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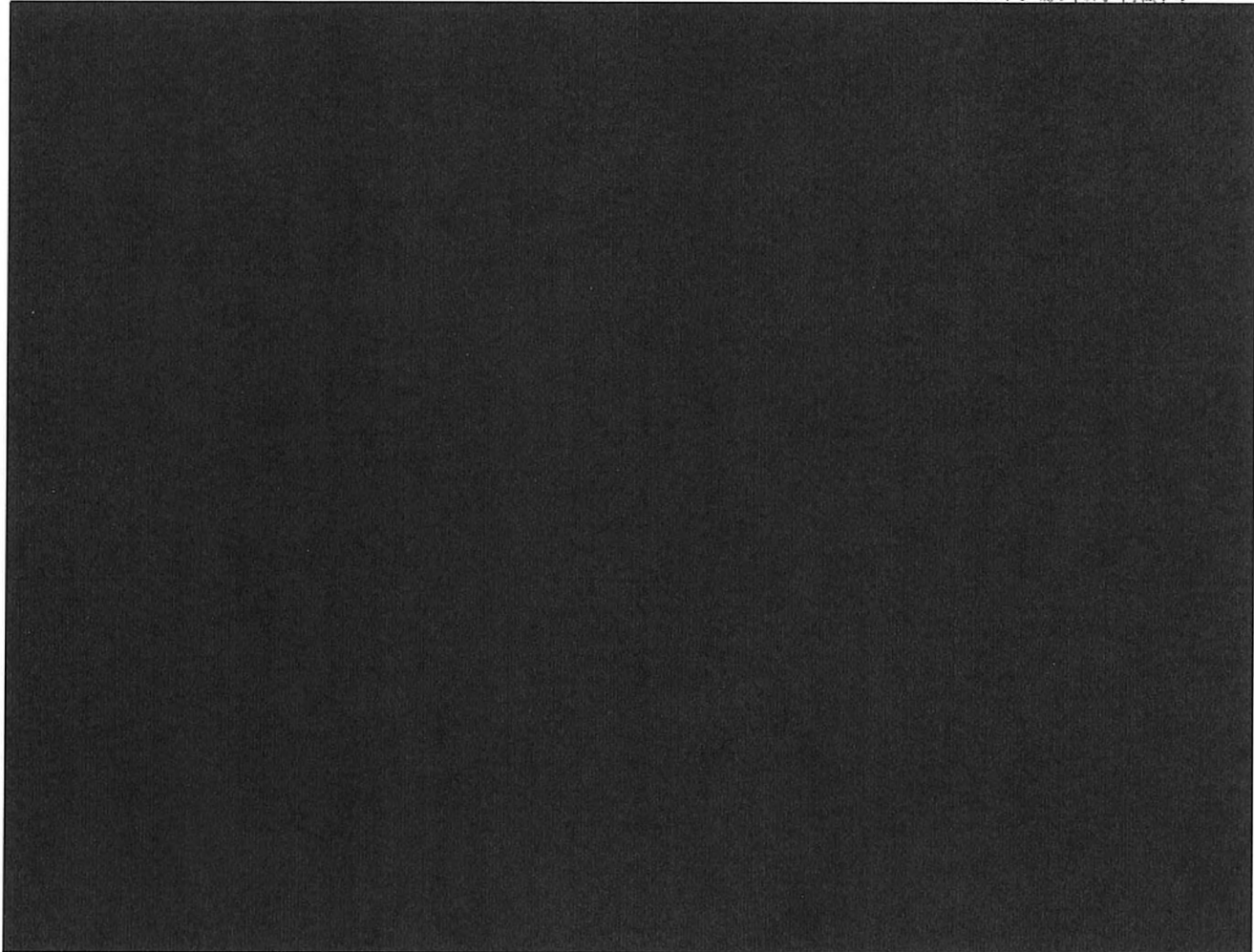
U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT 20 AUG 30 PM 4:12

WASHINGTON, D.C.

LEEANN FLYNN HALL



NOTICE OF CLARIFICATIONS

THE UNITED STATES OF AMERICA, through the undersigned Department of Justice attorney, respectfully submits the following clarifications for the record in the above-referenced matters. The first two clarifications below concern certain statements

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Classified by: Tashina Gauhar, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 30 August 2036

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made in documents previously submitted to this Court in the above-referenced matters.

The third and fourth clarifications below concern how the National Security Agency (NSA) will apply its section 702 minimization procedures to discrete communications within Multi-Communication Transactions (hereinafter "MCTs"). Specifically, outlined below is a multi-layered approach to help ensure that any United States person information contained within MCTs is treated in accordance with NSA's section 702 minimization procedures. This approach will not be altered without prior notice to this Court. ~~(TS//SI//NF)~~

I. CLARIFICATIONS

A. NSA Will Purge Any MCT Containing One or More Single, Discrete, Wholly Domestic Communications Upon Recognition. ~~(S)~~

As noted in the Government's submission of June 28, 2011, NSA does not intentionally acquire transactions containing wholly domestic communications, and has implemented [REDACTED] means which are reasonably designed to prevent the acquisition of such transactions. Notice of Filing of Government's Response to the Court's Supplemental Questions of June 17, 2011 (hereinafter "June 28th Submission") at 12. The June 28th Submission further asserted that "in the event NSA recognizes a wholly domestic communication^[1] which is not to, from, or about a tasked selector which it has

¹ As noted in the Government's June 28th Submission, the Government defined a "wholly domestic communication" to be a communication as to which the sender and all intended recipients are located within the United States. The Government further noted that it included within that term any discrete communication within a transaction where the sender and all intended recipients of the discrete

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unintentionally acquired in the course of conducting its Section 702 upstream Internet collection, NSA would handle the entire transaction in accordance with subsection 1806(i) and either purge it or, if appropriate, seek authorization from the Attorney General to retain it." *Id.* Accordingly, in the event that NSA's section 702 upstream collection of Internet communications resulted in the unintentional acquisition of a transaction containing a wholly domestic communication, NSA would purge the entire transaction upon recognition, unless the Attorney General authorized its retention after first determining that its contents indicated a threat of death or serious bodily harm to any person. ~~(TS//SI//NF)~~

To aid in the recognition of wholly domestic communications within an MCT, if an NSA analyst seeks to use a discrete communication within the MCT (for example, in a FISA application, intelligence report, or section 702 targeting), the analyst will first perform checks to determine the locations of the users of the electronic communications accounts/addresses/identifiers referenced in that discrete communication within the MCT to the extent reasonably necessary to determine whether that communication is wholly domestic. For example, if the "active user"² is a tasked selector, no checks need

communication were located in the United States at the time the communication was acquired. See June 28th Submission at 2. ~~(TS//SI//NF)~~

² As noted in the Government's filing on August 16, 2011, the Government defined the "active user" as follows: "[w]hen NSA acquires an Internet transaction between an individual using an electronic communications account/address/identifier and his/her service provider, that individual is the 'active user' for that transaction." NSA Characterization of Upstream Data: Process and Results, filed August 16, 2011 (hereinafter "August 16th Submission") at 4 n.13. ~~(TS//SI//NF)~~

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be done, because the user of the tasked selector, who by operation of the NSA targeting procedures is a non-United States person reasonably believed to be located outside the United States, would be either the sender or an intended recipient of each of the discrete communications contained within the MCT. If the active user is not a tasked selector, NSA would attempt to determine the active user's location;³ if that check indicates that the active user is located outside the United States, no further checks need be done, because the foreign-based active user would be either a sender or intended recipient of each of the discrete communications within the MCT. In the absence of a more efficient and effective means of recognizing the presence of a wholly domestic communication within an MCT, the Government submits that this process is reasonably designed to recognize and purge at the earliest practical point in the analytic process any unintentionally acquired wholly domestic communication. ~~(TS//SI//NF)~~

B. Clarification of Certain Information Contained within the Government's August 16, 2011 Submission. ~~(S)~~

In the August 16th Submission, the Government advised the Court that NSA conducted a manual review of a statistically representative sample of Internet communications acquired through NSA's section 702 upstream collection. As explained in the August 16th Submission, NSA identified 5,081 transactions within the representative sample as being MCTs. NSA determined that of those 5,081 MCTs, 4,847

³ To determine the location of the non-targeted active user, NSA would perform the same sort of [REDACTED] analysis it would perform before tasking an electronic communications account/address/identifier in accordance with its section 702 targeting procedures. ~~(TS//SI//NF)~~

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contained discrete communications believed to be to or from persons located outside the United States and thus are not believed to contain any wholly domestic communications.⁴ NSA further determined that 10 of the 5,081 MCTs appeared to contain at least one wholly domestic communication. However, NSA was unable to definitively determine whether the remaining 224 MCTs contained wholly domestic communications, because those MCTs lacked information sufficient to identify the active user or determine the active user's location. Nevertheless, NSA asserted that it had no basis to believe any of these 224 MCTs contained wholly domestic communications. ~~(TS//SI//NF)~~

As noted above, these 224 MCTs lack any definitive technical data or content that would enable NSA to characterize the communications within them as being wholly domestic. Despite the absence of such definitive information, it is nevertheless reasonable to presume that none of the discrete communications contained within these MCTs are wholly domestic. Specifically, each of these MCTs was acquired because it contained at least one discrete communication to, from, or about a tasked selector used by a person who, by operation of NSA's section 702 targeting procedures, is a non-U.S. person reasonably believed to be located outside the United States. With respect to MCTs that contain discrete communications to or from a tasked selector, it is reasonable

⁴ This figure 4,847 is the sum of 713 MCTs reviewed by NSA analysts as containing a tasked selector as the active user and 4,134 MCTs reviewed by NSA analysts as containing discrete communications believed to be to or from non-targeted persons located outside the United States. See August 16th Submission at 5 nn.15 & 16. ~~(TS//SI//NF)~~

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to presume, given the absence of information to the contrary, that the active user of the MCT is likewise a non-U.S. person reasonably believed to be located outside the United States. See *In re Directives to Yahoo!, Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, Docket No. 105B(g):07-01, Mem. Op. at 87 (USFISC Apr. 25, 2008) (hereinafter "Yahoo Directives Mem. Op.") (recognizing that "the vast majority of persons who are located overseas are non-United States persons and that most of their communications are with other, non-United States persons, who are located overseas") (footnote omitted). Similarly, because it is reasonable to presume that the active user of the MCT is a non-U.S. person reasonably believed to be located outside the United States, one can also reasonably presume, given the absence of information to the contrary, that the other persons with whom the active user has been in contact are also non-United States persons located outside the United States. ~~(TS//SI//NF)~~

Of note, an experienced team of NSA analysts manually reviewed the content of each of these 224 MCTs and did not observe any U.S. person information within any of the discrete communications contained therein. NSA analysts are trained to use their best judgment to recognize and identify U.S. person information that may be present within any SIGINT collection and to apply minimization procedures to such information as required by the authority under which that information was acquired.

While the technical information present for each of these transactions was not indicative of the location of the sender or all intended recipients of any communication other than

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those more specifically to or from NSA's tasked selector, none of the information or data intelligible to those analysts conducting the review was identifiable as U.S. person information. ~~(TS//SI//NF)~~

Moreover, with respect to MCTs acquired because they contain discrete communications about a tasked selector, the [REDACTED] means by which NSA ensures it does not intentionally acquire wholly domestic communications limits, in all but a minute percent of cases, the acquisition of MCTs to persons located outside the United States, who reasonably can be presumed to be non-United States persons. Thus, to the extent that the MCTs of those non-United States persons contain discrete communications that are not to, from, or about a tasked selector, those communications are unlikely to be to or from United States persons or persons located in the United States. *Id.* To be sure, the [REDACTED] means by which NSA ensures it does not intentionally acquire wholly domestic communications are not perfect, and it is possible that NSA may unintentionally acquire MCTs containing wholly domestic communications. Indeed, as previously explained to the Court, NSA was able to identify MCTs containing wholly domestic communications in the representative sample. NSA was able to do so, however, only because the communications in those MCTs bore recognizable indicia of being wholly domestic (i.e., they contained concrete information contrary to the presumption). The 224 MCTs here lack any such indicia.

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Accordingly, it is reasonable to presume that these 224 MCTs do not contain wholly domestic communications. ~~(TS//SI//NF)~~

C. Clarification Concerning How NSA Will Apply its Section 702 Minimization Procedures to Discrete Communications Within MCTs. ~~(S)~~

In order to help ensure that NSA intelligence analysts handle any United States person information they encounter within a discrete communication within an MCT⁵ in accordance with NSA's section 702 minimization procedures, NSA will apply the following multi-layered approach:

- NSA will train its analysts to recognize MCTs and how to appropriately handle the discrete communications contained within them, as further described below.
- NSA analysts seeking to use a discrete communication within an MCT (for example, in a FISA application, intelligence report, or section 702 targeting) will assess whether the discrete communication is to, from, or about a tasked selector.
 - If the discrete communication is to, from, or about a tasked selector, any U.S. person information in that communication will be handled in accordance with the NSA minimization procedures.
 - If the discrete communication is not to, from, or about a tasked selector, and also is not to or from an identifiable U.S. person, that communication

⁵ NSA extracts metadata from Internet communications acquired through its section 702 upstream collection, including discrete communications within MCTs. NSA's architecture for the extraction, analysis, and storage of metadata from Internet communications acquired pursuant to section 702 differs markedly from the architecture NSA analysts use to analyze content from such communications. Currently, it is not operationally feasible in an effective or a timely manner for NSA analysts to identify and further evaluate the nature of upstream Internet communications from the extracted metadata within NSA's metadata repositories. Nevertheless, if an Internet communication has been identified for purge (for any reason, including its having been identified as containing a wholly domestic communication) in one of NSA's content repositories, any corresponding metadata extracted from that communication and stored in NSA's metadata repositories is also purged: ~~(TS//SI//NF)~~

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(including any U.S. person information therein) will be handled in accordance with the NSA minimization procedures.

- If the discrete communication is not to, from, or about a tasked selector but is to or from an identifiable U.S. person, that communication cannot be used for any purpose other than to protect against an immediate threat to human life (e.g., force protection or hostage situations). NSA will report any such use to the Office of the Director of National Intelligence and to the National Security Division of the Department of Justice, which will promptly notify the Foreign Intelligence Surveillance Court of such use.
- To reinforce training and awareness of these aspects of NSA upstream collection, NSA will add a cautionary banner to the tools NSA analysts use to view the content of communications acquired upstream under section 702.⁶ The banner will direct analysts to consult guidance on how to identify MCTs and how to handle them.
- Prior to using any one or more discrete communications contained in an MCT (for example, in a FISA application, intelligence reporting, or section 702 targeting), an NSA analyst must:
 - verify either that the discrete communication is to, from, or about a tasked selector or that it is not to or from a U.S. person;⁷

⁶ Because NSA currently lacks [REDACTED] means to reliably identify MCTs, the cautionary banner will be broadly displayed on tools NSA analysts use to view the content of all upstream transactions, except in those limited number of transactions that can be first identified [REDACTED]

[REDACTED] As noted in the August 16th Submission, however, the banner is over-applied to NSA's upstream collection the majority of the time (i.e., NSA estimates that the banner will be over-applied more than approximately 83% of the time to single, discrete communications in upstream collection). See August 16th Submission at 1 n.2. There will also be circumstances in which the banner is under-applied to NSA's upstream collection due to issues such as [REDACTED]

[REDACTED] In sum, NSA's experience has shown that there may be more efficient and effective means of handling MCTs in the long term and may seek to revise or discontinue use of the banner at a later time. Regardless, NSA will not implement any such revisions without prior notification of the Court. ~~(TS//SI//NF)~~

⁷ To help determine whether a discrete communication not to, from, or about a tasked selector is to or from a U.S. person, NSA would perform the same sort of [REDACTED] analysis it would perform before tasking an electronic communications account/address/identifier in accordance with its section 702 targeting procedures. ~~(TS//SI//NF)~~

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- verify that the discrete communication is not a wholly domestic communication; and
- appropriately document these verifications.

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D. Clarification Concerning How NSA Will Conduct Queries of Communications Acquired Under Section 702 Using U.S. Person Identifiers. ~~(S)~~

Subsection 3(b)(5) of the NSA minimization procedures currently pending before the Court provide:

Magnetic tapes or other storage media containing communications acquired pursuant to section 702 may be scanned by computer to identify and select communications for analysis. Computer selection terms used for scanning, such as telephone numbers, key words or phrases, or other discriminators, will be limited to those selection terms reasonably likely to return foreign intelligence information. Any United States person identifiers used as terms to identify and select communications must be approved in accordance with NSA procedures.

As discussed in the previous filings, the Government acknowledged that "rigorous and strict controls" will be placed on the retrieval of U.S. person information consistent with statutory requirements and Congressional intent. *See* Government's Response to the Court's Briefing Order of May 9, 2011 (hereinafter "June 1st Submission") at 23; June 28th Submission at 24-25; *cf.* H.R. Rep. No. 95-1283, pt. 1 at 59 (1978) (Congress recognized that minimizing the retention of information concerning U.S. persons for counterintelligence or counterterrorism purposes can be accomplished through the application of "rigorous and strict controls"). In light of the results of NSA's manual review of upstream collection described in the Government's August 16th Submission,

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NSA will limit the use of United States person identifiers as computer selection terms to identify and select communications for analysis to communications acquired from Internet service providers [REDACTED]

[REDACTED] unless NSA can later develop a capability or procedures to strictly limit such queries to portions of NSA's upstream collection that contain only discrete communications to, from, or about NSA's tasked selector.

Accordingly, United States person identifiers will not be used as computer selection terms for communications acquired through NSA's upstream collection unless such capabilities are later developed by NSA. NSA would not begin querying upstream collection using United States person identifiers without prior notice to the Court.

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III. CONCLUSION

As previously explained to the Court, the Government believes that NSA's upstream collection is consistent with the Act and the Fourth Amendment even though such collection may result in the acquisition of MCTs containing discrete communications that are not to, from, or about a tasked selector, or that are wholly domestic in nature. The Government respectfully submits, for the reasons explained in the previous filings and herein, including the multi-layered approach described above, that the results of NSA's analysis of a representative sample of its upstream collection provide a basis upon which the Court can approve, as consistent with the Act and the

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Fourth Amendment, NSA's continued acquisition of foreign intelligence information through its section 702 upstream collection. ~~(TS//SI//NF)~~

First, the results of NSA's analysis of a representative sample of its upstream collection indicates that the scope of the intrusion into Fourth Amendment-protected interests caused by NSA's upstream collection is reasonable. Specifically, NSA's review revealed that the vast majority of the Internet communications acquired by NSA's upstream collection -- approximately 90% -- are single, discrete communications to, from, or about a tasked selector. See August 18th Submission at 3. Since the first DNI/AG 702(g) certification, this Court has consistently found the acquisition of such communications to be in accordance with the Act and the Fourth Amendment. See [REDACTED] Mem. Op. at 15-20, 32-41; see also, e.g., *In re DNI/AG Certification* [REDACTED] Docket No. [REDACTED] Mem. Op. at 22-27, 29 (USFISC Apr. 7, 2009). Contributing significantly to that finding, in the Court's view, was the application of robust minimization procedures similar to those used in other collections authorized under the Act. See, e.g., [REDACTED] Mem. Op. at 29-31, 40-41. ~~(TS//SI//NF)~~

NSA's review of its upstream collection further revealed that of the approximately 10% of Internet communications acquired through upstream collection that are MCTs, approximately 14% of those MCTs are those of persons targeted in accordance with NSA's targeting procedures. See August 18th Submission at 4. As such, all of the discrete communications within those MCTs are communications to or from

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the target. This Court repeatedly has found that the acquisition of communications to or from the target to be consistent with the Act and the Fourth Amendment. *See, e.g.,* [REDACTED] Mem. Op. at 15-17, 33. The fact that multiple such communications may be acquired within a single MCT of a target should not alter that conclusion. ~~(TS//SI//NF)~~

NSA's review also found that approximately 52% of the other MCTs featured an active user who was located outside of the United States. *See* August 18th Submission at 4-5. Additionally, although approximately 33% of the other MCTs required further research, such research ultimately led NSA to conclude that all discrete communications in those MCTs included at least one user who was located outside of the United States.⁸ *See id.* at 7. Although these two sets of communications -- which combined represent approximately 85% of all MCTs -- were not communications to or from a tasked selector, the Court has found that NSA's acquisition of single, discrete "abouts" communications featuring a tasked selector is consistent with the Act and the Fourth Amendment, *see, e.g.,* [REDACTED] Mem Op. at 17-20 & n.17, 32-41, and the Government has asserted that NSA's acquisition of MCTs containing such discrete communications is consistent with both the Act and the Fourth Amendment, *see* June 1st Submission at 3-24; June 28th Submission at 13-17, 22-24. Notably, the nature of these MCTs further supports assertions made by the Government in those previous filings. For instance, the

⁸ Although no further substantive information is available on the 224 MCTs that NSA is otherwise unable to definitively determine are not wholly domestic, for the reasons more specifically discussed above, the Government submits that it is reasonable for the Court to presume that these 224 MCTs do not contain wholly domestic communications. ~~(TS//SI//NF)~~

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Government asserted that "it is reasonable to presume that most of the discrete communications that may be within the acquired transaction -- even those that are not to or from a tasked selector -- are between non-United States persons located outside the United States." June 28th Submission at 5; *see also id.* at 23; *cf.* Yahoo Directives Mem. Op. at 87 (recognizing that "the vast majority of persons who are located overseas are non United States persons and that most of their communications are with other, non-United States persons, who are located overseas") (footnote omitted), *aff'd*, 551 F.3d 1004 (Foreign Int. Surv. Ct. Rev. 2008). ~~(TS//SI//NF)~~

In sum, NSA's review revealed that more than 99% of the MCTs it collects -- and therefore more than 99.9% of its overall upstream collection -- do not feature wholly domestic communications; the acquisition of such MCTs does not violate either the Act or the Fourth Amendment. Although NSA has determined that less than one percent the MCTs acquired through its upstream collection -- and thus less than 0.1% of its overall upstream collection -- likely include wholly domestic communications,⁹ *see*

⁹ Even in those cases where an MCT contained a wholly domestic communication, NSA's review indicated that a majority of the total discrete communications were not wholly domestic. For instance, of the 25 discrete communications included in the ten MCTs that did contain wholly domestic communications, a majority of those discrete communications (at least 15) were assessed to not be wholly domestic. *See* August 18th Submission at 5-7. This finding further bolsters some of NSA's assessments in the previous filings. For example, NSA assessed [REDACTED]

[REDACTED] " *See* June 1 Submission at 11. Similarly, NSA also assessed "that a United States-based user would [REDACTED] only in a minute percentage of cases." *Id.*; *see also id.* at 9 ("NSA's acquisition of transactions or single Internet communications between [REDACTED] currently occurs only in a very small percentage of cases."). ~~(TS//SI//OC,NF)~~

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August 18th Submission, NSA's acquisition of such MCTs is nevertheless permissible under the Act and the Fourth Amendment. As described in detail in the previous filings, NSA is currently incapable of preventing the acquisition of MCTs, regardless of whether they contain wholly domestic communications, without ceasing its upstream collection entirely (except for [REDACTED]). See June 1st Submission at 27-28; June 28th Submission at 9-10. Given the significant foreign intelligence information obtained through NSA's upstream collection, along with the multi-layered approach described above -- including specialized training given to analysts, a banner applied to upstream collection containing MCTs, restrictions on use of MCTs, destruction of MCTs containing a wholly domestic communication, and a prohibition on using U.S. person identifiers to query section 702 upstream collection --

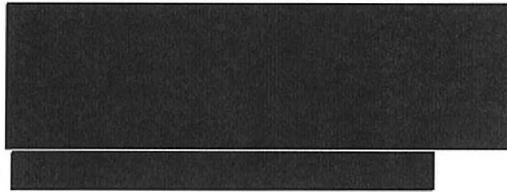
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the Government submits that NSA's acquisition of foreign intelligence information through upstream collection, including the acquisition of MCTs, is reasonable and consistent with the Act and the Fourth Amendment. ~~(TS//SI//NF)~~

Respectfully submitted,

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Office of Intelligence
National Security Division
United States Department of Justice

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VERIFICATION

I declare under penalty of perjury that the facts set forth in the foregoing "Notice of Clarifications" are true and correct based upon my best information, knowledge and belief. Executed pursuant to Title 28, United States Code, § 1746, on this 30th day of August, 2011. (U)



Signals Intelligence Directorate Compliance Architect
National Security Agency

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