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SEMIANNUAL ASSESSMENT OF COMPLIANCE WITH FISA AMENDMENTS ACT
PROCEDURES AND GUIDELINES, SUBMITTED BY THE ATTORNEY GENERAL AND
THE DIRECTOR OF NATIONAL INTELLIGENCE

Reporting Period: September 4, 2008 - November 30, 2008

March 2009


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(U) Semiannual Assessment of Compliance with FISA Amendments Act Procedures and Guidelines, Submitted by the Attorney General and the Director of National Intelligence

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(U) INTRODUCTION

(U) The FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2438 (hereinafter “FAA” or “the Act”), requires the Attorney General and the Director of National Intelligence to assess compliance with certain procedures and guidelines under the FAA, and to submit such assessments to the Foreign Intelligence Surveillance Court (FISC) and relevant congressional committees at least once every six months. As required by the Act, a team of oversight personnel from the Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI) have conducted compliance reviews to assess whether the authorities under the FAA have been implemented in accordance with applicable procedures and guidelines, described below. This report sets forth DOJ’s and ODNI’s first, joint compliance assessment under the FAA, covering the period September 4, 2008, through November 30, 2008 (the “reporting period”).¹

(U) Section 702(l) of the FAA provides:

Not less frequently than once every 6 months, the Attorney General and Director of National Intelligence shall assess compliance with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and guidelines adopted in accordance with subsection (f) and shall submit each assessment to—

- (A) the Foreign Intelligence Surveillance Court; and
- (B) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution—(i) the congressional intelligence committees; and (ii) the Committees on the Judiciary of the House of Representative and the Senate.

(U) The targeting procedures referred to in subsection (d) are procedures that the Attorney General must adopt, in consultation with the Director of National Intelligence, “that are reasonably designed to (A) ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (B) 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)(2) requires that these procedures be reviewed by the FISC.

¹ (U) This report accompanies the Semiannual Report of the U.S. Department of Justice Concerning Acquisitions under Section 702 of the FISA Amendments Act of 2008, which is submitted pursuant to Section 707 of the FAA and covers the same reporting period. That report was submitted to Congress on March 5, 2009.

(U) The minimization procedures referred to in subsection (e) must also be adopted by the Attorney General in consultation with the Director of National Intelligence. They must meet the definition of “minimization procedures” under Section 101(4) or 301(4), as appropriate, of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (hereinafter “the FISA”).² They must also be reviewed and approved by the FISC.

(U) The guidelines referred to in subsection (f) similarly must be adopted by the Attorney General, in consultation with the Director of National Intelligence. Subsection (f) requires that these guidelines be provided to certain congressional committees. The purpose of these guidelines is to ensure compliance with the limitations set forth in section 702(b), which are as follows:

An acquisition authorized under subsection (a)—

- (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
- (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;
- (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
- (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
- (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

These guidelines, the Attorney General’s Guidelines for the Acquisition of Foreign Intelligence Information Pursuant to the Foreign Intelligence Surveillance Act of 1978, as Amended (the Attorney General’s Acquisition Guidelines), were adopted on August 5, 2008.

² (U) Section 101(f) provides: “minimization procedures, with respect to electronic surveillance, means--

- (1) specific procedures, which shall be adopted by the Attorney General, 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;
- (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1), shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;
- (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and
- (4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 102(a) [50 USCS § 1802(a)], procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 105 [50 USCS § 1805] is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.”

[REDACTED]

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[REDACTED]

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(U) Although the FAA is a newly enacted statute, the processes used to implement the FAA's authorities – including the use of foreign targeting and minimization procedures, and the oversight of the use of those authorities – share key elements with the processes used under the Protect America Act of 2008, Pub. L. No. 110-55, 121 Stat. 552 (hereinafter “the PAA”). Like the FAA, the PAA required the use of targeting and minimization procedures, and the targeting procedures under both the FAA and PAA require the conduct of joint compliance reviews by ODNI and DOJ. Those compliance reviews were conducted at periodic intervals under the PAA.⁶ They involved thorough reviews of documentation, interactions with program personnel, agency oversight personnel, compliance incident reports, regular onsite visits, and reports provided to congressional committees.⁷ This experience under the PAA – by both agency and oversight personnel – has provided an important level of continuity to those involved in the implementation of FAA authorities. That said, the FAA has added significant new requirements – including, but not limited to, this semiannual assessment and the Attorney General's Acquisition Guidelines.

(U) This assessment first provides a detailed description of the process by which the authorities granted under the FAA are implemented, focusing specifically on the targeting

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4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

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⁶ (U) Unlike the FAA, the PAA did not require that the minimization procedures be approved by the FISC; nor did it require that compliance assessments be provided to congressional committees. However, the government based the PAA minimization procedures on minimization procedures that the FISC had previously approved in other contexts, and submitted regular compliance reports (monthly/bimonthly) to congressional committees.

procedures. It then describes the conduct of the compliance assessments themselves – explaining the methodology used by the joint DOJ and ODNI team to review the measures being used to implement the authorities, and assess compliance with the procedures and guidelines. These descriptions are necessary to provide context for the findings.

(U) In sum, this assessment finds that the procedures have been implemented with care, reflecting a focused and concerted effort by agency personnel to comply with the requirements of the FAA. The joint oversight team has observed a small number of compliance incidents during the reporting period. The joint oversight team has been informed that information collected as a result of these incidents has been or is being purged from data repositories. Finally, the team assesses that these incidents do not represent any intentional attempt to circumvent or violate the procedures required by the Act. It should be noted, of course, that even a small number of incidents can have the potential of carrying broader implications. Accordingly, this assessment groups these incidents into certain categories and examines them in order to better understand the broader implications of each category and determine whether measures have been implemented to prevent recurrences. The oversight team will review the efficacy of those measures during the next reporting period. Moreover, the oversight team is evaluating, on an ongoing basis, the manner in which it conducts oversight to find areas to make oversight more efficient and effective.

(U) IMPLEMENTATION OF FAA AUTHORITIES - OVERVIEW

~~(S)~~ Roles [REDACTED]

~~(TS//SI//NF)~~ [REDACTED] b1

⁸ (U) “The term ‘electronic communication service provider’ means-- (A) a telecommunications carrier, as that term is defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153); (B) a provider of electronic communication service, as that term is defined in section 2510 of title 18, United States Code; (C) a provider of a remote computing service, as that term is defined in section 2711 of title 18, United States Code; (D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored; (E) a parent, subsidiary, affiliate, successor, or assignee of an entity described in subparagraph (A), (B), (C), or (D); or (F) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).”

⁹ (U) Section 101(i) of FISA defines United States person as follows: “a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act [8 USCS § 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 subsection (a)(1), (2), or (3).

[REDACTED]

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[REDACTED]

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(TS//SI//NF) Once information is collected [REDACTED], it is subject to FISC-approved minimization procedures. NSA's minimization procedures set forth specific measures NSA must take when it acquires, retains, and/or disseminates non-publicly available information about United States persons.

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[REDACTED]

(S) FBI is authorized [REDACTED] to acquire foreign intelligence information [REDACTED]

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[REDACTED]

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[REDACTED]

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(S) NSA's Targeting Procedures.

(S) NSA's targeting procedures address, among other subjects, the manner in which NSA will determine that a person targeted under the FAA is a non-United States person reasonably believed to be located outside the United States, the [REDACTED], and the documentation required. The procedures provide that NSA's targeting determinations should be made in light of the totality of the circumstances based on the information available [REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

¹⁴ (S) NSA has developed a series of [REDACTED] factors to facilitate training and tasking for its analysts to use when identifying [REDACTED] and meeting documentation requirements under the "totality of the circumstances" requirement. These factors are based on the three categories described in the targeting procedures [REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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(U) **United States Person Status.**

(S) With respect to the United States person status [REDACTED], the procedures provide that in many cases, the information NSA reviews to determine the location of an individual may also bear on the non-United States person status of that individual. [REDACTED] b3

[REDACTED] b3

[REDACTED]

[REDACTED] b1 b3

[REDACTED]

[REDACTED] b1 b3

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18 [REDACTED] b1

[REDACTED]

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(U) **Documentation.**

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[REDACTED]

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The citation is a reference that identifies the source of the information, [REDACTED], enabling oversight personnel to locate and review the information that led the analyst to his/her reasonable belief.

[REDACTED]

[REDACTED]

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[REDACTED]

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(S) The source records cited to by analysts [REDACTED] are contained in a variety of NSA data repositories. These records are retrieved by NSA when requested by the DOJ/ODNI oversight team, to verify determinations [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U) **Oversight and Compliance.**

(S) The procedures provide that NSA's Signals Intelligence Directorate (SID), with NSA's Office of General Counsel (OGC), will deliver training on the procedures. They further provide that SID Oversight and Compliance will conduct oversight activities and make any necessary reports, including those relating to incidents of non-compliance, to the NSA Inspector General and NSA's OGC, and will ensure that necessary corrective actions are taken to address any identified deficiencies. SID Oversight and Compliance is to conduct spot checks of targeting decisions and disseminations to ensure compliance with procedures.

(S) First under the PAA and now under the FAA, NSA has instituted internal training programs, access control procedures, standard operating procedures, compliance incident reporting measures, and similar processes to implement the requirements of the targeting procedures. Only analysts who have received certain types of training and authorizations are provided access to the FAA program. They must review an NSA Office of General Counsel (OGC) training program,

and must take an examination. The databases they use are subject to audit/review by SID Oversight and Compliance, as well as by the NSA's Office of Inspector General (OIG). They may consult standard operating procedures for guidance, as well as supervisors, SID Oversight and Compliance personnel, and NSA OGC attorneys.

(S) In addition, the procedures provide that DOJ and ODNI will conduct oversight of NSA's exercise of authority under Section 702 of the Act, including periodic reviews by DOJ and ODNI personnel to evaluate the implementation of the procedures at least once every sixty days (further discussed below).

(S) Finally, the procedures call for NSA to report to DOJ and ODNI any incidents of non-compliance with the procedures by NSA personnel that result in the intentional targeting of a person reasonably believed to be located in the United States or the intentional acquisition of any communication in which the sender and all intended recipients are known at the time of acquisition to be located within the United States, with a requirement to purge any resulting collection. NSA must also report any incidents of non-compliance, [REDACTED]

Additionally, if NSA learns, after targeting a person reasonably believed to be outside the United States, that the person is inside the United States, or if NSA learns that a person who NSA reasonably believed was a non-United States person is in fact a United States person, NSA must terminate the acquisition, and treat any

acquired communications in accordance with its minimization procedures. In each of the above situations, NSA must report the incident to DOJ and ODNI within seven days of learning of the incident.

(S) FBI Targeting Procedures.

FBI is authorized to acquire foreign intelligence information [REDACTED]

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[REDACTED]

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(U) Documentation.

[REDACTED]

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(U) **Oversight and Compliance.**

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[REDACTED]

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(U) **Minimization.**

(S) As referenced above, once [REDACTED] has been targeted for collection, non-publicly available information collected as a result of these taskings that concerns United States persons and is not foreign intelligence information must be minimized. The FISC-approved minimization procedures require such minimization in the acquisition, retention, and dissemination of foreign intelligence information. Although there are differences between the minimization procedures approved under the FAA and the minimization procedures approved under prior court orders and to the procedures implemented under the PAA, as a general matter, minimization under the FAA is similar in most respects to minimization under other FISA orders. [REDACTED] b1

(U) **CONDUCT OF COMPLIANCE ASSESSMENT ACTIVITIES**

(U) Reviews of compliance with FAA procedures and guidelines have benefited from many months of experience with such reviews under the PAA. The personnel conducting the reviews – and the personnel implementing the authorities – have over time become increasingly familiar with the terminology, documentation, databases, personnel, and processes involved, thus facilitating reviews and allowing all concerned to focus more readily on specific issues requiring attention, rather than on understanding the basics, or on addressing matters of formatting or presentation or consistency.

[REDACTED]

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[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

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[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

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[REDACTED]

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(S) Review Process - NSA.

(S) The review process begins when NSA electronically sends, prior to the visit date, the [REDACTED] tasked during the review period to DOJ and ODNI. DOJ attorneys conduct a 100% review of the [REDACTED] and prepare a detailed report of their findings, which they share with the ODNI members of the review team. During their reviews, DOJ attorneys seek to determine whether the [REDACTED] meet the documentation standards required by NSA's targeting procedures and provide sufficient information for the reviewers to ascertain the basis for NSA's foreignness determinations. For those [REDACTED] that, on their face, meet standards and provide sufficient information, no further supporting documentation is requested for the onsite review. DOJ attorneys then identify the [REDACTED] that, based on initial review, did not meet documentation standards or otherwise did not provide sufficient information, and set forth their explanations for each of those [REDACTED]. The review team then focuses on those [REDACTED] during the upcoming review.

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(S) This initial review serves an important function for the review team. By reviewing the documentation "off site," the DOJ attorneys can analyze the [REDACTED] with care, and make initial review assessments based on the type of information set forth on the [REDACTED] based on the type of determinations made at NSA. [REDACTED]

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(S) During the onsite review, the team examines [REDACTED] together with NSA SID personnel and NSA analysts. The team has access to [REDACTED] and interacts directly with analysts to ask questions, identify issues, clarify ambiguous entries, and provide guidance on areas of potential improvement. Interaction continues following the onsite reviews in the form of email and telephonic exchanges to answer questions and clarify issues.

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(S) Following the completion of a 60-day review cycle, DOJ prepares a report documenting the results of the review for that period. This report is provided to congressional committees as an attachment to the Section 707 Report. It documents the relevant time period of the review, the date of the onsite visit, the agencies reviewed, the number and types of [REDACTED], and a detailed summary of the findings for that review period. These reports contain specific details – without providing [REDACTED] – that explain, [REDACTED], the issues addressed by the oversight team as part of its review during that period, and the outcome of each issue.

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(S) Review Process – FBI.

(S) For FBI, the review team schedules a visit in advance with FBI, so that FBI can prepare [REDACTED]

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[REDACTED]

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(U) Review Process – Minimization.

(S) During the onsite visits to NSA, the team reviews [REDACTED] verify compliance with minimization procedures. [REDACTED]

[REDACTED]

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(U) Review Process – Compliance Incident Reports.

(S) The targeting procedures require that incidents of non-compliance be reported to the DOJ and ODNI within seven days of the reporting agency learning of the incident. These reports are reviewed by the team, with follow-up questions asked for clarification and action.

(U) COMPLIANCE ASSESSMENT – FINDINGS

(U) This assessment finds that the procedures have been implemented with care, reflecting a focused and concerted effort by agency personnel to comply with the requirements of the FAA. The personnel involved in implementing the authorities are appropriately focused on directing their efforts at non-United States persons reasonably believed to be located outside the United States. Processes have been put in place – mostly inherited, with improvements over time, from the PAA – to implement these authorities and to impose internal controls for compliance and verification purposes.

(S) There have been a small number of compliance incidents during the reporting period (a very small percentage of overall activity). Information collected as a result of these incidents has been or is being purged from data repositories. The DOJ and ODNI oversight team does not believe

these incidents represent an intentional attempt to circumvent or violate the procedures required by the Act. Because even a small number of incidents can have the potential of carrying broader implications, this assessment groups these incidents into certain categories in order to identify patterns underlying these incidents and to assess whether the agency involved has implemented measures to prevent recurrences. The oversight team will review the efficacy of those measures during the next reporting period.

(U) Compliance Incidents – General.

(S) The compliance incidents identified in this reporting period have been separately reported in detail in the Semiannual Report of the U.S. Department of Justice Concerning Acquisition under Section 702 of the FISA Amendments Act of 2008, March 2009, submitted as required by section 707(b)(1) of the FAA (the “Section 707 Report”). This assessment does not reiterate the compliance incidents set forth in the Section 707 Report. It does, however, examine those incidents to assess broader implications and to determine whether the agency’s corrective measures address those implications.

(U) Number of Compliance Incidents.

[REDACTED]

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[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

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(U) A low number of incidents is, of course, a strong, positive indication of compliance. Likewise, a very low compliance incident rate is a strong, positive indication of compliance. As such, the low number of incidents and the very low incident rate should be kept in mind throughout this assessment. However, this compliance assessment will focus on and examine the incidents themselves.

(S) It is also important to note that, in the judgment of the oversight team, the conduct of the compliance reviews, over time (extending back to the initiation of the program under the PAA), has also helped reduce the number of incidents. For example, the collective experience of program personnel and oversight teams in preparing taskings, reviewing documentation, providing follow-on guidance and training, clarifying ambiguities, emphasizing the importance of timely incident reporting and follow-up, and providing feedback to analysts, has, in the assessment of the oversight team, improved the quality and consistency of documentation, the timeliness of incident reporting, and the overall operation of the program from an oversight perspective.

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[REDACTED]

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²⁴ (U) Incident citations refer to the citations used in the Section 707 Report.

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(S) NSA should provide additional training and guidance to its analysts to further clarify differences between the scope of the current FAA [REDACTED] and what was permitted under the PAA, with respect to United States persons.

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[REDACTED]

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[REDACTED]

(S) Documentation Incidents.

(S) As described in the Section 707 Report, documentation incidents are not separately enumerated in the report, but rather, are summarized in compliance review memoranda prepared by DOJ following each on-site review. These memoranda detail the number and types of documents reviewed, the specific issues identified on a [REDACTED] basis, and how each issue was resolved during or following the on-site review. Each review memorandum is attached to the Section 707 Report.

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(S) In general, the oversight team found the agencies' documentation practices to be sound and consistent with applicable requirements [REDACTED]

[REDACTED]

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(S) That said, documentation issues were identified and addressed during the reporting period, as set forth in the review memoranda. For example:

- *Questions about information on [REDACTED].* E.g., unclear, unfamiliar, or ambiguous source citations in [REDACTED]; lack of information [REDACTED] [REDACTED]. These types of questions were resolved through review of appropriate documentation during onsite visits and direct interaction with agency

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personnel. Additional guidance and training are always helpful in reducing this type of documentation issue.

[REDACTED]

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Questions about the age of supporting documentation. The documentation reviews during the reporting period raised questions about the point at which supporting information becomes too old to be relied upon in making a foreignness determination. As stated in the review memoranda, no guidance has been established on this issue. DOJ, ODNI, and the agencies involved are working to address this issue [REDACTED]

[REDACTED]

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While these checks do not, of course, serve as a substitute for sound up-front targeting practices, they do provide additional safeguards.

[REDACTED]

[REDACTED]

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(U) Minimization Review.

(S) In conjunction with its onsite reviews at NSA, the oversight team reviewed [REDACTED] reports generated by NSA during the reporting period, [REDACTED]

The oversight team found that these reports had been properly minimized. [REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

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(U) Conclusions.

(U) First and foremost, the oversight team found no indications, either in its review of any of the reported acquisition incidents, or in its other reviews of documentation or its interactions with NSA personnel, of any intentional non-compliance with the targeting procedures, minimization procedures, or the Attorney General's Acquisition Guidelines. Moreover, the oversight team found, in its reviews and its interactions with agency personnel, due regard for the seriousness of the obligations and responsibilities involved and an appropriate focus on targets reasonably believed to be non-United States persons located overseas. The oversight team identified – through reporting or review – a small number of incidents representing a very small fraction of activity during the reporting period. This assessment has examined these incidents, reviewed their implications, identified measures taken by NSA to address them, and identified areas for further attention, which the team will continue to monitor. The review team is continuing its compliance assessment process and will look for areas to improve its own reviews to make them more efficient and effective.

[REDACTED]

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