelligence information under Section 702. The NSA is the lead agency in the 702 Program and, during the OIG's review period, was the only agency with the formal authority to initiate electronic surveillance [redacted] under FISA Court-approved targeting procedures. Thus, during our review period, the NSA initiated all such electronic surveillance [redacted] although sometimes the NSA did so on behalf of the Central Intelligence Agency (CIA), or at the request of the FBI. B1 B3 B7E (S)

~~(S//NF)~~ [redacted] B1 B3 B7E (S)

[redacted] The FBI then applies its FISA Court-approved targeting procedures to determine whether [redacted] the NSA's determination that the presumed user of the account is a non-U.S. person located outside the United States. [redacted] (S) b1, b3, b7E

~~(S//NF)~~ The FBI is also responsible for routing to the NSA all communications acquired from providers under Section 702, [redacted] The 702-acquired information may be routed to the CIA or the FBI as well, but only upon request and subject to the approval of the NSA. [redacted] The FBI retains this information for analysis and dissemination in connection with its national security investigations. (S) b1, b3, b7E

(U//FOUO) This report describes the Office of the Inspector General's (OIG) review of the FBI's use of the authorities provided in Section 702 of the FAA. Section 702(*l*)(2)(A) authorizes the OIG to review the FBI's compliance with its targeting and minimization procedures. The OIG also conducted this review pursuant to its authority under the Inspector General Act of 1978, as amended, codified at 5 U.S.C. App. 3.

(U//FOUO) The FBI's compliance with its targeting and minimization procedures is subject to mandatory reviews that are conducted jointly by the Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI). The OIG sought to avoid replicating the DOJ and ODNI's compliance reviews, and instead concentrated on assessing the policies and procedures that the FBI implemented to carry out its targeting and post-targeting activities.

(U//FOUO) This report also discusses the OIG's findings with respect to three reviews we are required to conduct under Section 702(*l*)(2)(B) and (C) concerning the FBI's acquisition and dissemination of U.S. person information. Specifically, with respect to acquisitions authorized under Section 702(a), the OIG is required to review:

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[22] ~~(S//NF)~~ After reviewing a draft of this report, the NSA objected to this characterization of the FBI's [redacted] to the extent it suggests that the NSA lacks [redacted] pursuant to Section 702. (S) b1, b3, b7E

- (U//FOUO) "the number of targets that were later determined to be located in the United States, and to the extent possible, whether communications of such targets were reviewed";
- (U//FOUO) "the number of disseminated intelligence reports containing a reference to a United States-person identity"; and
- (U//FOUO) "the number of United States-person identities subsequently disseminated . . . in response to requests for identities that were not referred to by name or title in the original reporting[.]"

(U//FOUO) The FBI is also required by Section 702(*l*)(3) to provide annual reports concerning this same U.S. person information.

I. (U//FOUO) Methodology of OIG Review

~~(S//NF)~~ During the course of this review, the OIG interviewed approximately 45 individuals, including FBI personnel who administer the 702 Program (referred to in this report as the 702 Team), senior FBI Counterterrorism Division officials, personnel in the FBI's [redacted] (S) [redacted] and the [redacted] (S) who help support 702 operations, former FBI General Counsel Valerie Caproni, and other Office of General Counsel attorneys who provided legal advice to the FBI concerning Section 702 during our review period.[23] In addition, we interviewed several National Security Division attorneys, National Security Agency officials, and officials in the Office of the Director of National Intelligence. b1, b3, b7E

~~(S//NF)~~ We also reviewed thousands of documents, including approximately [redacted] individual files documenting the FBI's processing of NSA (S) requests [redacted], approximately [redacted] (S) disseminated intelligence reports, FISA Court filings, Office of Legal Counsel memoranda, FBI guidance documents and training materials, National Security Division compliance reports, and e-mails among FBI and other officials discussing the 702 Program. b1, b3, b7E

~~(S//NF)~~ In addition to conducting interviews and examining documents, the OIG conducted various statistical analyses of the [redacted] (S) [redacted] using random sampling and other analytic techniques. b1, b3, b7E

[23] (U//FOUO) Art Cummings, the Executive Assistant Director for the FBI's National Security Branch until his retirement from the FBI in April 2010, declined the OIG's request for an interview.

II. (U) Organization of this Report

(U//FOUO) In Chapter Two of this report we briefly describe how certain intelligence-gathering activities first authorized by the President in 2001 were brought under FISA Court supervision, followed by Congress's effort to modernize the FISA statute through the Protect America Act of 2007 and the FISA Amendments Act of 2008. We also discuss the legal provisions of Section 702, and provide an overview of the FBI offices and personnel who administer the 702 Program for the FBI.

~~(TS//SI//NF)~~ In Chapter Three we describe the FBI's targeting activities with respect to NSA nominations [redacted]. The (TS) OIG's review period for these targeting activities is from September 2008, [redacted] (TS) b1, b3, b7E through (TS) February 2010. [redacted] (TS) e first assess how the FBI processed the approximately two-thirds of these requests for which it [redacted] and then how it processed the balance of the requests [redacted] (TS) We also review the special procedures that the FBI developed for [redacted] (TS) involving persons who had [redacted] (TS) [redacted] (TS) Lastly, we provide our review of the number [redacted] that (TS) were acquired when the presumed user of the targeted account was later determined to be in the United States at the time of acquisition, as required by Section 702(*l*)(2)(C).

~~(S//NF)~~ In Chapter Four we describe the FBI's post-targeting activities, which involve the acquisition, routing, retention, purging, minimization, and dissemination of 702-acquired information. The OIG's review period for these activities extends through April 2010. However, because the FBI did not begin to retain 702 data until October 2009, we were only able to examine approximately seven months of information related to these post-targeting activities. We describe the policies and practices surrounding the FBI's eventual participation in the routing and retention process as a recipient of 702-acquired data, and how those policies and practices changed over time. We also describe the role of the 702 Team and other FBI personnel in the acquisition, retention, and dissemination process, and assess the FBI's application of its Standard Minimization Procedures and relevant guidance to disseminated intelligence reports containing 702 information. Lastly, we provide our review of the number of disseminated intelligence reports containing a reference to a U.S. person identity, as required under Section 702(*l*)(2)(B).

(U//FOUO) In Chapter Five we provide our conclusions and recommendations. Based on our findings, we made seven recommendations designed to improve the FBI's conduct of its activities under Section 702. The FBI and the National Security Division have provided comments to these recommendations, which are appended to this report. The OIG intends to closely monitor the FBI's progress in implementing these recommendations.

(U) CHAPTER TWO
BACKGROUND

(U//FOUO) In this chapter, we describe the transition of certain foreign intelligence-gathering activities from presidential authority under what was known as the "Terrorist Surveillance Program," which was in operation from 2001 through early 2007, to activities approved and supervised by the FISA Court during 2007. We then describe how efforts to modernize the Foreign Intelligence Surveillance Act of 1978 (FISA) through legislation and continued FISA Court supervision of these activities led to the enactment of the Protect America Act of 2007 (PAA), and later the FISA Amendments Act of 2008 (FAA).

(U//FOUO) We also provide an overview of Section 702 of the FAA, which authorizes the government to target non-U.S. persons reasonably believed to be located outside the United States to acquire foreign intelligence information, subject to certain limitations and in accordance with FISA Court-approved targeting and minimization procedures. Finally, we provide an overview of the FBI offices and personnel who administer the 702 Program for the FBI, as well as a brief description of how the FBI has used Section 702 in the past, and how it intends to use the statute in the future.

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I. ~~(TS//SI//NF)~~ Transition of [redacted]

A. (U//FOUO) The Terrorist Surveillance Program

(U//FOUO) Following the terrorist attacks of September 11, 2001, the President authorized the National Security Agency (NSA) to use its signals intelligence capabilities to detect and prevent further attacks against the United States. The classified activities that the President authorized and the information derived from them fell into distinct categories that collectively came to be known as the "President's Surveillance Program" (PSP).[24] One category of activity under the PSP was publicly confirmed by the President in December 2005 following a series of media reports about the NSA's surveillance program.[25] That activity, called the "Terrorist Surveillance Program" or "TSP,"

[24] (U//FOUO) A detailed description of this program may be found in a classified OIG report entitled, "A Review of the Department of Justice's Involvement with the President's Surveillance Program" (July 2009).

[25] (U//FOUO) The first media account of the NSA surveillance activities appeared in a series of articles published in The New York Times between December 16 through 19, 2005. See "Bush Lets U.S. Spy on Callers Without Courts," James Risen and Eric Lichtblau, New York Times, December 16, 2005.

authorized the NSA, [redacted] to intercept the content of communications into and out of the United States where there was a reasonable basis to conclude that at least one of the communicants was a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.

~~(TS//SI//NF)~~ The TSP and the other intelligence activities authorized by the President under the PSP were legally controversial because these activities traditionally were viewed to be governed by the FISA statute.[26] Subject to certain statutory exceptions, and until it was amended in 2007 by the PAA, FISA generally required the approval of the FISA Court whenever the government sought to acquire, for foreign intelligence purposes, "the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States." For the FISA Court to grant authority to conduct electronic surveillance, the government would first have to establish probable cause to believe that the target of the surveillance is a "foreign power" or an "agent of a foreign power," and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used" by the target. FISA imposed similar legal requirements to conduct a physical search, including of stored electronic communications.

(U//FOUO) When FISA was enacted in 1978, most international telephone calls were carried by satellite. Under FISA, the interception of such calls constituted "electronic surveillance" only if the acquisition intentionally targeted a U.S. person in the United States, or if all participants to the communication were located in the United States. Thus, government surveillance of satellite communications that targeted foreign persons outside the United States generally was not considered electronic surveillance, and the government was not required to obtain a FISA Court order authorizing the surveillance, even if one of the parties to the communication was in the United States.

~~(TS//SI//NF)~~ In the mid-1980s, however, fiber optic technology began to replace satellites as the primary means for transmitting international (and domestic) communications. Because many of these communications were now "wire communications" routed through and acquired inside the United States,

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[26] (U//FOUO) Proponents of this view cite 18 U.S.C. § 2511(2)(f), which states, in relevant part, that the

> (U) procedures in [chapter 119 and 11 of title18] and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

this change in technology brought most electronic communications within FISA's definition of "electronic surveillance." Consequently, the government was required to obtain FISA Court orders to conduct electronic surveillance it previously had been authorized to conduct outside of FISA.

(U//FOUO) Under the TSP, the President authorized electronic surveillance to be conducted without the particularized probable cause showings to the FISA Court required under FISA. According to a Justice Department memorandum publicly released on January 19, 2006, the TSP was "supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States." The Department further maintained that the program was lawful because, in the wake of the September 11 terrorist attacks, Congress had passed an Authorization for the Use of Military Force, which "confirms and supplements" the President's inherent power to conduct warrantless surveillance during wartime.

B. (U//FOUO) FISA Court Orders

~~(TS//SI//NF)~~ Beginning in 2004, the PSP activities authorized by the President were transitioned in stages to FISA authority under a series of orders issued by the FISA Court. The last of the activities to come under FISA Court order was the TSP. The transition of the TSP from presidential authority to FISA Court orders was precipitated in part by the disclosure of the program in a series of articles in The New York Times in December 2005.

~~(TS//SI//NF)~~ The government's application to the FISA Court for this electronic surveillance authority was premised on a novel and expansive interpretation of the FISA statute. As noted, FISA generally required the government to establish probable cause to believe that the target of the surveillance is a "foreign power" or an "agent of a foreign power," and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used" by the target. In its post-TSP filings with the FISA Court, the government proposed that the term "facilities" be interpreted far more broadly than how the term ordinarily had been applied.[27] The government also requested that senior NSA officials, rather than a FISA Court judge, be authorized to make individualized findings of probable cause to determine that a particular telephone number or e-mail address was being used by a member or agent of the targeted entity [redacted] (TS) b1, b3, b7E

[27] ~~(TS//SI//NF)~~ Under the FISA statute, the term "facilities" generally was understood to apply to specific telephone numbers or e-mail addresses (collectively referred to as "selectors").

[redacted] and that the communication was to or from a foreign country. (TS) b1, b3, b7E

~~(TS//SI//NF)~~ FISA Court Judge Malcolm Howard granted the government's application as to foreign selectors on January 10, 2007.[28] On January 17, 2007, Attorney General Alberto Gonzales wrote to Senators Patrick Leahy and Arlen Specter, respectively the Chairman and Ranking Minority Member of the Senate Judiciary Committee, to inform them that due to Judge Howard's order approving the government's application, collection under the TSP would cease.

~~(TS//SI//NF)~~ On March 20, 2007, the government filed an application to renew Judge Howard's January 10 Order. The renewal application was filed with Judge Roger Vinson, the FISA Court "duty judge" during that week. In an April 3, 2007 Memorandum and Order, Judge Vinson wrote that he could not grant the government's renewal application. He determined, based on past practice under FISA and the Congressional intent underlying the statute, that the FISA Court, not senior NSA officials, must make the necessary probable cause determinations. He also rejected the government's broad construction of the term "facilities," concluding that the electronic surveillance to be conducted by the government was directed at specific telephone numbers and e-mail addresses, [redacted] (TS) b1, b3, b7E

~~(TS//SI//NF)~~ While sympathetic to the government's stated need for enhanced "speed and flexibility" in responding to terrorist threats, Judge Vinson concluded that FISA's requirements reflected a balance struck by Congress between privacy interests and the need to obtain foreign intelligence information, and until Congress took legislative action on FISA to respond to the government's concerns, the FISA Court was bound to apply FISA's procedures. In denying the government's application, Judge Vinson urged the government to seek a 60-day extension of Judge Howard's foreign selectors order, which the government subsequently sought and obtained.

~~(TS//SI//NF)~~ The government later submitted a revised renewal application and, on May 31, 2007, obtained authority from Judge Vinson to conduct electronic surveillance on foreign selectors. This authority, however, was considerably narrower than the authority initially sought from and granted by Judge Howard. Although the government was allowed to conduct electronic surveillance targeting selectors reasonably believed to be used outside the United States and for which probable cause existed to believe were being used

[28] ~~(TS//SI//NF)~~ Judge Howard declined to authorize [redacted] of (TS) selectors used by persons in the United States (domestic selectors) in the manner proposed by the government in its application. b1, b3, b7E

or about to be used by [redacted] (TS) b1, b3, b7E associated terrorist entities, the FISA Court – and not the NSA – would make the probable cause determinations as to each selector.

~~(TS//SI//NF)~~ Under the May 31, 2007 Order, the FISA Court initially approved approximately [redacted] foreign selectors for which the NSA previously (TS) had found probable cause to conduct electronic surveillance under the terms of the earlier FISA Court Order. However, according to a former senior Justice Department official familiar with these events, the rigorous nature of the FISA Court's probable cause review of new selectors submitted to the various FISA Court judges following Judge Vinson's May 31, 2007 Order caused the NSA to place fewer foreign selectors under coverage than it wanted to. This factor and the comparatively laborious process for targeting foreign selectors under Judge Vinson's Order combined to accelerate the government's efforts to amend the FISA statute to streamline and modernize the government's surveillance authorities within the United States directed at persons located outside the United States. b1, b3, b7E

~~(TS//SI//NF)~~ The PAA, and its successor, the FAA, accomplished many of these objectives. The PAA, described briefly below, was signed into law on August 5, 2007. Because the PAA effectively superseded Judge Vinson's May 31, 2007, foreign selectors Order, the government did not seek to renew the Order when it expired on August 24, 2007.

C. (U//FOUO) The Protect America Act

(U//FOUO) The Protect America Act of 2007 (PAA), Pub. L. No. 110-55, was enacted as a temporary measure to address the legal impediments that existed under FISA to the swift acquisition within the United States of communications to or from targeted foreign selectors.[29] The PAA accomplished this by amending FISA to exclude from the statute's definition of "electronic surveillance" the interception of communications to or from targeted foreign selectors.

(U//FOUO) Under the FISA statute's original definition of "electronic surveillance," FISA Court authorization generally was required to intercept any communication to or from a "particular, known United States person who is in the United States" if the communication was acquired by targeting that person. Such authorization also was necessary to acquire other communications (such as those acquired by targeting persons outside the United States) if the

[29] (U//FOUO) The PAA was signed into law on August 5, 2007. It was set to expire 180 days after its enactment, or on February 1, 2008. However, Congress passed a bill, signed by the President on January 31, 2008, extending the PAA for 15 days so that discussions on new legislation could continue. No agreement on new legislation was reached during that period, and the PAA expired on February 16, 2008.

communication was a "wire communication to or from a person in the United States" and the acquisition occurred inside the United States.

(U//FOUO) The PAA amended FISA by providing: "Nothing in the definition of electronic surveillance . . . shall be construed to encompass surveillance directed at a person reasonably believed to be located outside the United States." The effect of this amendment was to exclude from the individualized FISA Court application and order requirements of FISA any communication acquired by targeting a person overseas, regardless of where the communication was intercepted, whether the communication traveled by a wire, or whether the target was a known United States person determined by the Attorney General to be an agent of a foreign power located outside the United States.

(U//FOUO) In place of these individualized FISA Court applications and orders, the PAA inserted a new legal mechanism to govern the acquisition of communications from persons "reasonably believed to be located outside the United States." The PAA provided that the Attorney General and the Director of National Intelligence may authorize the acquisition of foreign intelligence information concerning such persons for up to one year, provided these officials certified that there were reasonable procedures in place for the government to determine that a target was reasonably believed to be outside the United States and that the acquisition of the foreign intelligence therefore was not "electronic surveillance" under the amended definition of the term. Unlike traditional FISA, the PAA did not require the Attorney General and the Director of National Intelligence to identify the specific facilities or places at which the acquisition of foreign intelligence information was directed.

(U//FOUO) In order to authorize such acquisition of foreign intelligence information, the Attorney General and the Director of National Intelligence also were required to certify that the minimization procedures to be used with respect to such acquisitions comported with the procedures adopted by the Attorney General for minimizing information obtained by electronic surveillance under FISA.[30] As discussed in Chapters Three and Four, these targeting and minimization requirements are central features of the intelligence-gathering and sharing activities conducted under Section 702 of the FISA Amendments Act as well.

[30] (U//FOUO) FISA generally requires that with respect to electronic surveillance the Attorney General shall adopt "specific procedures . . . that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information[.]" 50 U.S.C. § 1801(h).

(U//FOUO) In addition to addressing targeting and minimization requirements in the certification, the Attorney General and the Director of National Intelligence also were required to certify that the acquisition involved obtaining the foreign intelligence information from or with the assistance of a communications service provider having access to the communications, either as the communications were transmitted or while they were stored, and that a "significant purpose of the acquisition is to obtain foreign intelligence information[.]"

(U//FOUO) The PAA left unchanged the procedures for acquiring foreign intelligence information by targeting foreign powers or agents of foreign powers in the United States, as well as the procedures under Executive Order 12,333 (E.O. 12,333) Section 2.5, to obtain Attorney General approval before acquiring foreign intelligence information against a U.S. person outside the United States.

~~(S//NF)~~ The first PAA certification was filed with the FISA Court on August 9, 2007. [redacted] (S) were filed with the FISA Court under the PAA. The FISA Court reviewed these certifications and approved them, allowing the government to continue the activities authorized by the Attorney General and the Director of National Intelligence to acquire foreign intelligence information concerning persons reasonably believed to be outside the United States without individualized FISA Court approval for up to one year. These acquisitions were conducted by the NSA. As of January 31, 2008, the PAA certifications also authorized the FBI to acquire [redacted] on behalf of the NSA. After the PAA expired on (S) February 16, 2008, the government's foreign intelligence acquisition authority under the statute gradually lapsed as the individual certifications expired. The final PAA certification expired in April 2009.

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The respective roles of the NSA, the CIA, and the FBI under the PAA

were formalized in a Memorandum of Understanding (MOU) signed in April 2008.[31]

~~(S//SI//NF)~~ The FBI's role under the PAA thus became virtually identical to its current role under the Section 702 of the FAA – to acquire, on behalf of the NSA (and the CIA through the NSA), [redacted] persons reasonably believed to be located outside the United States, and to provide technical assistance to the NSA in acquiring the in-transit communications of persons reasonably believed to be outside the United States. (S) B1 B3 B7E

(U//FOUO) Although the Department viewed the PAA as an adequate temporary fix to those provisions of FISA seen as outdated because of changes in telecommunications technology, Department and other Intelligence Community officials continued to press Congress for more permanent modernization legislation. The result of these efforts was the FISA Amendments Act of 2008.

II. (U) The FISA Amendments Act of 2008

(U//FOUO) The FISA Amendments Act of 2008 (FAA) was signed into law as Public Law 110-261 on July 10, 2008. According to the FAA's legislative history, Congress had two primary goals in passing the FAA. First, Congress wanted to provide a sound statutory framework, consistent with the Constitution, enabling the targeting of persons reasonably believed to be located outside of the United States for the acquisitions of foreign intelligence information, while simultaneously affording additional protections to United States persons whose communications are targeted for collection or collected incidentally. In striking this balance, Congress discarded the PAA's redefinition of the term "electronic surveillance," which had excluded from FISA's individualized order requirement *all* persons outside the United States, including U.S. persons, and instead promulgated a specific authorization for the acquisition of communications from *non*-U.S. persons located outside the United States without an individualized order. The result was a sharply narrowed statute under which U.S. persons overseas could no longer be

[31] ~~(S//NF)~~ According to an attorney in the FBI's Office of General Counsel who participated in drafting the Memorandum of Understanding (MOU), the document took a long time to negotiate, and was not finalized until after the PAA expired. However, the attorney stated that the MOU remained in effect after the PAA expired because certifications issued under the PAA were valid for one year, and thus the use of PAA authority extended beyond the PAA's expiration. This attorney also stated that the MOU remains in effect under the FAA to the extent it is relevant to the FAA's provisions. Thus, provisions in the MOU concerning targeting the accounts of U.S. persons, which is prohibited under the FAA, are considered void.

targeted without an individualized warrant, as had been possible prior to the FAA.

(U//FOUO) Second, Congress wanted to provide civil immunity for those electronic communication service providers who had provided assistance to the Intelligence Community under the PSP pursuant to written assurances that the program had been authorized by the President and determined to be lawful. See, e.g., Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007, S. Rep. No. 110-209 (Oct. 26, 2007).

(U//FOUO) Consistent with these two goals, the FAA contains two primary provisions: an authorization to collect foreign intelligence information by targeting non-U.S. persons located overseas, including explicit limitations on that authority and an oversight regime to monitor its use; and a mechanism to extend immunity to qualifying electronic communication service providers for prior participation in the PSP.

A. (U//FOUO) The Authorization to Collect Foreign Intelligence Information

(U//FOUO) The FAA authorizes the collection of foreign intelligence information from persons reasonably believed to be located outside of the United States. The Act contains separate sections authorizing such collection under three different circumstances: targeting non-U.S. persons outside the United States (Section 702); acquisitions inside the United States targeting U.S. persons outside the United States (Section 703); and other acquisitions targeting U.S. persons outside the United States (Section 704).[32] These provisions, and in particular Section 702, which is the focus of this review, are summarized below.

1. (U//FOUO) Section 702

a. (U//FOUO) Authorization and Limitations

(U//FOUO) Section 702, which is codified at 50 U.S.C. § 1881a, et seq., authorizes the targeting of non-United States persons who are reasonably believed to be located outside of the United States to acquire foreign intelligence information, without an individualized order from the FISA Court.[33] The affirmative authorization contained in Section 702(a) states:

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[32] (U//FOUO) These provisions will expire on December 31, 2012, unless reauthorized by Congress. See FAA, Section 403(b)(1).

[33] (U//FOUO) Section 701(a) incorporates the definition of "United States person" provided in Title I of FISA:

(Cont'd.)

> (U) (a) AUTHORIZATION.—Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection [FAA] (i)(3) or a determination under [FAA] subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

(U//FOUO) The affirmative authorization contained in Section 702(a) is strictly limited in several ways. Under the terms of subsection (a) itself, any acquisition under Section 702(a) must be made pursuant to either a FISA Court order (through the approval of a "certification," discussed below), or a determination that exigent circumstances exist, as defined in Section 702(c)(2) and subject to subsequent and expeditious action by the FISA Court.[34] The plain language of subsection (a) also requires that acquisitions pursuant to Section 702(a) must be conducted "to acquire foreign intelligence information," and that the person targeted for such acquisition be reasonably believed to be located outside the United States. Id.

(U//FOUO) Section 702(b) specifies limitations to the authority to collect foreign intelligence information under subsection (a).[35] The chief limitation

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> (U) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

(U) 50 U.S.C. § 1801(i).

[34] (U//FOUO) Section 702(c)(2) allows for the Attorney General and the Director of National Intelligence to determine that exigent circumstances exist when, "without immediate implementation of an authorization under subsection (a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order" from the FISA Court. *See* FAA § 702(c)(2), 50 U.S.C. § 1881a(c)(2). When such a determination is made, however, the Attorney General and the Director of National Intelligence must submit to the FISA Court a certification for such authorization "as soon as practicable but in no event later than 7 days after such determination is made." FAA § 702(g)(1)(B), 50 U.S.C. § 1881a(g)(1)(B).

[35] (U) The full text of Section 702(b) states:

> (U) (b) Limitations.—An acquisition authorized under subsection (a)—
>
> (U) (1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(Cont'd.)

imposed by Section 702(b) is that the acquisition may not intentionally target a United States person; as discussed below, the targeting of United States persons under the FAA is addressed in Sections 703 and 704. Section 702(b) also specifically prohibits the intentional targeting of any person "known at the time of acquisition to be located in the United States." Together, these two limitations – that the acquisition target non-United States persons reasonably believed to be located outside the United States at the time of acquisition – form what the Intelligence Community commonly refers to as the "foreignness" requirement. The foreignness requirement is designed to ensure that all persons located in the United States, and United States persons located anywhere, are afforded the protections of the more robust procedural requirements for acquisitions under other sections of the FAA and FISA.

(U//FOUO) Section 702(b) imposes other limitations and prohibitions designed to ensure that subsection (a) is not used for surveillance directed at persons within the United States, or at United States persons. Specifically, acquisitions authorized under subsection (a) may not intentionally target a person reasonably believed to be located outside the United States "if the purpose of the acquisition is to target a particular, known person reasonably believed to be in the United States" – the prohibited practice commonly referred to as "reverse targeting." Nor may Section 702(a) be used to intentionally acquire a communication if the sender and all intended recipients are known at the time of acquisition to be in the United States. Finally, Section 702(b) explicitly mandates that acquisitions made pursuant to Section 702(a) must be conducted in a manner consistent with the Fourth Amendment to the United States Constitution, which provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

(U) (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(U) (3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(U) (4) 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

(U) (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

b. (U//FOUO) Procedural Requirements of Section 702

(U//FOUO) Section 702(c) requires that acquisitions authorized pursuant to Section 702(a) shall conform to "the targeting and minimization procedures adopted in accordance with subsections (d) and (e)," and "upon submission of a certification in accordance with subsection (g), such certification," as explained below. FAA, Section 702(c)(1).

(U//FOUO) Section 702(d) requires the Attorney General, in consultation with the Director of National Intelligence, to adopt targeting procedures that are reasonably designed to ensure that the acquisition of foreign intelligence information pursuant to Section 702 complies with the limitations in subsections (a) and (b). Specifically, Section 702(d)(1)(A) requires that the procedures "ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States," and Section 702(d)(2)(B) requires that the procedures "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 targeting procedures are subject to judicial review.[36]

~~(U//FOUO)~~ Section 702(e) requires the Attorney General, again in consultation with the Director of National Intelligence, to adopt minimization procedures governing the retention and dissemination of information acquired under Section 702(a) that meet the statutory rules in FISA that are otherwise applicable to data acquired through electronic surveillance and physical searches. Those provisions of FISA provide that the minimization procedures must be designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." The minimization procedures adopted under the FAA are subject to judicial review.[37]

(U//FOUO) In addition to specific targeting and minimization procedures, Section 702(f) requires the Attorney General, in consultation with

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[36] ~~(S//NF)~~ At present, only the NSA and the FBI conduct acquisitions under Section 702, and thus are required to submit their targeting procedures to the FISA Court for review. The CIA nominates selectors for electronic surveillance to the NSA, [redacted] through the NSA to the FBI, and therefore does not submit targeting procedures to the FISA Court. The NSA's and FBI's targeting procedures are discussed in Chapter Three. B1 B3 (S) B7E

[37] ~~(S//NF)~~ The CIA, NSA, and FBI each receives raw Section 702-acquired data and is required to retain and disseminate such data in accordance with its own minimization procedures. Therefore, the FISA Court must review the minimization procedures of all three agencies. The FBI's minimization procedures are discussed in Chapter Four.

the Director of National Intelligence, to adopt guidelines to ensure "compliance with the limitations in subsection (b)," and to ensure "that an application for a court order is filed as required by [the FAA]." Section 702(f)(1)(A)-(B). These guidelines are known as the Attorney General's Acquisition Guidelines. In addition to reiterating the targeting limitations of Section 702, these Guidelines provide that "[a] non-United States person reasonably believed to be located outside the United States may not be targeted under subsection 702(a) unless a significant purpose of the targeting is to acquire foreign intelligence information that such person possesses, is reasonably expected to receive, and/or is likely to communicate."

(U//FOUO) Finally, Section 702(g) requires the Attorney General and the Director of National Intelligence to submit written certifications to the FISA Court, either prior to the implementation of an authorization under subsection (a), or in the case of exigent circumstances, "as soon as practicable but in no event later than 7 days after such determination is made." Section 702(g)(1)(A)-(B). In addition to attesting to the fact that appropriate targeting and minimization procedures are in place, the certifications must also include copies of those procedures. Unlike traditional FISA applications seeking authority to conduct electronic surveillance within the United States, the certifications are "not required to identify the specific facilities, places, premises, or property at which an acquisition authorized under subsection (a) will be directed or conducted."

(U//FOUO) These certifications, filed *ex parte* and under seal, provide the primary mechanism by which the FISA Court conducts its judicial oversight of the implementation of Section 702. See FAA, Section 702(i) (establishing the FISA Court's "jurisdiction to review a certification submitted in accordance with subsection (g) and the targeting and minimization procedures adopted in accordance with subsections (d) and (e), and amendments to such certification or such procedures").[38]

(TS)

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[38] (U//FOUO) Except as discussed elsewhere in this report, subsections (h)-(k) are not directly relevant to this review. In summary, those subsections address the Attorney General and the Director of National Intelligence's authority to direct electronic communication service providers to provide the government with information and protect any records pertaining to acquisitions made under Section 702 (Section 702(h)); judicial review of certifications and procedures (Section 702(i)-(j)); and the FISA Court's maintenance and security of records and proceedings (Section 702(k)).

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Each certification contains:

- [redacted] (S)
- [redacted] (S)
- (U//FOUO) FBI targeting and minimization procedures;
- [redacted] (S)
- [redacted] (S)

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[redacted] (TS)

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c. (U//FOUO) Oversight Requirements

(U//FOUO) Section 707 and 702(*l*) provides for extensive oversight of the FBI's implementation of Section 702:

- (U//FOUO) Section 707(a) requires the Attorney General to submit semiannual reports to Congress that describe, among other things, the judicial review during the reporting period of all certifications and targeting and minimization procedures adopted under Section 702, and any instances of noncompliance with procedures and guidelines adopted under Section 702(d), (e), and (f).
- (U//FOUO) Section 702(*l*)(1) requires the Attorney General and the Director of National Intelligence to conduct semiannual assessments of the FBI's compliance with their targeting and minimization procedures and the Attorney General's Acquisition

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Guidelines. These assessments are submitted to the FISA Court and to Congress.

- ~~(S//NF)~~ Section 702(*l*)(2)(B) and (C) requires the Inspector General to review FBI acquisitions of persons later determined to be located in the United States and disseminations of intelligence reports containing a reference to a U.S. person identity. These reviews are submitted to Congress, the Attorney General, and the Director of National Intelligence.
- (U//FOUO) Section 702(*l*)(3)(A) requires the Director of the FBI to conduct annual reviews of FBI acquisitions of persons later determined to be located in the United States and disseminations of intelligence reports containing a reference to a U.S. person identity, among other requirements. These annual reviews are provided to the FISA Court, the Attorney General, the Director of National Intelligence, and Congress.

(U//FOUO) The OIG discusses each of these oversight requirements in Chapters Three and Four of this report.

2. (U//FOUO) Sections 703 and 704

(U//FOUO) Whereas Section 702 pertains only to non-United States persons reasonably believed to be outside of the United States, Sections 703 and 704 authorize the targeting of United States persons for the acquisition of foreign intelligence information when those persons are reasonably believed to be located outside the United States.

(U//FOUO) Section 703, codified at 50 U.S.C. § 1881b, et seq., addresses acquisitions of foreign intelligence information that target United States persons who are reasonably believed to be outside of the United States when the acquisition is conducted, and the acquisition "constitutes electronic surveillance or the acquisition of stored electronic communications or stored electronic data that requires an order under this Act, and such acquisition is conducted within the United States."

(U//FOUO) Section 704, codified at 50 U.S.C. § 1881c, addresses other acquisitions targeting United States persons outside the United States in circumstances where that person has a reasonable expectation of privacy and a warrant would be required if the acquisition occurred within the United States. This provision would cover, for example, the physical search of a United States person's home or office outside of the United States.

(U//FOUO) Our report is limited to the FBI's activities under Section 702.

B. (U//FOUO) Immunity Provisions

(U//FOUO) The FAA also addresses liability relief for electronic communication service providers who have been alleged in various civil actions to have assisted the U.S. Government under the auspices of the PSP. Specifically, with a certification from the Attorney General, the electronic communication service providers may avail themselves of five statutory defenses, among them, that they acted pursuant to a written request or directive from an appropriate official indicating that the activity in question was authorized by the President and determined to be lawful. See FAA Section 802(a)(1)-(5). In addition to applying retroactively, the immunity provisions of the FAA are not subject to sunset.

III. (U//FOUO) The FBI's Role and Organizational Structure Under Section 702

~~(S//NF)~~ The FBI conducts two general activities under Section 702. First, it approves the NSA's requests [redacted] (S) [redacted] sometimes called "selectors." Second, the FBI [redacted] (S) [redacted] from participating providers and transmits them in the form of raw unminimized data to the NSA and, at the NSA's direction, to the FBI and the CIA.[40] In accordance with its Standard Minimization Procedures, the FBI retains a portion of the raw data for analysis and dissemination as finished intelligence products. These two basic activities, discussed in detail in Chapters Three and Four of this report, are carried out by personnel in the Counterterrorism Division's [redacted] We refer to these personnel as the 702 Team. b1, b3, b7E

~~(S//NF)~~ [redacted] provides operational support to the FBI's investigative units at Headquarters and in the field. [redacted] (S) [redacted] b1, b3, b7E

[redacted] (S) [redacted] b1, b3, b7E

[redacted] (S) [redacted] b1, b3, b7E

[40] [redacted]

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) The 702 Team also worked closely with attorneys from the Office of General Counsel's National Security Law Branch (NSLB) during our review period. Among the NSLB attorneys with the most involvement in 702 matters was one attorney who provided advice on policy matters (the Policy Attorney) and another who counseled the team on how the legal requirements of Section 702 applied to the 702 Team's procedures (the Operations Attorney). In addition to the Policy and Operations Attorneys, NSLB Section Chiefs Karen Davis Miller and Richard McNally also had substantial participation in the 702 Program during the review period.

[redacted] (S) b1, b3, b7E

IV. (U//FOUO) The FBI's Evolving Use of Section 702

A. (U//FOUO) The FBI's Use of Section 702 Compared to Traditional FISA

~~(TS//SI//NF)~~ After acquiring electronic communications under Section 702 and with the NSA's approval, the FBI retains some of the 702 data in its own [redacted] for analysis and dissemination, primarily in connection with its international terrorism investigations. Prior to the PAA and FAA, the FBI obtained this type of data from traditional FISA coverage. The PAA and FAA allowed the Intelligence Community to transition many selectors covered under traditional FISA to coverage under these new and more streamlined legal authorities. During the relevant portion of the OIG's review period, the number of 702-acquired electronic communications retained by the FBI fluctuated over time due to policy considerations (described in Chapter Four). However, the overall number of such communications was substantial, and approximated the number of electronic communications that the FBI collected and retained under traditional FISA. Figure 2-1 below shows the relative parity between the number of electronic communications that the FBI acquired and retained under Section 702 [redacted] from October 2009, when the FBI began retaining 702 data in [redacted] through April 2010. (TS)

(TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(TS) [redacted] (TS) b1, b3, b7E

[redacted] (TS)

[redacted] (TS)

~~(S//NF)~~ The FBI has used information collected under Section 702 in several national security investigations. According to senior Counterterrorism

[41] ~~(S//NF)~~ The OIG compiled this chart from numerical data provided by [redacted] (S) b1, b3, b7E

Division officials, [redacted] (S) b1, b3, b7E

~~(TS//SI//NF)~~ [redacted] (TS) b1, b3, b7E

[redacted] or example, in September 2009 the NSA reported to the FBI that a Pakistan-based al Qaeda operative targeted under Section 702 had been in contact with an e-mail account that the FBI determined was being used by Najibullah Zazi, a legal permanent resident living in Colorado. An FBI investigation revealed that Zazi and two associates planned to bomb the New York City subway lines. FBI agents arrested Zazi On September 19, 2009, and in February 2010 he pleaded guilty to multiple terrorism-related charges.

B. ~~(S//NF)~~ The FBI's Plans to Nominate Selectors for Section 702 Coverage

~~(S//NF)~~ The FBI plans to greatly expand its role in the 702 Program this year by nominating selectors for Section 702 coverage. Because the nominations program was still being formulated during our review period, the OIG was unable to review these proposed activities in depth for this report. However, in Chapters Three and Four we identify certain FBI policies and practices under the 702 Program that may be affected by the nominations initiative, and thus briefly summarize the nominations proposal below.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

Unlike the [redacted] process, the FBI, and not the NSA, would be the owning agency for the selectors it nominates, and would assume the primary obligation to review the content of incoming communications to ensure that the targeted account remains legally eligible for 702 collection and continues to produce foreign intelligence information.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ These witnesses told us that the FBI's nominating activities were expected to begin in early 2013. While finalizing this report, however, the OIG learned that the FBI began nominating its first selectors in April 2012.

(U) CHAPTER THREE
THE FBI'S ROLE IN THE SECTION 702 TARGETING PROCESS

~~(S//NF)~~ In the preceding chapter, we outlined the FBI's two primary functions under Section 702 of the FAA. First, after the NSA applies its targeting procedures and nominates a selector [redacted] (S) the FBI must [redacted] (S) To do so, the FBI reviews the sufficiency of the NSA's foreignness determinations and [redacted] (S) b1, b3, b7E [redacted]. Second, for any Section 702-authorized acquisition from an Internet service provider (ISP), [redacted] (S) he FBI acquires the targeted data from the provider, and transmits it in raw, unminimized form to the NSA and, at the NSA's direction, to the FBI and the CIA. The FBI retains the raw data in [redacted] for (S) analysis and, where appropriate, for dissemination as intelligence products.

~~(S//NF)~~ This chapter describes the first of these functions: the FBI's procedures for approving the targeting of selectors that have been designated by the NSA [redacted] For (S) the targeting issues discussed in this chapter, the OIG's review period is from September 2008, when the first [redacted] was (S) nominated to the FBI, through February 2010. b1, b3, b7E

~~(S//NF)~~ In Section I of this chapter, we provide a brief description of the procedures that governed the targeting process, including the FISA Court-approved targeting procedures that formed the basis for the NSA to target, and the FBI to review and approve, a selector for a [redacted] (S) b1, b3, b7E Section II describes the OIG's methodology for reviewing the FBI's targeting activities. In Section III we describe the FBI's application of its targeting procedures to review the sufficiency of the NSA's foreignness determinations for nominated selectors. Section IV describes the FBI's application of its targeting procedures to [redacted] (S) In Section V we describe the FBI's procedures for processing selectors used by targets who had [redacted]. (S) Section VI describes the OIG's review of FBI acquisitions of [redacted] (S) who were later determined to be in the United States, a review that both the OIG and the FBI are required to conduct pursuant to Section 702(l)(2) and (3). In Section VII we provide our analysis of the FBI's Section 702 targeting activities during the review period.

I. (U//FOUO) Procedures Governing the Targeting Process

~~(S//NF)~~ The Section 702 targeting process – whereby a selector is identified for possible acquisition of communications, the foreign intelligence value of the acquisition is assessed, and a judgment is formed about whether the presumed user is a non-U.S. person reasonably believed to be located outside the United States – is a FISA Court-approved process in which each agency has well defined and distinct responsibilities. The process is memorialized in three primary documents: a [redacted] (S) [redacted] the NSA's FISA Court-approved targeting procedures; and the FBI's FISA Court-approved targeting procedures. In addition, the FBI has developed [redacted] (S) [redacted] which are designed to translate the broad mandates of the [redacted] and the FBI Targeting Procedures into [redacted] (S) [redacted] guidance for those members of the 702 Team who are responsible for conducting the FBI's targeting activities under Section 702. This section summarizes the relevant provisions of these documents. b1, b3, b7E

A. ~~(S//NF)~~ The [redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

~~(S//NF)~~ The respective roles of the NSA and FBI described in the MOU remained largely constant through the transition from the PAA to the FAA and continue today. With the exception of the [redacted] these roles are made binding on the NSA and the FBI through their FISA Court-approved targeting procedures, discussed below. (S) b1, b3, b7E

B. (U//FOUO) Targeting Procedures Under the FAA

~~(S//NF)~~ Pursuant to Section 702(d)(1) of the FAA, all acquisitions of foreign intelligence information under Section 702 are conducted pursuant to targeting procedures promulgated by the Attorney General in consultation with the Director of National Intelligence. These procedures must be "reasonably designed" to "ensure that any acquisition authorized under [Section 702] is limited to targeting persons reasonably believed to be outside the United States," and to "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(d)(1).

(U//FOUO) The targeting procedures are filed as attachments to each certification provided to the FISA Court pursuant to Section 702(g), and are specifically reviewed as part of that court's certification approval process. Sections 702(g)(2)(B) and 702(i)(2)-(3). The goal of the FISA Court's review is to determine whether the procedures are consistent with the requirements of the FAA and the Fourth Amendment.

~~(S//NF)~~ During the OIG review period, the NSA and FBI submitted separate targeting procedures [redacted] all of which were approved by the FISA Court.[43] These procedures, which were conceived of and drafted collaboratively by the relevant agency and the DOJ's National Security Division, serve as official representations to the FISA Court about the steps each agency will take to ensure that targeting pursuant to Section 702 is done in a manner consistent with the authorities and prohibitions of the statute. The following sections summarize these procedures. (S) b1, b3, b7E

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[43] [redacted] (S)

b1, b3, b7E

1. (~~S//NF~~) Overview of the NSA's Targeting Procedures

(~~S//NF~~) The NSA's targeting procedures are a critical first step in the [redacted] process because they must be applied to (S) selectors before the selectors can be nominated to the FBI. The NSA's targeting procedures, which have remained substantially unchanged since the enactment of the FAA, address two activities directly relevant to the FBI's role in the 702 program: b1, b3, b7E

- (~~S//NF~~) the manner in which the NSA determines that a person targeted under Section 702 is a non-United States person reasonably believed to be located outside the United States ("foreignness determination"); and
- (~~S//SI//NF~~) the post-targeting analysis done by the NSA to ensure that it does not intentionally target a person known at the time of acquisition to be located in the United States or intentionally acquire any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States.

(U//FOUO) NSA Targeting Procedures at 1.

(~~TS//SI//NF~~) The NSA targeting procedures address the targeting of both telephone and Internet communications, [redacted] (TS) [redacted] this section summarizes only those procedures relating to Internet communications. According to NSA documents filed in support of Section 702 certifications, the term "Internet communications" includes communications that traverse the Internet, [redacted] (TS) b1, b3, b7E

[redacted]

(~~TS//SI//NF~~) As to the NSA's determination that the target is reasonably believed to be located outside the United States, the NSA applies a "totality of the circumstances" analysis based on one or more of the following: [redacted] (TS) b1, b3, b7E

[redacted]

[44] (~~TS//SI//NF~~) In addition to acquiring communications that are to or from a target, the NSA also "seeks to acquire communications about the target," meaning communications in (Cont'd.)

[redacted]

[redacted] B1 B3 B7E (S)

(U//FOUO) NSA Targeting Procedures at 4.

~~(TS//SI//NF)~~ The NSA targeting procedures also govern the NSA's assessment of the foreign intelligence purpose of the targeting, which is an assessment of "whether the target possesses and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory."

[redacted]

~~(TS//SI//NF)~~ When the NSA's post-targeting analysis reveals that a target has entered the United States or is a United States person, the targeting

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which the target is referred to in the content of a communication. Electronic communications "about" a 702 target are only collected "upstream" of U.S. providers, and the NSA has represented to the FISA Court that "no about communications will be obtained by acquisitions conducted by the FBI."

procedures direct it to terminate any ongoing acquisition from the target "without delay" to avoid the intentional targeting of persons known to be in the United States. The procedures also direct the NSA to report the incident to the DOJ and the ODNI, and to treat the acquisition in accordance with its minimization procedures. In cases where the post-targeting analysis yields information that is unclear as to the location of a target, the NSA targeting procedures direct the NSA to "presume that the target has entered the United States" and terminate any ongoing acquisition from the target.

2. (U//FOUO) Overview of the FBI's Targeting Procedures

~~(S//NF)~~ The FBI also attaches its targeting procedures to each certification presented to the FISA Court for approval, and like the NSA targeting procedures, the FBI targeting procedures remained unchanged during the OIG's review period. These procedures, which are applied when the NSA nominates an account [redacted] address three primary activities: (S) b1, b3, b7E

- ~~(S//NF)~~ the FBI's process for acquiring foreign intelligence information, [redacted] by targeting electronic communications accounts designated by the NSA ("Designated Accounts") as being used by non-United States persons reasonably believed to be located outside the United States; (S) b1, b3, b7E
- (U//FOUO) the FBI"s documentation of that process; and
- (U//FOUO) compliance and oversight.

~~(S//NF)~~ FBI Targeting Procedures at 1. [redacted] (S) b1, b3, b7E

a. ~~(S//NF)~~ The FBI's Responsibility for Assessing the NSA's Foreignness Determinations

~~(S//NF)~~ Consistent with the MOU, the FBI targeting procedures carefully circumscribe the FBI's role in assessing the eligibility of the NSA's nomination for acquisition under Section 702. The targeting procedures require the FBI, "in consultation with the NSA, [to] review and evaluate the sufficiency of: (a) NSA's explanation for its reasonable belief that the user of the Designated Account is located outside of the United States; and (b) information provided by NSA concerning the Designated Account user's non-United States person status." Notably, the FBI's targeting procedures do not state that the FBI will assess the NSA's determination that a nomination will

result in the acquisition of foreign intelligence information. Rather, the targeting procedures state that the "NSA will . . . be responsible for determining that a significant purpose of the acquisition is to obtain foreign intelligence information," and that the NSA will "represent [to the FBI] that a significant purpose of acquiring the [redacted] is to obtain foreign intelligence information." (S) b1, b3, b7E

~~(S//NF)~~ According to 702 Team personnel, the FBI interprets these provisions to mean that while it will review and evaluate the sufficiency of the NSA's foreignness determinations, it will play no role in assessing the purpose of acquiring communications from a nominated account.

~~(S//NF)~~ In addition to assessing the sufficiency of the NSA's foreignness determinations, the FBI is also required under the targeting procedures to [redacted] (S) [redacted] (S) [redacted] (S) However, the targeting procedures do not obligate the FBI to conduct an independent, *de novo* analysis of a target's U.S. person status and location [redacted] (S) [redacted] (S) [redacted] (S) [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ The result of these provisions is to make the FBI's approval [redacted] (S) a default position, with denial of a request justified only when the FBI concludes, in consultation with the NSA, that the NSA's foreignness determination is not sufficient or when the FBI [redacted] (S) [redacted] (S) and the FBI and NSA cannot subsequently reach agreement about the eligibility of the account for targeting. b1, b3, b7E

~~(S//NF)~~ Finally, the FBI targeting procedures provide that the NSA will "promptly advise" the FBI any time "NSA analysis of [redacted] (S) or other technical data, indicates that a user of a [redacted] from which [redacted] were acquired by the (S) FBI pursuant to these procedures is actually located within the United States or is a United States person." Upon receiving upon such notification, the FBI must [redacted] (S) meaning that it must [redacted] (S) [redacted]

b1, b3, b7E

b. (U//FOUO) Documentation of the FBI's Targeting Activities

~~(S//NF)~~ The FBI targeting procedures require the FBI to document its targeting activities. Specifically, the procedures require the FBI to retain the information it receives from the NSA concerning each target's U.S. person status and location. In addition, the FBI must [redacted] (S) for each account nominated to it by the NSA.

b1, b3, b7E

c. (U//FOUO) Compliance and Oversight

~~(S//NF)~~ The FBI targeting procedures contain provisions requiring the FBI to take specific steps to ensure compliance with and oversight of its targeting activities under Section 702. The FBI must develop and deliver training for all personnel involved in processing NSA [redacted] to (S) instruct them about their responsibilities under the statute and the targeting procedures. The FBI's Inspection Division is required to conduct oversight of the FBI's exercise of its targeting procedures, and of its training, "at least once every quarter." In addition, the targeting procedures require the DOJ and ODNI to "evaluate the implementation of these procedures" at least once every sixty days. Lastly, the FBI must report any incidents of noncompliance with the targeting procedures by FBI personnel to the DOJ's National Security Division (NSD), the FBI OGC, and the ODNI Civil Liberties Protection Officer within five business days of learning of the incident.

b1, b3, b7E

3. (U//FOUO) The FBI's [redacted] and the [redacted]

b7E

~~(S//NF)~~ The 702 Team developed [redacted] (S) to provide practical, step-by-step guidance to the 702 (S) Team about how to conduct [redacted] under the FBI's targeting procedures. [redacted] (S) [redacted]

b1, b3, b7E

(U//FOUO) The SOPs have been in place since the PAA, well before the FBI began processing stored communications search requests under the FAA in September 2008. FBI representatives who were personally involved in the drafting of the original SOPs told us that the document was the result of collaboration between the FBI OGC and the 702 Team. Section Chief Karen Davis Miller of the NSLB's Policy, Training, Litigation and Oversight Section stated that the SOPs were developed under then-FBI General Counsel Valerie Caproni's direction, and she characterized Caproni's concern as wanting to ensure that the 702 Team would have "crystal clear" directions about what they were to do.[45] Miller also told us that the 702 Team and the FBI OGC agreed that the SOPs should be drafted with compliance and future oversight reviews in mind.

(S) [redacted] b1 b3 b7E

~~(S//NF)~~ The SOPs also address the 702 Team's review of the sufficiency of the NSA's foreignness determinations for nominated selectors, but do not

(S) provide the same level of detail for this sufficiency review [redacted] b1 b3 b7E

(S) [redacted] This form, known as the "checklist," is used to document every action taken under the SOPs on every selector nominated by the NSA [redacted] b1 b3 b7E

(S) [redacted] 46

[45] (U//FOUO) Valerie Caproni served as FBI General Counsel from August 2003 until her resignation from the FBI in September 2011.

46 (S) [redacted] b1 b3 b7E

largely because it has been well designed to reflect [redacted] of the (S) operators. b1, b3, b7E

(S) [redacted] b1 b3 b7E

(U//FOUO) In addition to the SOPs and the checklist, the 702 Team views the FBI's OGC as an important source of guidance when conducting the FBI's targeting activities under Section 702. Nearly every FBI representative we interviewed emphasized that the 702 Team is encouraged to contact the FBI OGC with any questions about the statute, the targeting procedures, or the SOPs.

C. (U//FOUO) The FBI's Documentation of Its Targeting Process

~~(S//NF)~~ Consistent with the requirements of the FBI's targeting procedures, the 702 Team has implemented a system to retain and organize selector-specific information provided by the NSA, the completed checklists, and any associated documentation.

~~(S//NF)~~ The core of the system is a series of paper files known as (S) [redacted] each of which contains all of the relevant information used by the FBI when processing an NSA [redacted]. Each selector file contains three common elements. First, each file contains a "selector sheet." b1 b3 b7E

(S) [redacted] that are relevant to the FBI's assessment of the NSA's foreignness determinations.

(S) [redacted] b1 b3 b7E

II. (U//FOUO) The OIG's Methodology for Reviewing the 702 Team's Targeting Activities

(U//FOUO) Before describing how the OIG conducted its review of the FBI's targeting procedure activities, we first summarize the oversight conducted by the joint NSD/ODNI compliance review teams and by the FBI's Inspection Division. The results of these oversight efforts form the foundation for certain factual assumptions that the OIG used in conducting its review of the FBI's targeting activities, as described in subsection B below.

A. (U//FOUO) Summary of NSD/ODNI and Inspection Division Oversight of FBI Targeting Activities

1. (U//FOUO) NSD Compliance Reviews

~~(S//NF)~~ The Attorney General is required by Section 707 to submit to Congress semiannual reports concerning the FBI's compliance with its targeting and minimization procedures under Section 702.[47] For targeting activities, each Semiannual Report contains the results of NSD monthly compliance reviews, conducted jointly with ODNI, which document any compliance incidents occurring under Section 702 during the semiannual reporting period. A "compliance incident" generally involves a failure to comply with applicable targeting procedures, whether or not such failure results in an improper acquisition. The reviews are conducted at the NSA, CIA, and the FBI. During the period covered by this review, joint NSD/ODNI compliance assessment teams produced four semiannual reports of the FBI's targeting and minimization activities under Section 702.

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

~~(S//NF)~~ NSD officials told the OIG that based on their experience conducting these reviews, the 702 Team personnel thoroughly prepared the files for the reviews and accurately identified [redacted] (S)

b1, b3 b7E

[redacted] (TS)

b1, b3, b7E

[47] (U//FOUO) These Semiannual Reports are in addition to the Semiannual Assessments conducted under Section 702(*l*)(1). As NSD officials described them, Semiannual Assessments provide a "30,000 foot look at the overall compliance program and the trends discovered related to the program."

[redacted] (TS) b1, b3, b7E

~~(S//NF)~~ In addition to reporting basic statistical information about the number and disposition [redacted] the NSD/ODNI compliance reviews we examined for this report focused closely on the 702 Team's compliance with its targeting procedures, with particular emphasis on ensuring that the 702 Team fully [redacted] (S) selectors identified by the Team (S) [redacted] b1, b3, b7E

[redacted] (S) b1, b3, b7E

2. (U//FOUO) Inspection Division Quarterly Audits

(U//FOUO) The FBI's targeting procedures require the Inspection Division to conduct "periodic reviews . . . to evaluate the implementation of the procedures and the training given to relevant personnel." These reviews must be conducted at least quarterly.

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

~~(S//NF)~~ As with the NSD/ODNI compliance assessments, and consistent with the oversight requirement in the targeting procedures, the Inspection Division audits focused on whether the 702 Team adhered to its [redacted] (S) [redacted] (S) [redacted] (S) [redacted] b1, b3, b7E Many of the compliance occurrences discussed in the Inspection Division audits involved errors that either had been identified and reported to NSD by the 702 Team or discovered by NSD/ODNI assessment teams during the course of their oversight activities. In these instances, the audit teams primarily assessed whether appropriate corrective action had been taken.

~~(S//NF)~~ During the OIG's review period, the Inspection Division audits broadened to include areas that the NSD/ODNI assessments do not include. In November 2009, the audits began including reviews of the [redacted] the FBI entity responsible for maintaining unminimized 702 data. These audits focused on [redacted] compliance with its training requirements and internal procedures, including verifying that any improperly obtained data was purged from the FBI's [redacted] In February 2010, the audits began including reviews of the [redacted] compliance with its training requirements and internal procedures as well. (S) (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) The NSD/ODNI compliance assessments and Inspection Division audits indicate that the FBI's rate of compliance with its targeting procedures is above 99 percent.

B. (U//FOUO) OIG Methodology for Reviewing the FBI's Targeting Activities

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[50] ~~(TS//SI//NF)~~ The OIG review team consulted with a statistician from the OIG's Audit Division in designing its random sample. [redacted] (TS) b1, b3, b7E

each selector in this random sample, we extracted relevant information from the [redacted] and entered it into a [redacted] for further analysis [redacted] (TS) [redacted] (TS) (TS) b1, b3, b7E

~~(S//NF)~~ Third, the OIG reviewed [redacted] of (S) specific interest to the review, such as selectors [redacted] (S) [redacted] selectors for which the NSA had withdrawn [redacted] (S) [redacted] For these categorical reviews, we often reviewed all or substantially all of the selectors of each type we could find, although for one category, the withdrawn selectors, [redacted] (S) [redacted] b1, b3, b7E

(U//FOUO) Fourth, the OIG requested and reviewed other relevant documents and information, including e-mails, ECs, internal guidance, and FISA Court filings that further illuminate the FBI's targeting activities during the OIG's review period. These documents were provided by many FBI components, including [redacted] OGC, [redacted] and [redacted] as well as by Department components such as NSD and the Office of Legal Counsel. b7E

~~(S//NF)~~ In addition to documentary review, the OIG interviewed several members of the 702 Team, [redacted] (S) [redacted] b1, b3, b7E

~~(S//NF)~~ Finally, the 702 Team provided the OIG a comprehensive demonstration of how it applies its targeting procedures during which the OIG observed [redacted] from the (S) NSA, and had the opportunity to ask questions of members of the 702 Team as they [redacted] applied the FBI's targeting procedures to [redacted] (S) [redacted] b1, b3, b7E

III. ~~(S//NF)~~ The FBI's Application of Its Targeting Procedures: Review of the NSA's Foreignness Determinations

~~(S//NF)~~ In this section we describe how the NSA applies its targeting procedures to nominate selectors to the FBI for [redacted] (S) [redacted] and how those nominations are conveyed to the FBI. We then b1, b3, b7E

describe the FBI's preliminary review of the sufficiency of the NSA's foreignness determinations.

A. ~~(S//NF)~~ Background: The NSA's Application of its Targeting Procedures

~~(S//NF)~~ As described above, before sending a nomination [redacted] (S) to the FBI, the NSA is responsible for applying its targeting procedures and determining that that the presumed user of the nominated account is a non-U.S. person reasonably believed to be located outside the United States (the "foreignness determination"). In interviews with the OIG, NSA personnel who are directly involved in the Section 702 targeting process described how the NSA's targeting procedures are implemented.[51] b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)b1, b3, b7E

[51] (U//FOUO) The OIG interviewed the following NSA personnel: the NSA's Section 702 Implementation Lead in the NSA's Office of the Director of Compliance (ODOC); a Technical Director in the Signals Intelligence Directorate (SID) Special Source Operations group; a former Chief of the SID Oversight and Compliance group now staffed to the Monitoring and Assessments group of ODOC; a former Chief of PAA/FAA Procedures and Analytic Support Office of SID Oversight and Compliance, now also staffed to the Monitoring and Assessments group of ODOC; the NSA's Deputy General Counsel for Operations; and a line attorney in the Office of General Counsel with extensive experience with both the PAA and FAA Section 702. The OIG's review benefitted substantially from the NSA's cooperation.

[52] (U//FOUO) However, the analyst does not have discretion with regard to detasking accounts if it is determined that the presumed user is a U.S. person or located in the United States. Upon recognizing such cases, NSA officials stated that the NSA detasks collection from the account immediately.

(S) [redacted] b1 b3 b7E

(U//FOUO) [redacted] b7E

This review includes, among other things, checking the cited source for the analyst's foreignness determination to verify that the analyst has a reasonable basis for the foreignness assessment, and often to verify that the analyst has included in the foreignness explanation the most current relevant information available to the NSA.

(S) [redacted] b1 b3 b7E

53

B. ~~(S//NF)~~ The FBI's Receipt of Nominated Selectors From the NSA

~~(S//NF)~~ Once the NSA has applied its targeting procedures, it forwards a nomination to the FBI for those selectors for which it wants a [redacted] b1 b3 b7E

(S) [redacted]

(S) [redacted] b1 b3 b7E

system called [redacted]. [redacted] (S) b1, b3, b7E

1. ~~(S//NF)~~ [redacted] b7E

~~(S//NF)~~ [redacted] (S) and [redacted] are parts of an administrative system that [redacted] b1, b3, b7E

(S)

(S) [redacted] b1, b3, b7E

~~(S//NF)~~ The 702 Team most commonly uses [redacted] in three ways.

(S) [redacted] b1, b3, b7E

(S) [redacted] b1, b3, b7E

[54] ~~(S//NF)~~ After reviewing a draft of this report, the FBI told the OIG that while this paragraph accurately describes one use of [redacted] during the OIG's review period, the FBI no longer uses [redacted] in this manner. b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

2. (U//FOUO) [redacted] b7E

[redacted] (S) b1, b3, b7E

[redacted] b1, b3, b7E (S)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[55] ~~(S//NF)~~ Certain identifying information relating to the targeted selector and the NSA analyst has been redacted from this image.

[redacted] (TS)

b1,
b3,
b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

3. ~~(S//NF)~~ NSA Nominations of Selectors to the FBI During the OIG Review Period

~~(TS//SI//NF)~~ For the review period of September 1, 2008 through February 28, 2010, the 702 Team identified and produced to the OIG [redacted] (TS) selector sheets indicating that an account had been nominated by the NSA for a [redacted] pursuant to Section 702.[56] As shown in b1, b3, b7E

[redacted] (TS) b1, b3, b7E

(Cont'd.)

Figure 3-2 below, the OIG's analysis of the [redacted] indicates that the number of nominations varied from month to month, [redacted] (TS) b1, b3, b7E

[redacted] (TS)

[redacted] b1, b3, b7E

(TS) b1, b3, b7E

[redacted]

C. ~~(S//NF)~~ FBI's Preliminary Review of the [redacted] for Sufficiency of the NSA's Foreignness Determination

b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

~~(S//SI//NF)~~ Consistent with the [redacted] and the FBI's targeting (S) procedures, the [redacted] state that the SSA's review of foreignness "is not an (S) entirely separate and independent review, but rather a review to determine whether NSA has provided a reasonable explanation" of the presumed user's location outside the United States. The [redacted] therefore instruct the SSA that (S) the SSA "can assume the facts provided are accurate [redacted] (S) [redacted] At the same time, the [redacted] also direct the SSA to (S) contact the NSA for additional information if "the SSA does not agree that the foreignness explanation . . . is sufficient" or does not understand it, and to document the contact. This directive is consistent with the requirement in the targeting procedures that "[t]he FBI, in consultation with NSA, will review and evaluate the sufficiency of" the NSA's foreignness determination.

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS) b1, b3, b7E

~~(S//NF)~~ Below we describe this preliminary review in more detail and provide select data about its implementation by the 702 Team. We focus on the two issues which the Lead and Assistant Program Coordinators described as the primary focus of the SSAs' preliminary review: the adequacy of the NSA's identification of the targeted selector; and the basis for the NSA's determination that the presumed user is a non-U.S. person reasonably believed to be located outside the United States.

1. ~~(S//NF)~~ Review of the Selector Identification

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

2. ~~(S//NF)~~ Review of the NSA's Foreignness Determination

[redacted] (S) [redacted] b1, b3, b7E Below we examine the 702 Team's review of the NSA's foreignness determinations, and we identify two circumstances in which the members of the 702 Team expressed discomfort with or raised questions about the NSA's foreignness determinations: where the NSA bases its foreignness determination on [redacted]

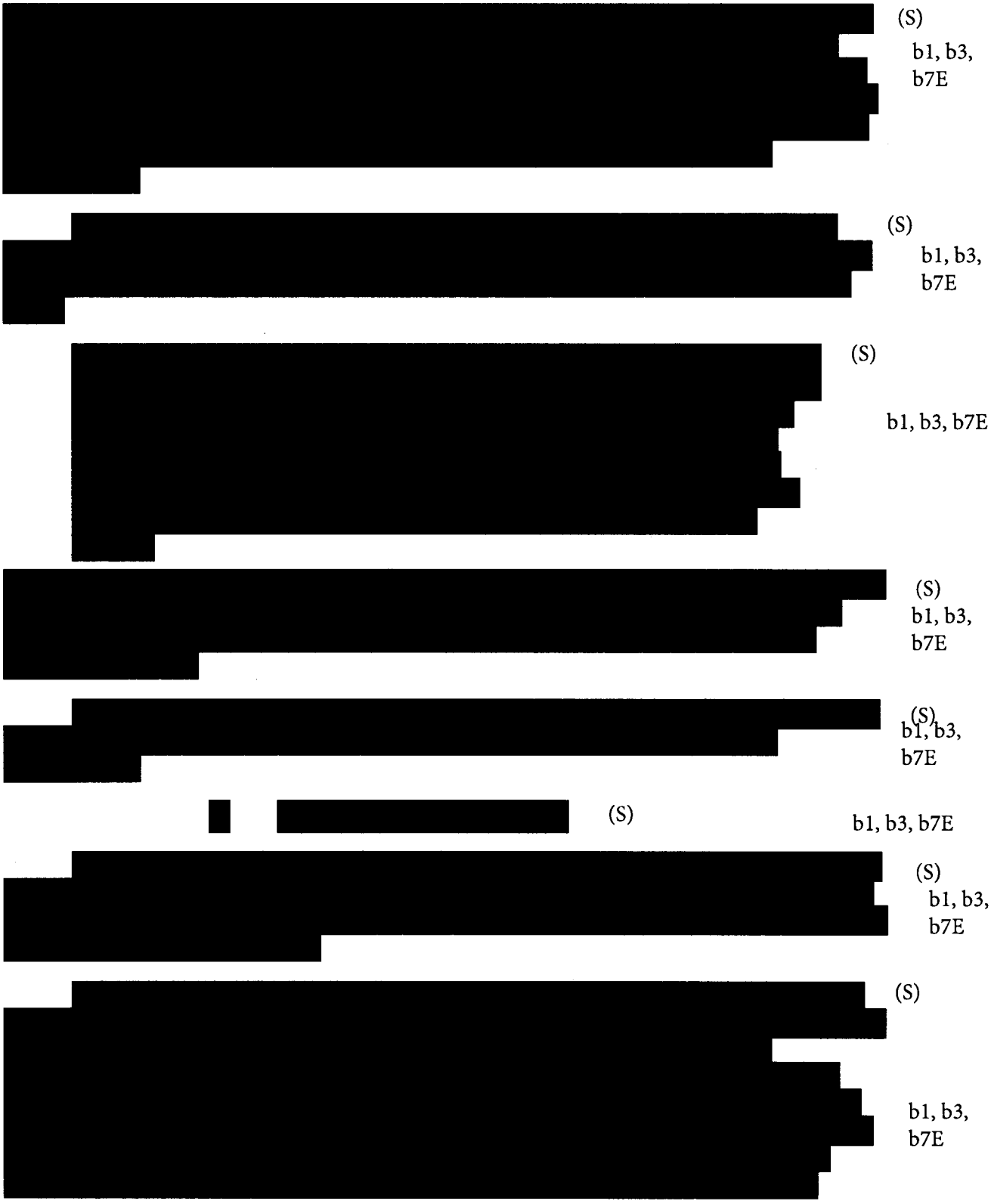
a. ~~(S//NF)~~ [redacted] b7E

[redacted] (TS) the SSA reviews these fields to confirm that the NSA has assessed the target to be located outside the United States, and to be a non-U.S. person. [redacted] (TS) b1, b3, b7E [redacted]

[redacted] (TS) b1, b3, b7E [redacted]

~~(S//NF)~~ According to the second [redacted] Unit Chief during our review period and the 702 Team Lead and Assistant Program Coordinators, [redacted] (S) b1, b3, b7E

g [redacted] (S) b1, b3, b7E [redacted]


(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

b1, b3, b7E

(S)

(TS)

b1, b3, b7E

(TS)

b1, b3, b7E

b1, b3, b7E

(S)

(TS)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

b1, b3, b7E

[redacted] (S)

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] the FISA Court (Cont'd.)

[redacted] (TS) b1, b3, b7E

~~(TS/SI)~~ Shortly thereafter, on [redacted] 2008, the FISA Court (TS) approved the first FAA Section 702 certification, and with it the NSA's first set of Section 702 targeting procedures. Those targeting procedures specifically addressed the [redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

noted that it had "no reason to question the presumption that the vast majority of persons who are located overseas are not United States persons and that most of their communications are with other, non-United States persons, who are also located overseas." The court called this a "common sense presumption." In re Directives, Docket Number 105B(g): 07-01, at 87 & n.81 (FISA Court, April 25, 2008).

[redacted] (TS) b1, b3, b7E

~~(S//NF)~~ [redacted] (S) b1, b3, b7E

[redacted] (S)

[redacted] (TS) b1, b3, b7E

(2) ~~(S//NF)~~ Use of the [redacted] Factor in [redacted] (S) b1, b3, b7E

[redacted] (S)

~~(S//NF)~~ Given the 702 Team's longstanding discomfort with [redacted] (S) the OIG examined how the NSA used [redacted] in [redacted] (S) b1, b3, b7E its nominations to the FBI, and how the 702 Team reviewed [redacted] that cited this factor.

62 [redacted] (TS) b1, b3, b7E

(TS)

b1, b3, b7E

(S)

b1, b3, b7E

(TS)

b1, b3, b7E

(TS)

b1, b3, b7E

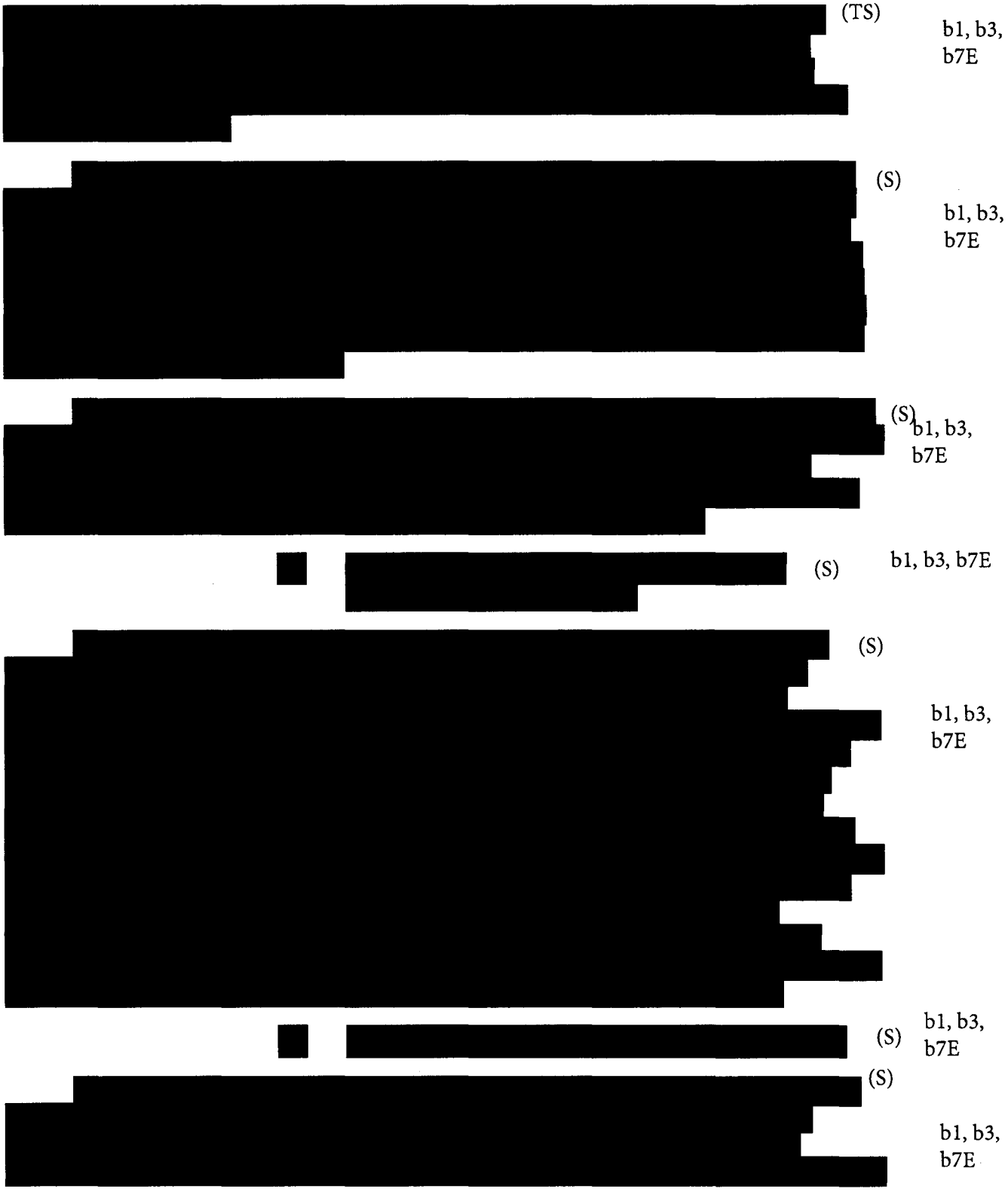
[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E



(TS) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(~~S//NF~~) Our most significant finding from this second [redacted] analysis (S) was that we did not identify any instance among the [redacted] selectors in (S) our random sample where the 702 Team requested more current foreignness information from the NSA based on a concern that the foreignness information was too [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

b1, b3
[redacted] (TS) b7E

~~(S//NF)~~ Third, many of the 702 Team members the OIG interviewed said they assume that the NSA provides its strongest rationale, with its most recent foreignness information, when providing its foreignness explanation. Indeed, NSA officials confirmed to the OIG that the NSA includes the most recent foreignness information available at the time of nomination, although they added that there are occasions when the NSA's most recent information at the time of nomination is [redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

(S) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

63

~~(S//NF)~~ The OIG does not believe that the FBI acts improperly or contrary to its targeting procedures when it approves [redacted] (S) and we note that reliance on [redacted] b1 b3 b7E

63 ~~(TS//SI//NF)~~ The DOJ/ODNI compliance assessment teams do consider the age of the information the NSA relies upon in tasking accounts for electronic surveillance. For example, during a compliance review of the NSA that covered [redacted] (TS) the NSD/ODNI compliance team reported that, for [redacted] accounts, the NSA relied on information that was [redacted] (TS) However, according to the report, the NSA provided information to the compliance assessment team for [redacted] indicating that they had (TS) been [redacted] (TS) Similarly, in a compliance review that covered [redacted] (TS) the NSD/ODNI compliance team found that, [redacted], the NSA relied on (TS) information that was [redacted] (TS). The compliance report did not provide further information about these [redacted] (TS) b1, b3, b7E

However, as discussed below in connection with acquisitions subsequently determined to be improper under Section 702, the OIG found that the NSA sometimes develops more recent information about a targeted user's eligibility for 702 coverage after the nomination has been submitted [redacted] (S) [redacted] Given the FBI's obligation to review the sufficiency of the NSA's foreignness determinations in consultation with the NSA, we believe the FBI should request the NSA to provide more current information in appropriate circumstances. The OIG therefore recommends that the FBI should consider issuing guidance advising when the 702 Team should seek more current information from the NSA about a targeted user's eligibility for Section 702 coverage. b1, b3, b7E

3. (U//FOUO) Change to the Preliminary Review Process

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

IV. ~~(S//NF)~~ The FBI's Application of its Targeting Procedures: [redacted] (S) b1, b3, b7E

~~(S//NF)~~ In addition to requiring "the FBI, in consultation with the NSA, to review and evaluate the sufficiency" of the NSA's foreignness determination, the FBI targeting procedures require the FBI to [redacted] (S) b1, b3, b7E

~~(S//NF)~~ However, as described above, the targeting procedures do not require the FBI to conduct an independent, *de novo* analysis of a target's foreignness and U.S. person status. Rather, the targeting procedures commit the FBI to [redacted] (S) b1, b3, b7E (Emphasis added.) The [redacted] (S)

~~(S//NF)~~ [redacted] (S)

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ This section will describe the [redacted] as it was conducted during the OIG's review period, and [redacted] (S) It will also provide select data about how the 702 Team has implemented this aspect of the targeting procedures and the [redacted] (S) b1, b3, b7E

A. ~~(S//NF)~~ Background: [redacted] Under the PAA (S) b1, b3, b7E

1. (S//NF) The FBI's Role and Standard of Diligence When [redacted] (S) b1, b3, b7E

~~(S//NF)~~ According to OGC attorneys we interviewed, the FBI's practice [redacted] and its (S) b1, b3, b7E

[redacted] dates back to the PAA, prior to the drafting of the [redacted] (S) Section Chief Karen Davis Miller told the OIG that the FBI, at General Counsel Caproni's direction, insisted that the FBI have an active role in the process for approving [redacted] because the [redacted] were being (S) conducted under the FBI's authority. Caproni also told us that because [redacted] (S) [redacted] was her view at the time the first targeting procedures were drafted that "the FBI was responsible [redacted] (S) [redacted] the FBI therefore had to "exercise due diligence."(S) b1, b3, b7E

~~(S//NF)~~ Caproni, Miller, and the Policy Attorney each emphasized that "due diligence" does not require that the FBI [redacted] (S) [redacted] Caproni stated that a "presumption of regularity" applies to the NSA's [redacted] and that "there is no reason to (S) presume that the NSA is not upholding its constitutional duty" with respect to the rights of United States persons, or otherwise violating the FAA or its own FISA Court-approved targeting procedures. The Policy Attorney stated that the [redacted] and other documents governing the interagency targeting process were (S) carefully drafted to make it clear that the FBI would only [redacted] (S) [redacted] (S) b1, b3, b7E

~~(S//NF)~~ This concept of "due diligence" regarding the [redacted] (S) has been conveyed to the operators on the 702 Team, each of whom expressed similar notions of the standard during interviews with the OIG. For example, the Lead Program Coordinator described the Team's standard of diligence as "thorough but reasonable." b1, b3, b7E

2. ~~(S//NF)~~ How the FBI Decided [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(~~S//NF~~) One reviewer we interviewed said that the memorandum assists in the approval process and helps streamline future audits, particularly by providing a written record documenting the [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

1. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S) [redacted] b1 b3 b7E

(S) [redacted]

(U//FOUO) After the OIG presented the above information to General Counsel Caproni, she stated that she was unaware of the gap in the procedures, called it a "mistake," and said that the Operations Attorney should "fix it."

(S) [redacted] b1 b3 b7E

(TS) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ The 702 Team ultimately approved all [redacted] selectors.[69] The OIG (S) emphasizes that, [redacted] (S) b1, b3, b7E the steps the 702 Team took were entirely consistent with the [redacted] (S) Nonetheless, for each of these selectors and for any other selectors processed by the 702 Team during the OIG review period that bore similar characteristics, the potential exists that the 702 Team, despite a proper application of the [redacted] (S)

~~(S//NF)~~ The OIG recommends, consistent with the FBI's obligation to [redacted] (S) b1, b3, b7E

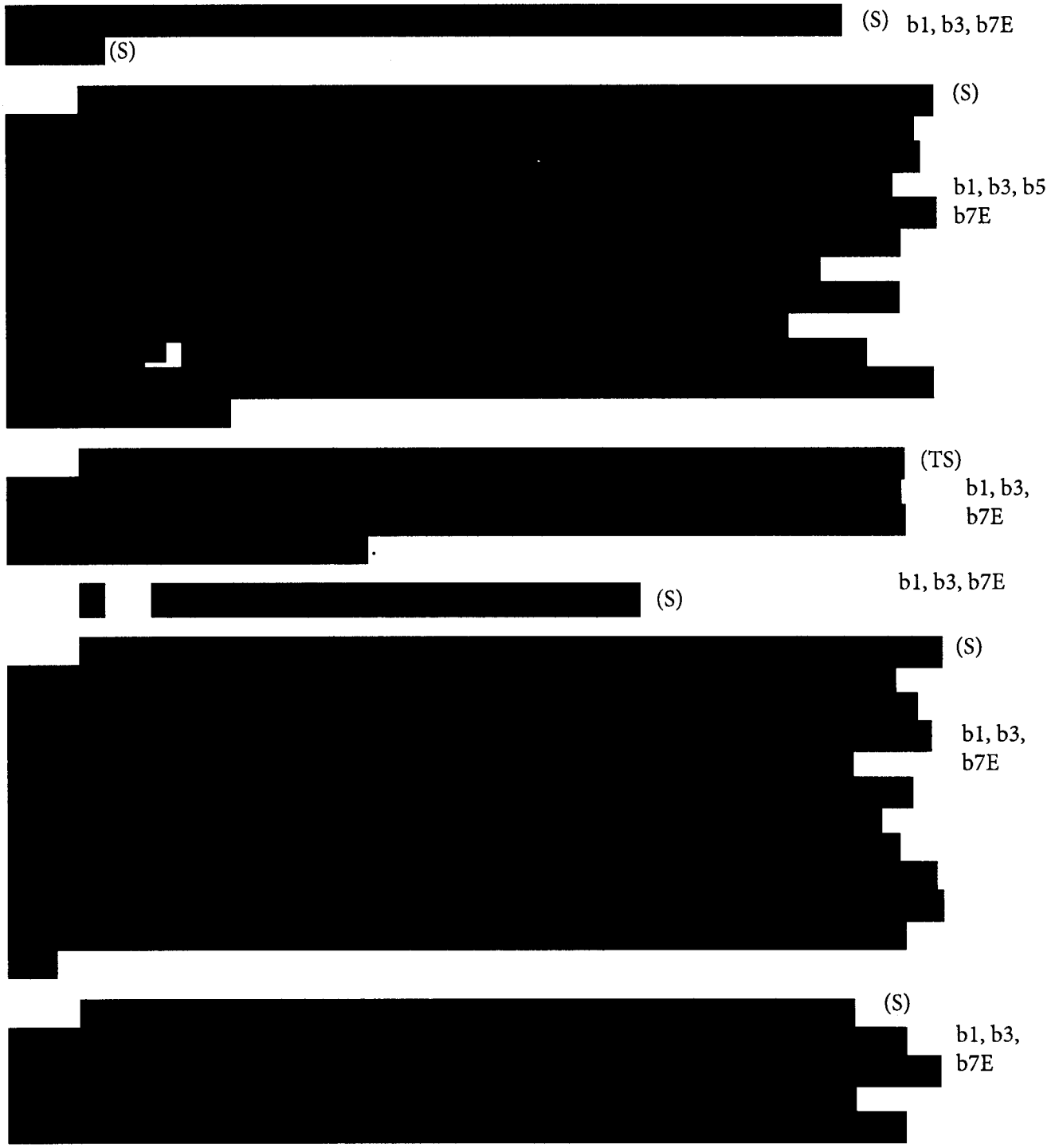
b1, b3, b7E

2. [redacted] (S)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E



[70] (U//FOUO) The version of this report that has been distributed outside the Department of Justice contains redactions in this sentence based on the Department's assertion of the attorney-client privilege.

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

~~(S//NF)~~ (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

[redacted] (S)

[redacted] (S) b1, b3, b7E

1. (U//FOUO) Relevance Judgments

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

2. (U//FOUO) Subjects of Field Office Investigations

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

72 [redacted]

71 ~~(S//NF)~~ These judgments must be understood in the context of the full approval process at the FBI: they are not made unilaterally by [redacted] but rather represent judgments of the 702 Team that in most cases have been assessed by both [redacted] (S) [redacted] and approved by an SSA. These review and approval processes are described in greater detail below. b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E


(S)b1, b3, b7E


(S)

b1, b3, b7E


(S)

b1, b3, b7E


(S)

b1, b3, b7E


(S)

b1, b3, b7E


(S)

b1, b3, b7E


(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

b1, b3, b7E

E. ~~(S//NF)~~ [redacted] (S)

~~(S//NF)~~ As noted above, the FBI's FISA Court-approved targeting procedures require the FBI to [redacted] (S) b1, b3, b7E

[redacted] (S)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E


(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(TS)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S) [redacted] b1, b3, b7E

(S) [redacted] b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ As described above, the FISA Court-approved FBI targeting procedures obligate the FBI to [redacted] for (S) b1, b3, b7E

(S) [redacted] b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

b. ~~(S//NF)~~ Change to the Second [redacted] Procedures (S) b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

(TS) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

3. [redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

~~(TS//SI//NF)~~ Lastly, in an October 3, 2011, Memorandum Opinion and Order, the FISA Court approved an amendment to the FBI's targeting procedures to [redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

b1, b3, b7E

(S)

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

1. ~~(S//NF)~~ [redacted] (S) b1, b3, b7E

~~(S//NF)~~ In deciding whether to approve a [redacted] (S) [redacted] the 702 Team SSAs have three possible dispositions from which to choose. One option is to approve the [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

located in the United States and thus not eligible for targeting under Section 702. To approve a [redacted] the SSA must memorialize the date and the decision [redacted] and then separately select "approve" in [redacted] to send an electronic notification to [redacted] that the [redacted].(S) b1, b3, b7E

(S//~~NF~~) However, pursuant to the FBI's targeting procedures, when the FB[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] b1, b3, (TS) b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) [redacted] (TS) b1, b3, b7E

[redacted] b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ One reason offered was that the NSA's targeting procedures are designed to identify ineligible targets before the selector is nominated to the FBI for [redacted] so that ineligible targets are rarely (S) nominated in the first place. Indeed, the Lead Program Coordinator stated that the "NSA has done an excellent job, in my opinion, of targeting people [who] are overseas." b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b6, b7C b7E

~~(S//NF)~~ Another factor that 702 Team members said may contribute to the [redacted] the fact that [redacted] (S) b1, b3, b7E

Specifically, at least two members of the 702 Team pointed out that [redacted] (S) The Lead Program Coordinator attributed this to the likelihood that the NSA [redacted] (S)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3,b6, b7C b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ Section 702 allows the government to acquire the communications of non-U.S. persons reasonably believed to be located outside the United States at the time of acquisition. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E (Cont'd.)

(TS)

b1, b3,b6, b7C

b7E

(S)

b1, b3, b6, b7C b7E

(S)

b1, b3, b6, b7C b7E

(S)

b1, b3, b7E

(TS)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) MOU ¶ 12.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b6, b7C b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b6, b7C b7E

[redacted] (TS) b1, b3, b7E

a. ~~(S//NF)~~ Information Considered in [redacted] (S) Determination b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

[redacted] (S)

[redacted] (S)

[redacted] (S)

[redacted] (S)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(S) b1, b3, b7E

(S)

b1, b3, b7E

(TS)

b1, b3, b7E


(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
(S)
b1, b3, b7E
b1, b3, b7E
(S)
(S)
b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

B. (U//FOUO) Other U.S. Travel Issues

[redacted] b7E

1. ~~(S//NF)~~ U.S. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted][81] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted]

[redacted] (S) b1, b3, b7E

VI. (U) Statutory Reporting Requirements for FBI Targeting Activities

(U//FOUO) Section 702 requires the OIG to conduct three reviews of the FBI's activities under the statute. One of the required reviews concerns the FBI targeting activities described in this chapter, and is set forth in Section 702(*l*)(2)(C), which provides, in relevant part:

> (U) The Inspector General of the Department of Justice and the Inspector General of each element of the intelligence community authorized to acquire foreign intelligence information under subsection (a) [of Section 702], with respect to the department or element of such Inspector General –
>
> . . .
>
> (U) (C) with respect to acquisitions authorized under subsection (a), shall review the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed[.]

(U) Id.[83]

(U//FOUO) The FBI is also required to conduct an annual review of the identical information. See Section 702(*l*)(3)(A)(iii). The importance of the FBI's reporting requirement to Congress was made clear by Representative Silvestre Reyes, who was the Chairman of the House Permanent Select Committee on Intelligence when Congress passed the FAA. Chairman Reyes stated:

> (U) Because of the nature of the new surveillance authorities granted under this bill, we were particularly concerned about the potential for a significant increase in the inadvertent collection of U.S.-person communications and information. For that reason, we have adopted several oversight provisions that require the Intelligence Community to report to Congress on the number of targets later determined to have been located inside the United

[83] ~~(S//NF)~~ The two other mandatory reviews are discussed in Chapter Four in connection with the OIG's discussion of the FBI's post-targeting activities. The three mandatory review provisions also apply to the NSA OIG because the NSA is "authorized to acquire foreign intelligence information" under Section 702(a). [redacted] (S)

[redacted] b1, b3, b7E

States, the number of disseminated intelligence reports that contain U.S.-person information, and the number of disseminated intelligence reports that contain information identifying specific U.S. persons. The Intelligence Committee plans to conduct vigorous oversight of the reports.

(U//FOUO) 154 Cong. Rec. H5758 (daily ed. June 20, 2008).

(U//FOUO) In this section we discuss the FBI's annual review with respect to this acquisition issue. We then describe the OIG's review of this issue and provide our conclusions based on our review.

A. (U) FBI's Annual Reporting under Section 702(l)(3)(A)(iii)

(U//FOUO) The FBI submitted its first annual report required by 702(l)(3)(A) on March 15, 2010. The annual report was drafted by the Operations Attorney, and covered the period of September 1, 2008, through August 31, 2009 (the 2009 reporting period), effectively the first year of FBI operations under the FAA. The report stated:

(S)

[redacted]

b1, b3, b7E

(U//FOUO) FBI Annual Report (March 15, 2009) at 2.

(U//FOUO) As of February 2012, when the FBI received a draft of this report for its review, the FBI had not submitted its second annual report, which will cover the period September 1, 2009, through August 31, 2010 (the 2010 reporting period), or its third annual report, which will cover the period September 1, 2010, through August 31, 2011 (the 2011 reporting period).[84]

(S)

[redacted]

b1, b3, b7E

[84] (U//FOUO) On May 22, 2012, the FBI transmitted two annual reports to Congress that covered the periods of September 1, 2009, to August 31, 2010, and September 1, 2010, to August 31, 2011, respectively. The OIG received copies of these documents but was unable to fully assess their contents prior to releasing this report.

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(U//FOUO) To assist the FBI in meeting its statutory reporting requirements, the OIG met with senior FBI officials from the Office of General Counsel, Inspection Division, and Counterterrorism Division in July 2011. During that meeting we presented our preliminary findings concerning these acquisitions and explained the methodology we used to reach them. As we told the FBI at that time, the OIG's analysis was based on information either within the FBI's possession or readily available to it. We describe our methodology and findings in detail below.

B. (U//FOUO) OIG Review of FBI Reportable Incidents

[redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

1. (U//FOUO) OIG Methodology

~~(S//NF)~~ As a preliminary matter, the OIG reviewed all Section 707 Semiannual Reports, Section 702 Semiannual Assessments, and Quarterly Reports to the FISA Court that covered acquisitions occurring during the OIG's review period.[85] These reports document *compliance* incidents – that is, the

[85] [redacted] (S)

b1, b3, b7E

(Cont'd.)

NSA or FBI's failure to comply with a specific requirement in its targeting (or minimization) procedures, whether or not the incident results in the improper collection of 702 data. We determined that these reports did not cite any compliance incidents attributed to the FBI that resulted in [redacted] (S) [redacted] in which the user of the targeted account was in the United States at the time of acquisition. b1, b3, b7E

~~(S//NF)~~ The OIG and FBI reporting provisions in Section 702(*l*)(2) and (3) would encompass compliance incidents, but only if such incidents actually resulted in the acquisition [redacted] The reporting provisions (S) also encompass other incidents that may occur in the FBI's exercise of its Section 702 authority and which are not compliance incidents: [redacted] (S) approved after the proper application of the NSA and FBI's targeting procedures, but which nonetheless result in the acquisition of [redacted] (S) [redacted] of a person who was in the United States at the time of acquisition. We refer to acquisitions covered by Section 702(*l*)(2) and (3) as "reportable incidents." b1, b3, b7E

~~(S//NF)~~ The OIG reviewed the FBI and NSA's targeting procedures and the [redacted] to determine whether such reportable incidents must be documented and notification to the FBI provided. The FBI's targeting procedures provide: b1, b3, b7E (S)

> ~~(S//NF)~~ If NSA analysis of [redacted] received from (S) the FBI, or other technical data, indicates that a user of a [redacted] from which [redacted] (S) were acquired by the FBI pursuant to those procedures is actually located within the United States or is a United States person, the NSA shall promptly advise the FBI, and the FBI [redacted] (S) [redacted] b1, b3, b7E

[redacted] at (S)

¶ 7. It does not appear that the FBI and the NSA developed a formal mechanism to implement this provision during the OIG's review period.[86] However, the NSA's targeting procedures more explicitly provide: b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ In the event that NSA concludes that a person is reasonably believed to be located outside the United States and after targeting this person learns that the person is inside the United States, or if NSA concludes that a person who at the time of targeting was believed to be a non-United States person was in fact a United States person, it will take the following steps:

. . .

~~(S//NF)~~ (2) Report the incident to DOJ through the Deputy Assistant Attorney General in the National Security Division with responsibility for intelligence operations and oversight, to the ODNI Office of General Counsel, and to the ODNI Civil Liberties Protection Officer within five business days.

~~(S//NF)~~ NSA's Targeting Procedures [redacted] (S) [redacted] Moreover, [redacted] provides: (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

b7E

(U//FOUO) [redacted] ¶ 15.

[redacted] (TS)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

~~(S//NF)~~ Witnesses stated that the FBI did not request or receive NSA notifications of 702 acquisitions that were later determined to be ineligible for 702 coverage (reportable incidents) until at least October 2009, when the FBI began to retain 702 data for its own analysis. The 702 Team Lead Program Coordinator stated that the FBI first received these notifications in the form of purge reports after it began retaining 702 data, but only concerning accounts for which the FBI had requested dual routing. He and the [redacted] Unit Chief b7E stated that the NSA subsequently began to send purge reports to the FBI whether or not the account was being dual routed to the FBI, although they could not pinpoint when this practice changed. The NSA's Assistant Director for Monitoring and Assessments, Office of the Director of Oversight and Compliance (ODOC), told the OIG that he did not believe the FBI ever requested the NSA to send it notices of reportable incidents beyond those that would have involved accounts that had been dual routed to the FBI.

(U//FOUO) The net effect of the gaps in this notification process was to leave the FBI unaware of potential reportable incidents during the OIG's review period, which covers all of the FBI's 2009 reporting period and part of its 2010 reporting period. To determine whether this gap resulted in FBI acquisitions during the OIG's review period that meet the reporting requirements of Section 702(*l*)(2) and (3), the OIG took the following steps.

~~(S//SI//NF)~~ First, the OIG obtained from the National Security Division the reports the NSA is required to provide under Section IV of its targeting procedures. These reports reflect incidents in which the appropriateness of the [redacted] was placed in doubt because the user of the targeted account appeared to be ineligible for 702 coverage. Each incident report b7E consists of a short narrative describing the NSA's discovery through post-targeting analysis that a user of a targeted selector was or may have been in the United States during the NSA's [redacted] of the account. Each report involves one selector, although some selectors were involved in more than one incident, and thus appear in more than one report. The reports also describe any action the NSA took to address the incident, such as detasking collection and purging any tainted data.

[redacted] (TS)

b1, b3, b7E

[redacted] (TS)

[redacted])b1, b3, b7E

(TS//~~SI~~//~~NF~~) The NSD provided the OIG with [redacted] incident reports (TS) involving NSA [redacted] activities. As described earlier in this (TS) chapter, most selectors tasked for [redacted] (TS) [redacted] o identify reports concerning selectors [redacted] (TS) [redacted] selectors (TS) nominated to the FBI for a [redacted] during the OIG's (TS) review period. This comparison yielded [redacted] unique selectors. (TS)

b1, b3, b7E

(S//~~NF~~) It is important to note that Section 702(*l*)(2) and (3) ask the OIG and the FBI to report on "the number of targets that were later determined to be located in the United States" that are "with respect to *acquisitions*" authorized under Section 702(a). (Emphasis added.) We therefore submitted this list of [redacted] (S) selectors to [redacted] (S) to determine whether an [redacted] (S) [redacted] occurred at all, and if so, when.

b1, b3, b7E

(S//~~NF~~) We asked [redacted] (S) to provide the tasking histories for the [redacted] (S) selectors. Specifically, the OIG asked [redacted] to provide, for each selector, what (S) action the FBI took [redacted] when (S) the action was taken, when the provider was tasked [redacted] (S) [redacted] and when the data from the provider was (S) returned to [redacted] for routing to the Intelligence Community (S)

b1, b3, b7E

(S//~~NF~~) The [redacted] data revealed two points critical to the OIG's analysis. (S) First, many of the reportable incident-related selectors nominated for [redacted] (S) either were not approved or were withdrawn by the NSA after the FBI had approved them. For these selectors, [redacted] (S)

[redacted]

b1, b3, b7E

[redacted] (S)

[redacted]

b1, b3, b7E

[redacted] (TS)

[redacted]

b1, b3, b7E

[redacted] (S) b1, b3, b7E

2. (U//FOUO) OIG Conclusions Regarding FBI Reportable Incidents

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(S) b1, b3, b7E

(TS)

b1, b3, b7E

(S)

b1, b3, b7E

(TS)

b1, b3, b7E


(TS)
b1, b3, b7E
b1,
b3,
b7E
(S)
(TS)
b1, b3,
b7E
(TS)
b1, b3,
b7E
(TS)
b1, b3,
b7E
b1,
b3,
b7E
(S)

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

(S) b1, b3, b7E

b. (~~S//NF~~) Foreignness Determinations Relied Upon

(TS) b1, b3, b7E

(TS) b1, b3, b7E

(TS) b1, b3, b7E

(TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

c. ~~(S//NF)~~ Review of Communications of Persons Later Determined to be In the United States

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[90] ~~(S//NF)~~ We discuss the 702 Team's purging procedures in Chapter Four in connection with the FBI's post-targeting activities under Section 702.

(U//FOUO) We believe the foregoing examples illustrate how the FBI can use information that it already possesses or that is readily available to it to meet its statutory reporting requirements under Section 702(l)(3)(A)(iii).

VII. (U) OIG Analysis

~~(S//NF)~~ In this section we present our analysis of the FBI's targeting activities under Section 702 during our review period. We first assess the FBI's performance of its two fundamental responsibilities under its targeting procedures: to review and evaluate the sufficiency of the NSA's foreignness determinations, and to [redacted] (S) b1, b3, b7E

[redacted] We next assess the FBI's special review process for [redacted] (S)

[redacted]

A. (U//FOUO) FBI's Application of its Targeting Procedures

~~(S//NF)~~ The FBI's FISA Court-approved targeting procedures set out in [redacted] and the standard it must meet (S) before [redacted] of selectors nominated to it under (S) Section 702. For each nomination, the FBI is required to fulfill two principal obligations under its targeting procedures. First, in consultation with the NSA, the FBI must "review and evaluate the sufficiency" of the NSA's explanation for its reasonable belief that the presumed user of a nominated account is located outside the United States and its information that the user is a non-U.S. person (the foreignness determination). Second, the FBI must [redacted] (S) b1, b3, b7E

[redacted] of the account nominated to it by the NSA. [redacted] (S)

[redacted] (S)

[redacted] b1, b3, b7E

However, the [redacted] were designed to implement the targeting procedures, and (S) b1, b3, b7E
thus, to assess how the FBI has met its principal obligations under the
targeting procedures, the OIG reviewed both the [redacted] themselves and how the (S)
[redacted] (S)

~~(S//NF)~~ We concluded that overall the FBI's 702 Team has implemented its targeting procedures with commendable deliberation, thoroughness, and b1, b3, b7E
professionalism. In reaching this conclusion, we took into account the FBI's current limited role in the 702 Program, the fact that the 702 authority was new during the period of our review, the complexity of the [redacted] (S)
[redacted]

~~(S//NF)~~ However, with regard to the FBI's obligation to review and evaluate the sufficiency of the NSA's foreignness determinations, we believe b1, b3, b7E
there are opportunities for the FBI to improve the effectiveness of its [redacted] (S)
through increased consultation and coordination with the NSA with respect to nominations [redacted] (S)

~~(S//NF)~~ We also identified one gap in the FBI's [redacted] (S) b1, b3,
procedures that, with little effort on the 702 Team's part, could improve the b7E
thoroughness of [redacted] The gap concerns the absence of a [redacted] (S)
[redacted] (S)
[redacted]

~~(S//NF)~~ Before proceeding to our assessment of these substantive targeting issues, the OIG notes that the 702 Team's documentation of its targeting activities was extremely thorough and well-organized. b1, b3,
Documentation of [redacted] (S) b7E
[redacted] According
to witnesses, the need for accurate and detailed record-keeping was emphasized at the outset of the 702 Program by the FBI's OGC, which anticipated that the FBI's use of 702 authority would be closely scrutinized and undergo considerable oversight. It is evident that the 702 Team, under the guidance of the Lead and Assistant Program Coordinators, understood the importance of this function and executed it diligently.

1. ~~(S//NF)~~ The FBI's Review and Evaluation of the Sufficiency of the NSA's Foreignness Determinations

~~(S//NF)~~ The FBI's review and evaluation of the sufficiency of the NSA's b1, b3,
foreignness determinations is an important step in the FBI's [redacted] (S) b7E
process. [redacted] (S)
[redacted]

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ The targeting procedures do not contain a specific standard of diligence the FBI must employ when reviewing and evaluating the sufficiency of the NSA's foreignness determinations. [redacted] (S)

[redacted] (S) For example, the [redacted] (S) state that the [redacted] (S) review of foreignness "is not an entirely separate and independent review, but rather a review to determine whether NSA has provided a reasonable explanation" of the presumed user's location outside the United States. [redacted] (S) b1, b3, b7E

[redacted]

~~(S//NF)~~ We found it significant that, in balancing the FBI's deference to the NSA against [redacted] (S), both the targeting procedures and the [redacted] require the FBI to conduct its sufficiency review "in consultation with" the NSA. [redacted] (S) b1, b3, b7E

[redacted] (S)

[redacted] b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS)

[redacted] b1, b3, b7E

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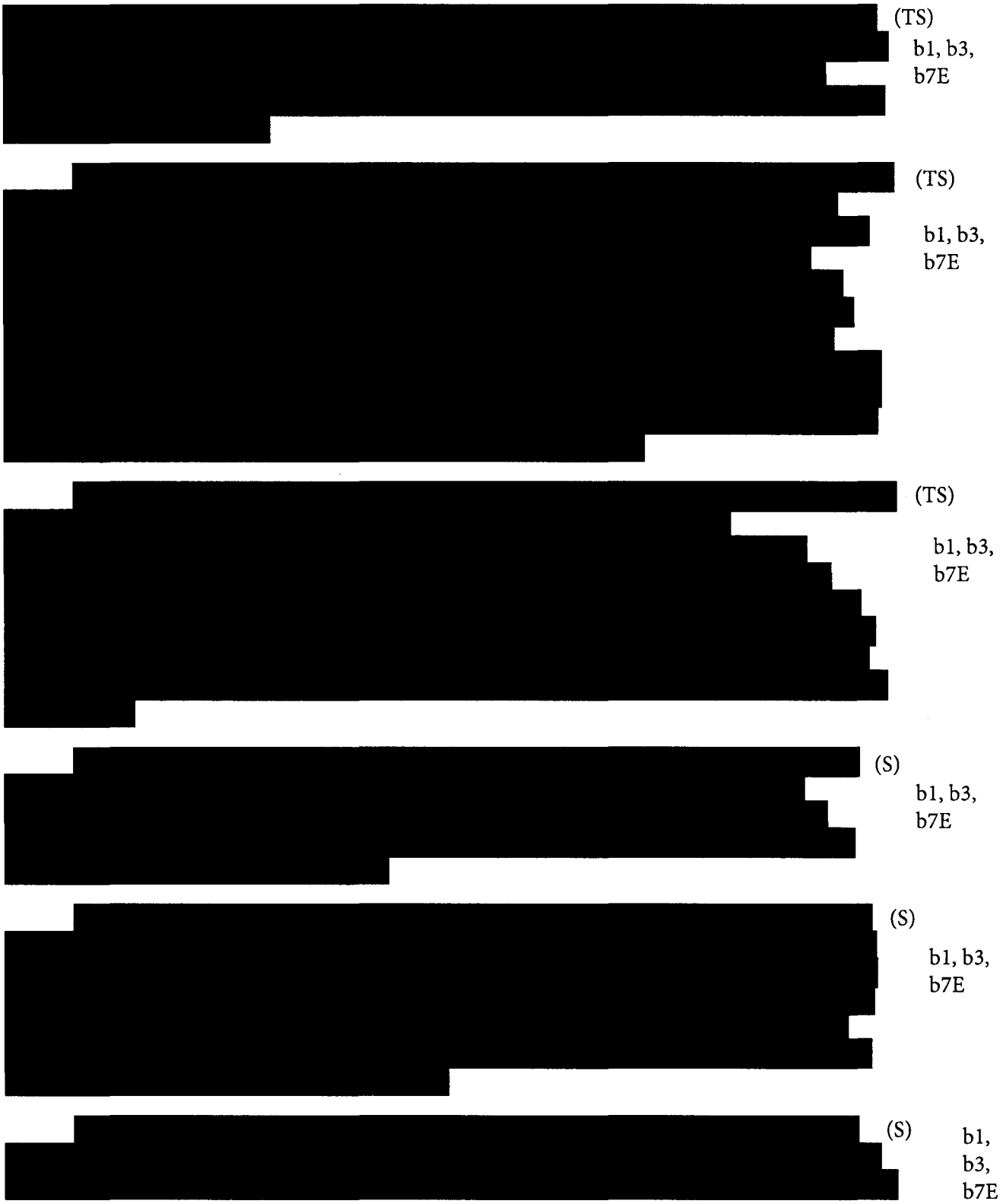
91 [redacted] (S) b1, b3, b7E



(TS) b1, b3, b7E

(TS) b1, b3, b7E

(TS) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

2. ~~(S//NF)~~ Reasonableness of the FBI's [redacted] Practices (S) b1, b3, b7E

~~(S//NF)~~ With regard to the FBI's obligation to [redacted] the (S) targeting procedures are more explicit about the standard that the FBI must meet. The targeting procedures require the FBI to ensure that [redacted] (S)

b1, b3, b7E

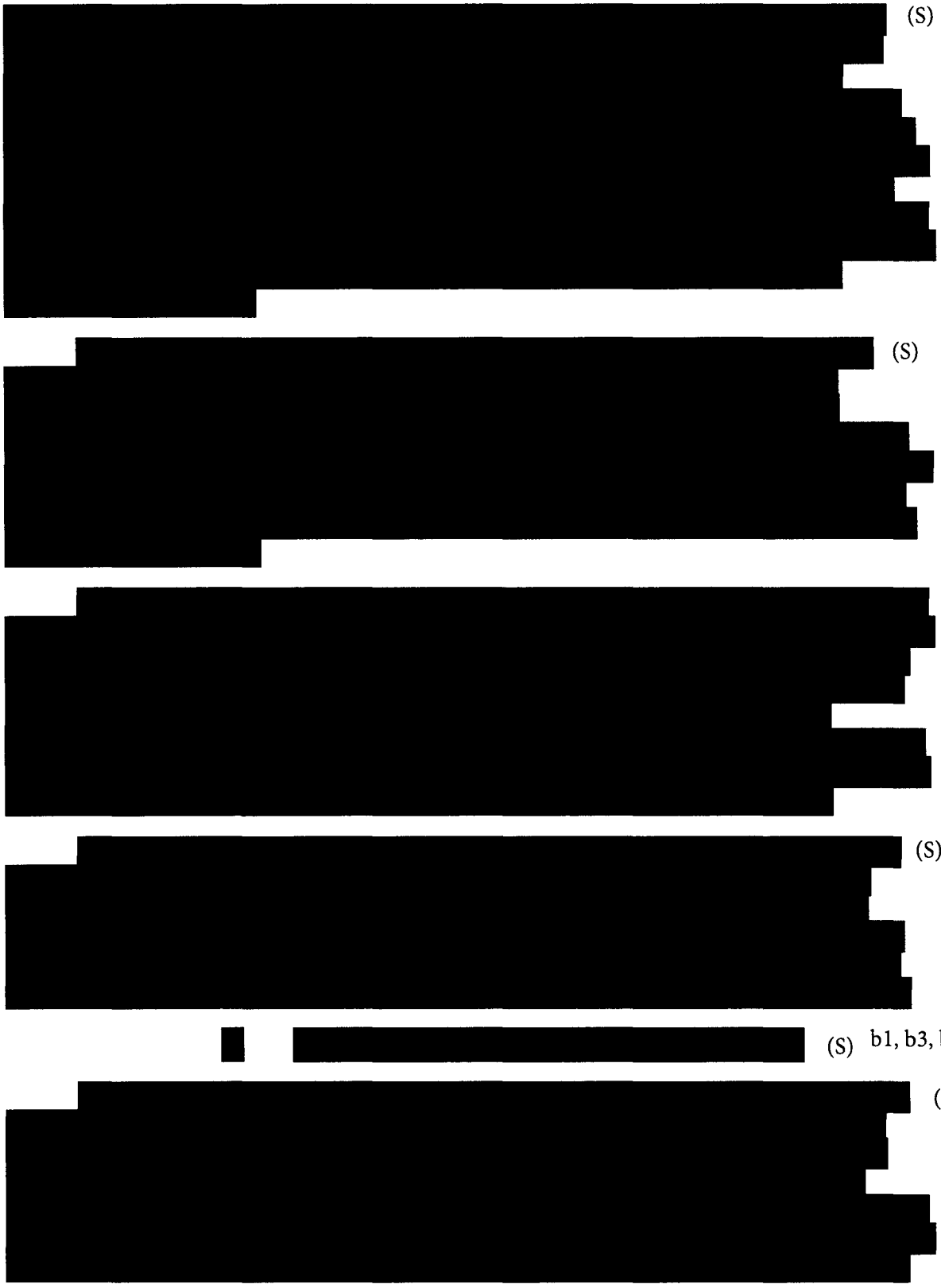
[redacted]

~~(S//NF)~~ Taking into account [redacted] nominated by the (S) NSA and the complexity of the [redacted] we concluded that the (S) FBI's [redacted] (S) b1, b3, b7E required by the targeting procedures, and that the FBI met this standard of diligence consistently throughout our review period. However, we identified one change to the [redacted] concerning a gap in the 702 Team's (S) procedure [redacted] that we believe can improve the quality of the (S) FBI's targeting activities at very little cost in terms of time or resources.

a. ~~(S//NF)~~ Use of 702 Team Resources [redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E



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b7E

B. [redacted] (S) b1, b3, b7E

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b7E

[redacted] (S) b1, b3, b7E

(S)

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[redacted] (S) b1, b3, b7E

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C. (U) The FBI's Compliance with its Annual Reporting Requirements under Section 702(*l*)(3)(A)(iii)

(U//FOUO) The FBI is required to submit annual reports to Congressional intelligence and judiciary committees, the Attorney General, the Director of National Intelligence, and the FISA Court on its Section 702 targeting activities. Specifically, "with respect to acquisitions authorized under [Section 702(a)]," the FBI is required to provide "the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed[.]" Section 702(*l*)(3)(A)(iii). The OIG refers to incidents meeting this statutory criterion as "reportable incidents."

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[redacted] (S)

b1,
b3,
b7E

(U//FOUO) The OIG's review period covered all of the FBI's 2009 reporting period and a portion of its 2010 reporting period. The OIG's findings indicate that the FBI's reporting for the 2009 reporting period was deficient because we found several acquisitions that according to the data we reviewed met the statutory reporting criteria but which were not reported by the FBI in its first annual report.[93] We could not assess the FBI's subsequent annual reporting because as of February 2012 that reporting had not been conducted.[94]

(U//FOUO) In an effort to assist the FBI in meeting its statutory reporting requirements, the OIG met with senior FBI Counterterrorism Division, OGC, and Inspection Division officials in July 2011 to present our preliminary findings and the methodology we used to reach them. We explained that to conduct our review, we used data either maintained by or readily available to the FBI.

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[93] (S) b1, b3, b7E

[94] (U//FOUO) On May 22, 2012, the FBI transmitted two annual reports to Congress that covered the periods of September 1, 2009, to August 31, 2010, and September 1, 2010, to August 31, 2011, respectively. The OIG received copies of these documents but was unable to fully assess their contents prior to releasing this report.

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(S//NF) CHAPTER FOUR
THE FBI'S POST-TARGETING ACTIVITIES: ACQUISITION, ROUTING, RETENTION, MINIMIZATION, AND DISSEMINATION OF SECTION 702 INFORMATION

~~(S//NF)~~ In this chapter we examine the FBI's post-targeting activities under Section 702 from September 2008 through the end of April 2010. Unlike the activities discussed in Chapter Three concerning the FBI's [redacted] (S) [redacted] many of its post-targeting activities did not commence until over a year after the FAA was enacted; most significantly, the FBI did not begin retaining Section 702-acquired data or disseminating it in intelligence reports until October 2009. B1 B3 B7E

~~(S//NF)~~ In Section I we provide an overview of the FBI's FISA Court-approved Standard Minimization Procedures for FISA electronic surveillance and physical search, as adapted to Section 702. In Section II we summarize how the FBI acquires 702 communications from participating providers and routes the communications within the Intelligence Community. In Section III we discuss 702 data retention issues, including a description of the FBI's dual routing policies and practices and how unminimized 702 data is retained. In Section IV we focus on the dissemination process for 702-acquired information. In Section V we describe our review of the number of disseminated intelligence reports containing a reference to a U.S. person identity, as required under Section 702(*l*)(2)(B). In Section VI we provide the OIG's analysis of the FBI's post-targeting activities under Section 702 during our review period.

I. (U//FOUO) FBI's Standard Minimization Procedures

(U//FOUO) "Minimization" is a process designed to ensure the appropriate acquisition, retention, and dissemination of information concerning U.S. persons that is acquired under Section 702 and other surveillance authorities. Minimization is necessary in part because targeting processes may result in the acquisition of communications that are irrelevant to the purpose of the surveillance. Authorized personnel are responsible for reviewing the communications to assess whether they meet the agency's standards for retention and dissemination, and for memorializing these assessments by annotating or "marking" the acquired communications before they can be made more broadly available. This assessment process generally is referred to as "minimization."

(U//FOUO) Under Section 702(e) of the FAA, the Attorney General, in consultation with the Director of National Intelligence, must adopt minimization procedures for acquisitions authorized under Section 702(a). The minimization procedures adopted under 702 must meet the minimization

standards for electronic surveillance and physical search as defined in the FISA statute. As such, the FBI's minimization procedures must be reasonably designed in light of the purpose and technique of the particular electronic surveillance or physical search, to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." See 50 U.S.C. §§ 1801(h) & 1821(4).

(U//FOUO) The FBI's minimization procedures are reviewed and approved by the FISA Court as part of the government's Section 702 certifications and serve as the primary authority governing the FBI's handling of raw 702-acquired information.[95] The FBI's minimization procedures in effect during the period covered by this review are entitled "Standard Minimization Procedures for Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act" (SMPs). Though designed to apply to information collected under traditional FISA, the SMPs were adapted to Section 702 through Attorney General-approved language that conforms relevant provisions to Section 702.[96]

~~(S//NF)~~ Among other changes, the 702 conforming language requires the FBI to remove from FBI's systems the communications of "a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States but is in fact located inside the United States at the time such communication is acquired or is subsequently determined to be a United States person." This amendment was necessary because the specific foreignness requirement of Section 702(a) (reasonable belief that a target is a non-U.S. person located outside the United States) is not an element of traditional FISA.

~~(S//NF)~~ The Attorney General adopted the SMPs after concluding that they meet the requirements of the FISA statute.

~~(S//NF)~~ The FBI's SMPs for all [redacted] in place from October 14, 2009, when the FBI began retaining Section 702-acquired information and thus was first required to apply its minimization procedures, through April 30, 2010, the end of our review period, are identical. The SMPs are organized (S) B1 B3 B7E

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[95] ~~(S//NF)~~ The CIA, NSA, and FBI each receives raw Section 702-acquired information and is required to retain and disseminate such information in accordance with its own minimization procedures. The FISA Court must review and approve the minimization procedures of all three agencies. The FISA Court was not required to review and approve each agency's minimization procedures under the PAA. See PAA, Section 105C.

[96] (U//FOUO) This Attorney General-approved language is referred to in this report as the "702 conforming language." Unless otherwise indicated, references in this report to the SMPs in effect during our review period incorporate the 702 conforming language.

around three basic phases of the minimization process: acquisition, retention, and dissemination. Below we summarize key provisions of the FBI's SMPs, as adapted to Section 702, and as interpreted by the FBI in relevant guidance.

A. (U//FOUO) Acquisition

~~(S//NF)~~ The SMPs govern the acquisition, retention, and dissemination of nonpublicly available information concerning unconsenting United States persons that the FBI obtains under traditional FISA and Section 702. The SMPs provide that "information acquired from electronic surveillance or physical search conducted under FISA concerning United States persons may be used and disclosed by Federal officers and employees without the consent of the United States persons" only in accordance with the SMPs. SMPs, Section I.B. The SMPs do not apply to publicly available information about United States persons or to information "acquired, retained, or disseminated with a United States person's consent." In addition, with limited exceptions not applicable to this report, the SMPs do not apply to information concerning non-United States persons. Id.

(U//FOUO) The SMPs adopt the FISA definition of "United States person," which is:

> (U) a citizen of the United States, an alien lawfully admitted for permanent residence [as defined in 8 U.S.C. § 1101(a)(20)], an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power as defined [in 50 U.S.C. § 1801(a)(1), (2), or (3)]

(U) 50 U.S.C. § 1801(i).

~~(S//NF)~~ The SMPs also include presumptions about United States person status for purposes of implementing the SMPs. These presumptions, set forth below, are important because the SMPs require references to United States person identities to be stricken in disseminated material unless the information reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime:

> ~~(S//NF)~~ [I]f an individual is known to be located in the United States, or if it is not known whether the individual is located in or outside of the United States, he or she should be presumed to be a United States person unless the individual is identified as an alien who has not been admitted for permanent residence or circumstances give rise to the reasonable belief that the individual

> is not a United States person. If an individual is known or believed to be located outside the United States, he or she should be presumed to be a non-United States person unless the individual is identified as a United States person or circumstances give rise to the reasonable belief that the individual is a United States person. In an on-line operation, if it is not known whether an individual is located in or outside of the United States, he or she should be presumed to be a non-United States person unless the individual is identified as a United States person or circumstances give rise to the reasonable belief that the individual is a United States person.

(U//FOUO) SMP General Provisions, ¶ C.

~~(S//NF)~~ The SMPs provide that the FBI may acquire [redacted] (S) [redacted] under Section 702 only in accordance with the FBI's targeting procedures, as adopted by the Attorney General, in consultation with the Director of National Intelligence, under Section 702(d). B1 B3 B7E

~~(S//NF)~~ The SMPs also require the FBI to "remove from FBI systems upon recognition" any communication acquired through targeting a person reasonably believed to be outside the United States or a non-U.S. person at the time of targeting, but who is in fact inside the United States or a U.S. person at the time of acquisition." The FBI is allowed to retain such communication only if the Director or Deputy Director determines in writing that the communication "is reasonably believed to contain significant foreign intelligence information, evidence of a crime that has been, is being, or is about to be committed, or information retained for cryptanalytic, traffic analytic, or signal exploitation purposes."

~~(S//NF)~~ Finally, the FBI is required to purge from its systems any communication it has acquired and retained that is inconsistent with the targeting and acquisition limitations set forth in Section 702(b).[97] This purging

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[97] (U//FOUO) As described in Chapter Two, Subsection 702(b) provides that "[a]n aquisition authorized under subsection (a)—"

> (U) (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
>
> (U) (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
>
> (U) (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
>
> (U) (4) 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

(Cont'd.)

requirement extends to all copies of the acquired communication that are accessible to any "end user electronically or in hard copy." [redacted] (S)

[redacted] B1 B3 B7E

B. (U//FOUO) Retention

(~~S//NF~~) The retention provisions of the SMPs govern the storage of, access to, and use of FISA-acquired information within the FBI's data storage systems. The SMPs define "FISA-acquired information" to mean "all information, communications, material, or property that the FBI acquires from electronic surveillance or physical search conducted pursuant to FISA."[98]

~~(S//NF)~~ The SMPs restrict access to this information to "authorized users." Authorized users are personnel who have been trained on the

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(U) (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

(U) FAA Section 702(b).

[98] (~~TS//SI//NF~~) The SMPs also define "Raw FISA-acquired information" to mean:

"information that (a) is in the same or substantially same format as when the FBI acquired it, or (b) has been processed only as necessary to render it into a form in which it can be evaluated to determine whether it reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime."

SMPs, Section III.A. Pursuant to a FISA Court Order dated July 22, 2002, and made permanent by an order dated May 19, 2004, the FBI has been allowed to share raw, or "unminimized," FISA-acquired data related to international terrorism with the CIA and the NSA for further analysis, retention, and dissemination in accordance with their own FISA Court-approved minimization procedures. The series of filings that led to these information-sharing procedures are generally known as the "Raw Take Motion" and the "Raw Take Order." Prior to the Raw Take Order, the CIA and the NSA received FISA data collected by the FBI related to international terrorism "only if and when" it was disseminated pursuant to the FBI's SMPs. Motion for Amended Orders Permitting Modified Minimization Procedures, filed with the FISA Court on May 10, 2002, under multiple docket numbers.

requirements of the SMPs and Section 702, [redacted] B1
[redacted] The SMPs also require the FBI to maintain records of all B3
personnel who have been granted access to this information and who have (S) B7E
accessed the information. [redacted]

~~(S//NF)~~ The SMPs provide that authorized users may access raw FISA-acquired information on a continuing basis only as necessary to determine whether it reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime (the SMP minimization standards). SMPs, Section III.B. Once raw FISA-acquired information has been assessed as meeting the SMP minimization standards, the FBI may retain the information for further investigation and analysis, and may disseminate it in accordance with other SMP requirements described below.

~~(S//NF)~~ [redacted] (S)
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B7E

~~(S//NF)~~ [redacted] B1
B3
(S) B7E

~~(S//NF)~~ [redacted] B1
B3
(S) B7E

[99] (U) As of May 2011, the FBI had approximately 35,437 employees, including 13,963 special agents and 21,474 support personnel. See http://www.fbi.gov/about-us/quick-facts.

[redacted] (S) B1 B3 B7E

[redacted] (S) B1 B3 B7E

C. (U//FOUO) Dissemination

~~(S//NF)~~ Lastly, the SMPs govern the dissemination of FISA-acquired information "of or concerning United States persons," both domestically and to foreign governments. The FBI may disseminate FISA-acquired information concerning United States persons that reasonably appears to be foreign intelligence information to federal, state, local, and tribal officials and agencies. The FBI also may disseminate, for law enforcement purposes, FISA-acquired information concerning United States persons that reasonably appears to be evidence of a crime but not foreign intelligence information, but must do so consistent with the rules governing access to FISA-acquired information in connection with criminal investigations and proceedings. The dissemination must also include a statement that such disclosure may only be used in a criminal proceeding with the advance authorization of the Attorney General. (S)

[redacted] B1 B3 B7E

~~(S//NF)~~ Disseminations of FISA-acquired information concerning United States persons to the governments of the United Kingdom, Canada, Australia, or New Zealand require approval of the Director of the FBI or a designee. Disseminations of this information to other foreign governments also require the approval of the Director or a designee not lower than Section Chief, and must be made in coordination with the FBI OGC. The SMPs require the FBI to maintain a record of all disseminations to foreign governments concerning United States persons and to report this information to the Attorney General or a designee on a quarterly basis. SMPs, Section IV.C. FBI officials told the OIG that there were no disseminations to foreign governments concerning United States persons during the OIG's review period.

~~(S//NF)~~ Section II below describes how the FBI physically acquires 702 data from participating providers and routes the data into [redacted] (S) B1 B3 B7E

II. ~~(S//NF)~~ FBI Acquisition of Section 702 Data

[redacted] (TS)

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A. ~~(S//NF)~~ [redacted] (S)

b1, b3, b7E

1. ~~(S//NF)~~ Overview of [redacted] (S)

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[redacted] (S)

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[redacted] (S)

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[redacted] (S)

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2. ~~(TS//SI//NF)~~ Upstream Collection

~~(TS//SI//NF)~~ [redacted] (TS)

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~~(TS//SI//NF)~~ As NSA officials described to the OIG, these activities, sometimes called "backbone" or "upstream" collections, [redacted] (TS) [redacted] major electronic communications providers other than domestic providers. These major electronic communications providers receive Section 702(h) directives, just as the domestic providers do, but not for account-based information. Rather, upstream collection [redacted] is capable of acquiring in-transit (TS) communications from the Internet backbone, a major communications network that facilitates the routing of data to or from specific e-mail accounts housed on provider servers.[101]

b1, b3, b7E

~~(TS//SI//NF)~~ In addition to collecting in-transit communications to or from 702 targets, the NSA also uses upstream collection to obtain communications that reference e-mail accounts or other identifiers targeted under Section 702 in the contents of messages, but which are not necessarily sent or received by communicants targeted under 702. Electronic communications "about" a 702 target are only collected upstream of providers, [redacted] (TS) In addition, neither the FBI nor the CIA receives unminimized communications from the NSA's upstream collection. FISA Court Memorandum Opinion, Oct.3, 2011, at 18.

b1, b3, b7E

~~(TS//SI//NF)~~ Approximately nine percent of the total Internet communications that the NSA acquires under Section 702 are through upstream collection. Id. at 23, n.21. [redacted] (TS)

b1, b3, b7E

[101] (U//FOUO) The Internet backbone is a high-speed network linking large metropolitan areas around the world at interconnection points called "national access points." Local providers connect to the backbone through routers so that data can be carried through the backbone to a final destination. See *Newton's Telecom Dictionary*, (24th ed. 2008)

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B. [redacted] (S) b1, b3, b7E

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[redacted] (S) b1, b3, b7E

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[redacted] (S) b1, b3, b7E

III. [redacted] (S) b1, b3, b7E

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1. [redacted] (S) b1, b3, b7E

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[redacted] (S) b1, b3, b7E

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104 [redacted] (S) b1, b3, b7E

[105] ~~(S//NF)~~ The NSA is required by its targeting procedures to conduct post-targeting analysis of data acquired under Section 702.

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[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

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[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

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[109] (U//FOUO) See, e.g., *A Special Report*, Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack, United States Senate Committee on Homeland Security and Governmental Affairs, February 3, 2011.

[110] (U//FOUO) The version of this report that has been distributed outside the Department of Justice contains redactions in this sentence based on the Department's assertion of the attorney-client privilege.

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[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

e. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S) b1, b3, b7E

(TS)

b1, b3, b7E

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b1, b3, b7E

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b1, b3, b7E

(S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

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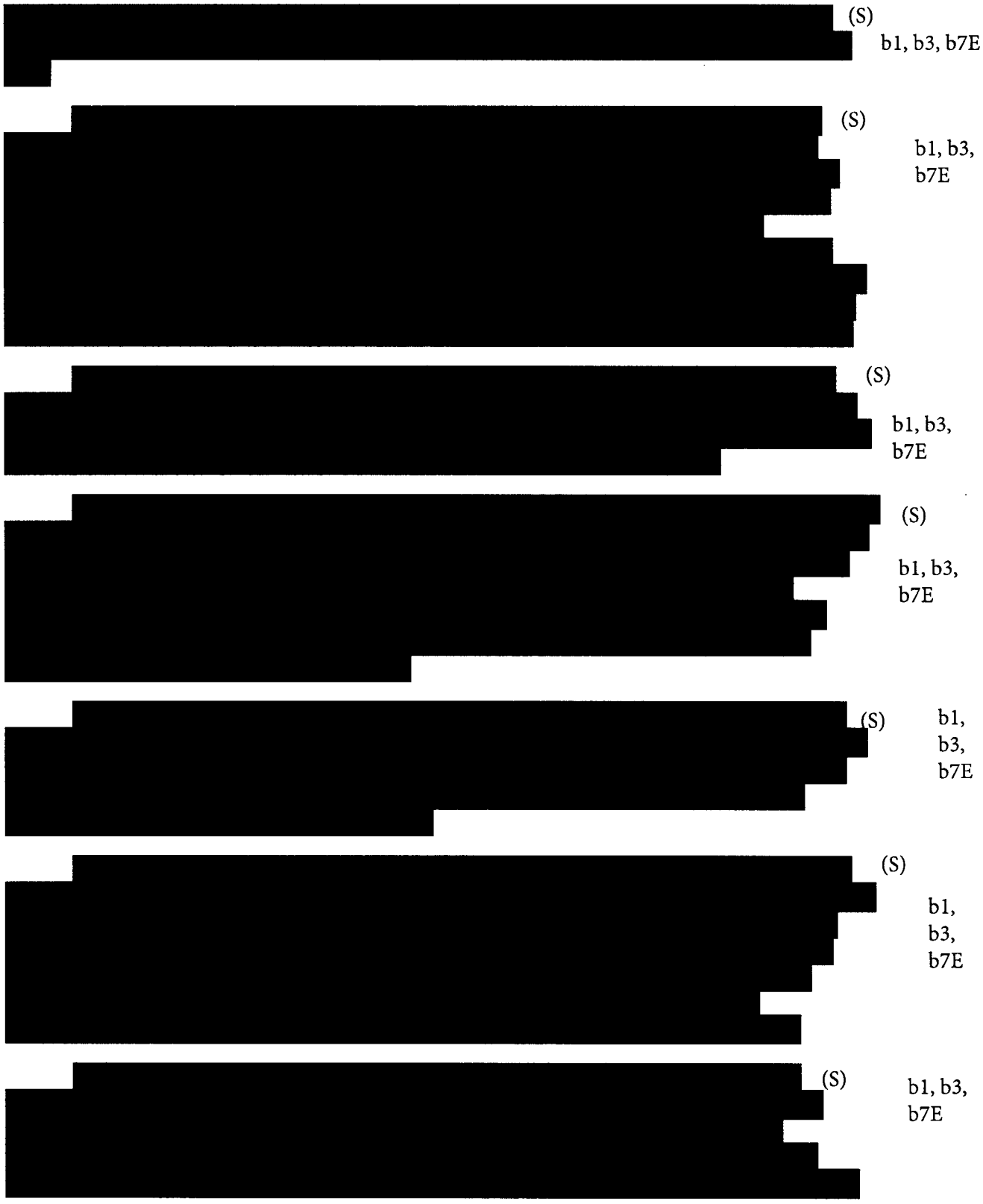
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2. [redacted] (S) b1, b3, b7E

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[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

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[redacted] (TS) b1, b3, b7E

B. ~~(S//NF)~~ Retention of and Access to Unminimized 702 Data

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[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

[redacted] b1 b3 b7E

(S) [redacted]

a. (U//FOUO) Volume of 702 Data

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[redacted] b1 b3 b7E

(S) [redacted]

(TS) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

c. (U//FOUO) Training Authorized Users

(S) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

[redacted] (S)

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3. [redacted] (S)

[redacted] (S)

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[redacted] (S)

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B3
B7E

[redacted] (S)

B1
B3
B7E

b. ~~(S//NF)~~ Purging 702 Data from [redacted] FBI Systems (S)

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B3
B7E

~~(S//NF)~~ The FBI's SMPs require that "[a]ny communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States but is in fact located inside the United States at the time such communication is acquired or is subsequently determined to be a United States person will be removed from FBI systems upon recognition . . . ."

[redacted] (S)

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These "Purging of FISA 702 [redacted] (S)
[redacted] (Purging [redacted] generally direct the authorized (S)
user to contact the 702 Team so that it may review the data and determine,
through [redacted] and other analysis, whether the data in fact must be (S)
purged. The Purge [redacted] also direct the 702 Team to notify the NSA [redacted] (S)
in the event it is concluded that [redacted] (S)
[redacted]

[redacted] (S)

b1,
b3,
b7E

[redacted] (S)

b1,
b3,
b7E

[redacted] (S)

b1,
b3,
b7E

(S)

b1, b3, b7E

(S)

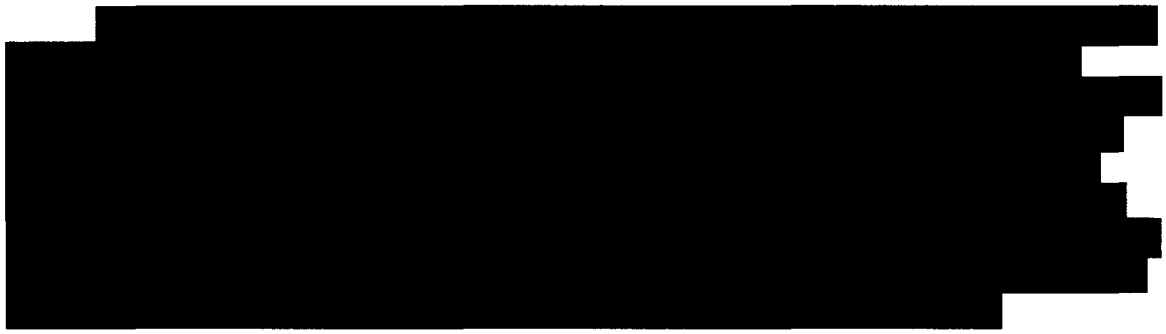
b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E



(S)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

IV. ~~(S//NF)~~ FBI Dissemination of Section 702-Acquired Information

~~(S//NF)~~ This section examines issues related to the dissemination of 702-acquired information, the third phase of the minimization process under the FBI's SMPs. We first discuss the meaning of certain key terms that are used in connection with dissemination activities. We then discuss the 702 Team's special role as case coordinator in the 702 dissemination process, as well as how it stores disseminated reports containing 702 data in [redacted] (S) administrative files. We also describe the NSD/ODNI joint 702 minimization reviews, followed by the OIG's assessment of the FBI's application of its minimization and dissemination requirements under the SMPs and internal FBI guidance. b1, b3, b7E

[redacted] (S) b1, b3, b7E

A. (U//FOUO) Definition of Certain Terms

(U//FOUO) Before discussing the issues surrounding the FBI's application of its SMPs and related guidance to 702 disseminations, we clarify certain terms that are used in connection with these dissemination activities. These terms are also used in our statutorily mandated review of disseminated intelligence reports that contain a reference to a U.S. person identity, which is discussed in Section V of this chapter.

1. (U//FOUO) Dissemination

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S) [redacted] b1 b3 b7E

115

(S) [redacted] b1 b3 b7E

2. (U//FOUO) Intelligence Reports

(S) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

(S) [redacted] b1 b3 b7E

[redacted] (S) B1 B3 B7E

[redacted] (S) B1 B3 B7E

[redacted] (S) B1 B3 B7E

~~(S//NF)~~ The SMPs define "FISA-acquired information" to mean "all information, communications, material, or property that the FBI acquires from electronic surveillance or physical search conducted pursuant to FISA." SMPs, Section III.A. This definition is made applicable to Section 702 by the 702 conforming language.

~~(S//NF)~~ According to both the Operations Attorney and NSD officials, "FISA-acquired information" includes both the content and metadata of electronic communications acquired under FISA.

4. (U//FOUO) U.S. Person

~~(S//NF)~~ The SMPs adopt the definition of "United States person" used in the FISA statute, which provides that a "United States person" is "a citizen of the United States, an alien lawfully admitted for permanent residence [as defined in 8 U.S.C. § 1101(a)(20)], an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power as defined [in 50 U.S.C. § 1801(a)(1), (2), or (3)]." 50 U.S.C. § 1801(i). The SMPs also contain certain presumptions about U.S. person status (see Section I.A. of this chapter), which are reiterated in the SMP Guidelines.

~~(S//NF)~~ The Operations Attorney stated that the definition of U.S. person supplied in the FISA statute should also apply for purposes of the reporting provisions of Section 702(*l*)(2) and (3).

B. ~~(S//NF)~~ Role of the 702 Team in Disseminations of 702-Acquired Information

[redacted] (S) B1 B3 B7E

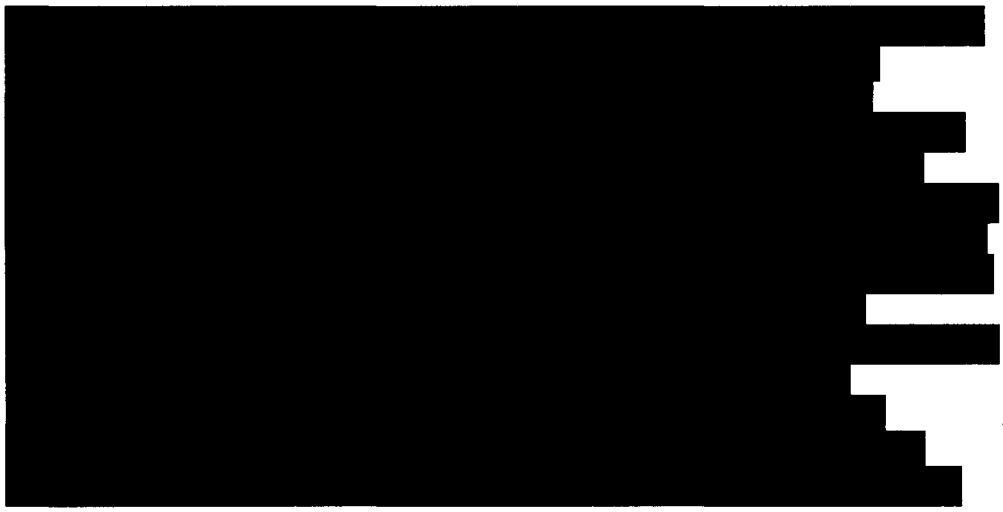
[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

1. (U//FOUO) Marking Policies

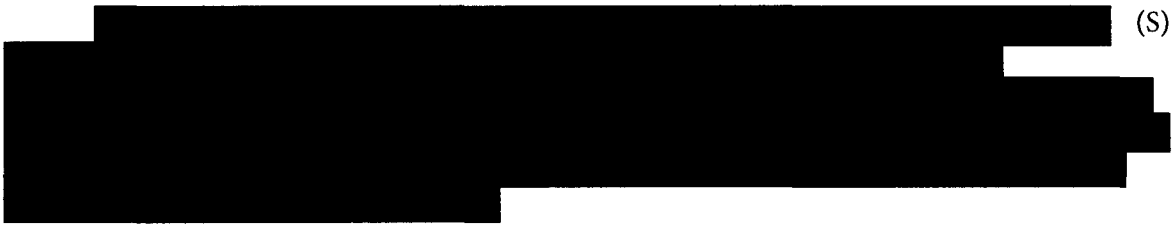
[redacted] (S) b1, b3, b7E



(S)

b1, b3, b7E

(U//FOUO) SMP Guidelines at Section 3.4, ¶ C.



(S)

b1, b3, b7E

(S)

b1, b3, b7E

(U//FOUO) SMP Guidelines at Section 3.5, ¶ C.

2. (U//FOUO) The Section 702 Case Coordination Process

(S)

b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

3. ~~(S//NF)~~ Storage of Section 702 Intelligence Reports in [redacted] (S)

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

C. ~~(S//NF)~~ FBI's Application of its Standard Minimization Procedures to Disseminations of Section 702-Acquired Information

[redacted] (S) b1, b3, b7E

1. (U//FOUO) NSD and ODNI Minimization Reviews

~~(S//NF)~~ The Attorney General is required by Section 707 to submit to Congress semiannual reports concerning the FBI's compliance with its targeting and minimization procedures under Section 702. For minimization activities, each Semiannual Report contains the results of NSD bi-monthly compliance reviews, which are conducted jointly with ODNI during the semiannual reporting period, documenting any compliance incidents occurring under Section 702. These joint NSD/ODNI compliance teams compile the semiannual assessments after conducting periodic targeting and minimization reviews at the NSA, CIA, and the FBI. Each review is written up in the form of an "Oversight Review Report of the Department of Justice's National Security Division," which we refer to as NSD compliance reports.

(U//FOUO) The NSD/ODNI minimization compliance reviews are designed to ascertain whether the FBI is properly marking disseminated 702 information, and whether disseminations of U.S. person information are performed in accordance with the SMPs and the FISA statute.

(U//FOUO) The OIG reviewed the three NSD compliance reports that covered the FBI's minimization activities through April 30, 2010. We also interviewed NSD attorneys who participated in the minimization reviews. Lastly, the OIG sought to determine whether the NSD's reviews were likely to have included all relevant documents.

a. (U//FOUO) NSD/ODNI Minimization Review Methodology

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

b. (U//FOUO) NSD Minimization Review Findings

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

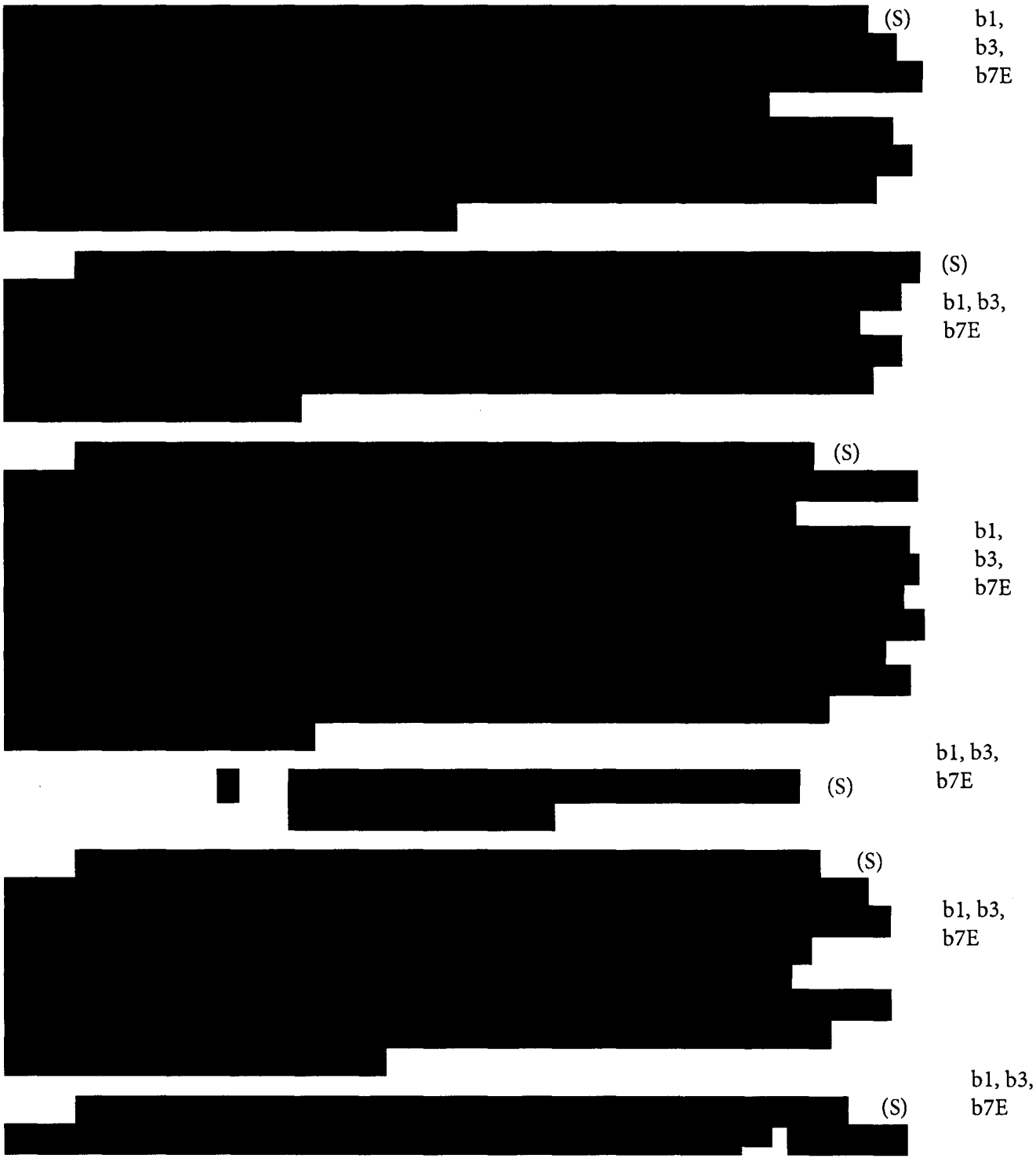
[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E



[118] (U) Under 50 U.S.C. § 1801(e), as amended by FAA § 110(a)(3), "foreign intelligence information" means

(Cont'd.)

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1,
b3,
b7E

[redacted] (S)

b1,
b3,
b7E

(U) (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against -

(U) (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(U) (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(U) (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(U) (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to -

(U) (A) the national defense or the security of the United States; or

(U) (B) the conduct of the foreign affairs of the United States.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] b1, b3, (S)b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] B1 B3 B7E (S)

[redacted] B1 B3 B7E (S)

[redacted] B1 B3 B7E (S)

[redacted] B1 B3 B7E (S)

[redacted] B1 B3 B7E (S)

122

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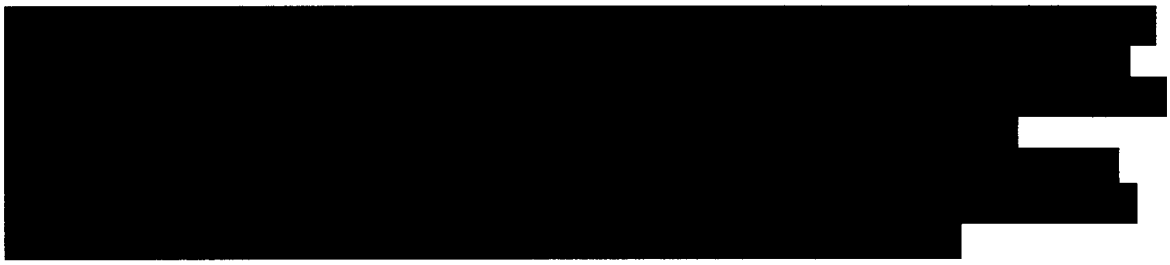
120 (U//FOUO) The version of this report that has been distributed outside the Department of Justice contains redactions in this sentence based on the Department's assertion of the attorney-client privilege.

121 (U//FOUO) The FBI may issue National Security Letters to obtain transactional data and subscriber information for electronic communications upon the FBI Director or his designee's certification that the "information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 18 U.S.C. § 2709(b).

[redacted] B1 B3 B7E (S)



(S)

b1,
b3,
b7E

(S)

b1,
b3,
b7E

(S)

b1,
b3,
b7E

(S)

b1,
b3,
b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

V. (U) Statutory Reporting Requirements for FBI Dissemination Activities

(U//FOUO) Section 702 requires the OIG and the FBI to report to Congress on references to U.S. person identities that are contained in intelligence reports that the FBI disseminates. The OIG's reporting requirement is set forth in Section 702(*l*)(2)(B), which provides, in relevant part:

> (U) (B) with respect to acquisitions authorized under subsection (a), [the OIG] shall review the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting[.]

(U//FOUO) For analytical purposes, the OIG has separated the above provision into two issues, both of which are "with respect to acquisitions authorized under" Section 702(a): (1) How many intelligence reports did the FBI disseminate that contained a reference to a U.S. person identity; and (2) How many U.S. person identities did the FBI disseminate in response to requests to unmask such identities where they were not referred to "by name or title in the original reporting."

(U//FOUO) The FBI is also required to review and report on the identical information. However, rather than being required to provide "a review of the number" of intelligence reports containing this information, the FBI is required to conduct "an accounting of" the number of such intelligence reports. See Section 702(*l*)(3)(A)(i) & (ii). In addition, Section 702(*l*)(3)(A)(iv) requires the FBI to provide "a description of any procedures developed [by the Director of the FBI] and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under [Section 702(a)] acquire the communications of United States persons, and the results of any such assessments." While the statute provides

no time period for the OIG's review, the FBI is required to conduct an "annual review" of these issues.

(U//FOUO) In this section we discuss the FBI's annual reviews of these intelligence reporting issues. We then describe the OIG's review of these issues and provide our conclusions based on our review.

1. (U) FBI's Annual Reporting under Section 702(*l*)(3)(A)(i), (ii) and (iv)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted][124] (S) b1, b3, b7E

[123] (U//FOUO) As noted above, the FBI did not submit its 2010 and 2011 annual reports until May 22, 2012, after it had reviewed a draft of the OIG's report.

[124] (U//FOUO) In September 2011 the Operations Attorney moved to another position in the OGC and was no longer responsible for advising the 702 Team on Section 702 matters. (Cont'd.)

[redacted] (S) b1 b3 b7E

[redacted] (S) b1 b3 b7E

(U//FOUO) As described below, this absence of guidance was reflected in the varying and sometimes inconsistent approaches FBI witnesses took in applying the central elements of the Section 702 reporting requirements to specific intelligence reports we presented to them during the OIG's review.

2. (U//FOUO) OIG Review of the Number of Disseminated Intelligence Reports Containing a Reference to a U.S. Person Identity

[redacted] (S) b1 b3 b7E

Another OGC attorney is now advising CXS on operational matters and the Operations Attorney is no longer responsible for drafting the FBI's annual reports.

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

(S) b1, b3, b7E

[125] (U//FOUO) The OIG's approach to identifying references to U.S. person identities for reporting purposes is similar to the approach set forth in the Attorney General Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons, which instructs that to be a U.S. person identity, "the information must discuss or refer to the U.S. person by name (or nickname or alias), rather than merely including potentially identifying information such as an address or telephone number that requires additional investigation to associate with a particular person. The Guidelines further state that "in most instances it will be necessary to use the context and circumstances of the information pertaining to the individual in question to determine whether the individual is a U.S. person." Id. at p. 2.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

126 [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

a. (U//FOUO) USPER Reports

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(TS)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

b. (U//FOUO) Non-USPER Reports

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

This issue is of particular relevance to 702 acquisitions [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1,
b3,
b7E

[redacted] (S)

b1, b3,
b7E

[redacted] (S)

b1, b3,
b7E

[redacted]

129

(S)

b1,
b3,
b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

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[130] ~~(TS//SI//NF)~~ The Operations Attorney stated that he had discussions with NSA OGC attorneys regarding their view of what constitutes a reference to a U.S. person identity for purposes of their SMPs. He stated, "They started with the notion that [a U.S. provider domain name] constitutes a U.S. person reference," but that this approach proved unworkable. The NSA's Minimization Procedures for Section 702 Acquisitions in effect during the OIG's review period incorporate the FISA statute's definition of "United States person," just as the FBI's SMPs do. See NSA Minimization Procedures, [redacted] (TS) However, the NSA minimization procedures provide additional guidance regarding what constitutes a U.S. person identity: b1, b3, b7E

> ~~(S//SI//NF)~~ Identification of a United States person means the name, unique title, address, or other personal identifier of a United States person in the context of activities conducted by that person or activities conducted by others that are related to that person. A reference to a product by brand name, or manufacturer's name or the use of a name in a descriptive sense, e.g., "Monroe Doctrine," is not an identification of a United States person.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b6, b7C b7E

[redacted] (S) b1, b3, b6, b7C b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

3. (U//FOUO) Disseminations of Previously Undisclosed U.S. Person Identities

(U//FOUO) As noted at the outset of this section, Section 702(*l*)(2)(B) also requires the OIG to review, "with respect to acquisitions authorized under subsection (a), . . . the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting[.]" The FBI similarly is required to provide an accounting of this same information in its annual reports under Section 702(*l*)(3)(A)(ii).

(U//FOUO) The OIG requested this information from the FBI. In late 2010, the FBI provided the following information to the OIG:

[redacted] (S)

b1, b3, b7E

(U//FOUO) The Assistant Program Coordinator told the OIG in January 2011 that the 702 Team had never been audited on this information and therefore had not been keeping track of it. The Operations Attorney stated that he is working on ideas for tracking this information on an ongoing basis so that "we don't have to go back and reconstruct it every year."

[redacted] (S)

b1, b3, b7E

[redacted] (S) b1, b3, b7E

VI. (U) OIG Analysis

~~(S//NF)~~ In assessing the FBI's post-targeting activities, the OIG took into account the fact that the FBI did not begin retaining and disseminating 702-acquired information until October 2009, over a year after it began targeting selectors [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

A. ~~(S//NF)~~ FBI Policies for Dual Routing Requests and Retention of Section 702-Acquired Data

~~(S//NF)~~ [redacted] (S) b1, b3, b7E

133 [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

B. (U//FOUO) Minimization and Dissemination Issues

~~(S//NF)~~ In this section we present our findings regarding the FBI's application of the SMPs and FBI guidance for minimizing and disseminating 702-acquired information. As noted, because the FBI did not begin to generate intelligence reports until close to the end of the OIG's review period, our review of this activity is based on a relatively small number of reports.

1. ~~(S//NF)~~ Maintenance of Disseminations Containing Section 702-Acquired Information

[redacted] (S) b1, b3, b7E

[134] (U//FOUO) The version of this report that has been distributed outside the Department of Justice contains redactions in this sentence based on the Department's assertion of the attorney-client privilege.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

C. (U//FOUO) OIG and FBI Reviews under Section 702(l)(2) and (3)

[redacted] (S) b1, b3, b7E

135 [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ The FBI is required by Section 702(*l*)(3)(A)(i) to conduct an annual accounting of the same information. [redacted] (S) b1, b3, b7E

(U//FOUO) Based the analysis we conducted, we provide two observations about this reporting requirement, as well as some suggestions for how the FBI should approach its own statutorily required reporting obligations.

(U//FOUO) First, the oversight and accounting objectives of Section 702(*l*)(2) and (3) are important and should be achieved in a timely manner. For this reason, we were concerned that as of February 2012, the FBI had not yet met its statutorily mandated annual accounting of intelligence reports that it disseminated as far back as December 2009.[136]

[redacted] (S) b1, b3, b7E

[136] (U//FOUO) As noted above, the FBI did not submit its 2010 and 2011 annual reports until May 22, 2012, after it had reviewed a draft of the OIG's report.

(S)
b1, b3, b7E

(S)
b1, b3, b7E

b1, b3, b7E
(S)

(S)
b1, b3, b7E

(S)
b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

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(U) CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

(U//FOUO) In this chapter we present the OIG's conclusions and recommendations based on our review of the FBI's use of Section 702 authority through February 2010 for targeting activities and through April 2010 for post-targeting activities.

I. (U) FBI Targeting Activities Under Section 702

~~(S//NF)~~ The OIG's review and analysis of the FBI's targeting activities under Section 702 during our review period is described in Chapter Three of this report. We assessed the FBI's performance of its two fundamental responsibilities under its FISA Court-approved targeting procedures: to review and evaluate the sufficiency of the NSA's foreignness determinations; and to [redacted] (S) b1, b3, b7E

A. (U//FOUO) FBI's Application of its Targeting Procedures

~~(S//NF)~~ The FBI applies its targeting procedures to accounts that have been nominated to it for a [redacted] (sometimes referred to as [redacted] after the NSA has applied its own targeting procedures and concluded that the users of the accounts are non-U.S. persons reasonably believed to be located outside the United States. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

~~(S//NF)~~ To implement the general requirements of its targeting procedures, the FBI developed [redacted] (S) which provide the 702 Team step-by-step procedures for processing NSA [redacted] To assess how the FBI met its principal obligations under the targeting procedures, the OIG reviewed both the [redacted] (S) themselves and how the [redacted] were applied in practice. (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

1. ~~(S//NF)~~ The FBI's Review and Evaluation of the Sufficiency of the NSA's Foreignness Determinations

~~(S//NF)~~ The FBI is required by its targeting procedures to review and evaluate the sufficiency of the NSA's explanation for its reasonable belief that the user of the nominated account is located outside of the United States, and the information that the NSA provides concerning the user's non-United States person status (the NSA's foreignness determination). [redacted] (S) b1, b3, b7E

[redacted]

[redacted] (S) b1, b3, b7E

[redacted]

[redacted] (S) b1, b3, b7E

a. ~~(S//NF)~~ **The** [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted]

[140] ~~(S//NF)~~ The NSA's targeting procedures remained unchanged throughout the OIG's review period.

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

b. ~~(S//NF)~~ [redacted] Information b7E

~~(S//NF)~~ The OIG also determined that a relatively small percentage of NSA nominations were predicated on foreignness explanations that used data older than one year. FBI witnesses generally agreed that foreignness information that was at least 1 year old raised questions about the sufficiency of the NSA's foreignness explanation, yet the OIG found no indication the 702 Team ever contacted the NSA for additional, possibly more recent information when asked to approve such nominations.

~~(S//NF)~~ Both the NSA and the FBI told the OIG that the information on the NSA's selector sheets represents the most current information available to the NSA at the time of nomination. However, we determined through our statutorily mandated review of FBI [redacted] that (S) the NSA sometimes develops more recent information about a targeted user's eligibility for 702 coverage after the nomination has been submitted [redacted] (S) b1, b3, b7E [redacted] Given the FBI's obligation to review the sufficiency of the NSA's foreignness determinations in consultation with the NSA, we believe the FBI should request the NSA to provide more current information in appropriate circumstances. We believe that this prudential measure can be implemented with a minimum of disruption to 702 Team operations, and in a manner that is consistent with the case-by-case nature of foreignness determinations.

(U//FOUO) Recommendation No. 1

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

2. ~~(S//NF)~~ **The FBI's** [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) Recommendation No. 2

[redacted] (S) b1, b3, b7E

3. ~~(S//NF)~~ The FBI's Practice for [redacted] (S) b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

[redacted] (TS)

b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) Recommendation No. 3

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

B. (U//FOUO) FBI's Compliance with its Annual Reporting Requirements under Section 702(*l*)(3)(A)(iii)

(U//FOUO) The FBI is required to submit annual reports to Congress on its Section 702 targeting activities. Specifically, "with respect to acquisitions authorized under [Section 702(a)]," the FBI is required to provide "the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed[.]" Section 702(*l*)(3)(A)(iii). The OIG refers to acquisitions found to be ineligible under Section 702 and that meet this statutory criterion as "reportable incidents."

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) The OIG's review period covered all of the FBI's 2009 reporting period and a portion of its 2010 reporting period. The OIG's findings

[141] (U//FOUO) On May 22, 2012, the FBI transmitted two annual reports to Congress that covered the 2010 and 2011 reporting periods, respectively. The OIG received copies of these documents but was unable to fully assess their contents prior to releasing this report.

indicate that the FBI's annual report for the 2009 reporting period was deficient because we found several acquisitions that according to the data we reviewed met the statutory reporting criteria but which were not reported by the FBI in its first annual report.[142]

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

142 [redacted] (S) b1, b3, b7E

[143] (U//FOUO) As noted above, the FBI did not submit its 2010 and 2011 annual reports until May 22, 2012, after it had reviewed a draft of the OIG's report.

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) Recommendation No. 4

[redacted] (S) b1, b3, b7E

(U//FOUO) Recommendation No. 5

[redacted] (S) b1, b3, b7E

II. (U//FOUO) FBI Post-Targeting Activities

[redacted] (S) b1, b3, b7E

[redacted] (S)

b1,
b3,
b7E

A. ~~(S//NF)~~ FBI Policies for Dual Routing Requests and Retention of Section 702-Acquired Data

[redacted] (S)

b1,
b3,
b7E

~~(S//NF)~~ [redacted] (S)

b1,
b3,
b7E

[redacted] (TS)

b1,
b3,
b7E

144

144 ~~(S//NF)~~ As the lead collection agency in the 702 Program, the NSA has the primary obligation to review the contents and the technical data from 702-acquired communications to ensure that the targeted users remain non-U.S. persons outside of the United States and

(Cont'd.)

therefore eligible for 702 coverage. The FBI is not explicitly required by its SMPs to review the 702 data that it retains.

[redacted] (TS) b1, b3, b7E

[redacted] (TS) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

1. (~~S//NF~~) Maintenance of Disseminations Containing 702-Acquired Information

[redacted] (S) b1, b3, b7E

2. [redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

(U//FOUO) Recommendation No. 6

[redacted] (S) b1, b3, b7E

C. (U//FOUO) FBI's Compliance with its Annual Reporting Requirements under Section 702(l)(3)(A)(i) and (ii)

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

[redacted] (S) b1, b3, b7E

145 [redacted] (S) b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

(S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

(U//FOUO) Recommendation No. 7

[redacted]

b7E

[redacted]

146 [redacted] (S)

b1, b3, b7E

[redacted] (S)

b1, b3, b7E

APPENDIX

U.S. Department of Justice

Federal Bureau of Investigation

Office of the General Counsel

Washington, D.C. 20535

August 17, 2012

The Honorable Michael E. Horowitz
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

(U) Dear Inspector General Horowitz:

(U) The Federal Bureau of Investigation (FBI) appreciates the opportunity to review and respond to the Office of the Inspector General (OIG) audit report entitled, *A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Amendments Act of 2008*. With respect to the OIG's recommendations, the FBI is pleased to report that it is already implementing measures to resolve the issues underlying each and every recommendation. Enclosed are the FBI's specific responses to the recommendations.

(U) The FBI appreciates OIG's oversight and independence. We were thus pleased that the report notes the "commendable deliberation, thoroughness, and professionalism" demonstrated by the FBI in its implementation of the Section 702 authority. The FBI takes pride in ensuring that its actions are consistent with the relevant statute and the Constitution of the United States.

(U) On behalf of the FBI, I thank you for the professionalism your staff exhibited as they worked with our representatives to complete this report. If I may be of further assistance in this matter, please do not hesitate to contact me.

Sincerely yours,

Andrew Weissmann by PNF

Andrew Weissmann
General Counsel

Enclosure

(U) **FBI Responses to the OIG Recommendations in *A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Amendments Act of 2008***

(S) [redacted] b1 b3

(U) **FBI Response:** The FBI concurs with this recommendation.

(S) [redacted] b1 b3

* * *

(S) [redacted] b1 b3

(U) **FBI Response:** The FBI concurs with this recommendation.

(S) [redacted] b1 b3

* * *

(S) [redacted] b1 b3

(S) [redacted] b1 b3

(U) **FBI Response:** The FBI concurs with this recommendation.

(S) [redacted] b1 b3

* * *

(S) [redacted] b1 b3

(U) **FBI Response:** The FBI concurs in part with this recommendation.

(S) [redacted] b1 b3

* * *

(S) [redacted] b1 b3

(U) **FBI Response:** The FBI concurs with this recommendation.

(S) [redacted] b1 b3

* * *

(S) [redacted] b1 b3

(U) **FBI Response:** The FBI partially concurs with this recommendation.

(S) [redacted] b1 b3

* * *

(U) **Recommendation 7:** "The FBI OGC should promptly issue guidance for meeting its annual reporting requirements under Section 702(*l*)(3)(A). The guidance should define the phrases "with respect to" and "reference to a United States-person identity" for statutory reporting purposes, and clarify the circumstances under which metadata constitutes a reference to a U.S. person identity, so that the FBI can fulfill these annual reporting requirements in a timely manner."

(U) **FBI Response:** The FBI concurs with this recommendation.

(U) The FBI intends to update its SOP to define the phrases "with respect to" and "reference to a United States-person identity" for statutory reporting purposes. Further, the FBI will issue guidance clarifying the circumstances under which metadata constitutes a reference to a U.S. person identity.

U.S. Department of Justice

National Security Division

~~SECRET//NOFORN~~

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

August 24, 2012

The Honorable Michael E. Horowitz
Inspector General
United States Department of Justice
Washington, D.C. 20530

Re: Department of Justice Office of Inspector General's (OIG) A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008

Dear Inspector General Horowitz:

Thank you for the opportunity to comment on the Department of Justice Office of Inspector General's (OIG) *A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008*. The scope and detail of this report demonstrate the thoroughness and care with which OIG has conducted its review of this important, and complex, program. NSD concurs with the report's finding that the Federal Bureau of Investigations (FBI) has "implemented its targeting procedures with commendable deliberation, thoroughness, and professionalism," and appreciates the recommendations OIG has formulated to improve the implementation of the FBI's targeting and minimization procedures. (U)

NSD, in collaboration with the Office of the Director of National Intelligence (ODNI), is committed to ensuring that the Intelligence Community's use of section 702 is consistent with the law, orders of the Foreign Intelligence Surveillance Court, and the protection of the privacy and civil liberties of Americans. NSD and ODNI recognize the important role that your office serves to help ensure that section 702 authorities are implemented in a manner that reflects a

Unclassified when attachments are removed

Classified by: Lisa O. Monaco, Assistant Attorney General, National Security Division, Department of Justice
Reason: 1.4(c)
Declassify on: 24 August 2037

focused and concerted effort by FBI personnel to comply with the statute's requirements. Attached are NSD's responses to each of the recommendations set forth in the report. (U)

Please let me know if NSD can be of further assistance on this or any other issue. (U)

Sincerely,

Lisa O. Monaco
Assistant Attorney General
for National Security

Attachment:
National Security Division Department of Justice Office of Inspector General's (OIG) A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008

National Security Division
Department of Justice Office of Inspector General's (OIG)
A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008.

Recommendation 1: (U)

(S) [redacted] b1 b3

Response: (U)

(S) [redacted] b1 b3

Recommendation 2: (U)

(S) [redacted] b1 b3

Response: (U)

NSD concurs with this recommendation. (U)

Recommendation 3: (U)

(S) [redacted] b1 b3

Response: (U)

(S) [redacted] b1 b3

Recommendation 4: (U)

(S) [redacted] b1 b3

Response: (U)

NSD agrees that the FBI should ensure that its reporting obligations have been fulfilled and that the FBI should track statutorily reportable obligations as they arise. (U)

Recommendation 5: (U)

(S) [redacted] b1 b3

Response: (U)

NSD concurs with this recommendation. (U)

Recommendation 6: (U)

(S) [redacted] b1 b3

Response: (U)

(S) [redacted] b1 b3

(S) [redacted] b1 b3

Recommendation 7: (U)

The FBI OGC should promptly issue guidance for meeting its annual reporting requirements under Section 702(l)(3)(A). The guidance should define the phrases "with respect to" and "reference to United States-person identity" for statutory reporting purposes, and clarify the circumstances under which metadata may constitute a reference to a U.S. person identity, so that the FBI can fulfill these annual reporting requirements in a timely manner. (U)

Response: (U)

NSD concurs with this recommendation. (U)

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Office of the Inspector General
U.S. Department of Justice
www.justice.gov/oig

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