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1934 Act/ Rule 14a-8

December 11, 2006

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, DC 20549

Re: AT&T Inc. 2007 Annual Meeting
Stockholder Proposal of Jeremy Kagan

Ladies and Gentlemen:

This statement and the material enclosed herewith are submitted on behalf of AT&T Inc. ("AT&T") pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended. AT&T has received a stockholder proposal from "As You Sow," on behalf of Jeremy Kagan, for inclusion in AT&T's 2007 proxy materials. The proposal was co-filed by Jeffrey Hersh, Calvert Asset Management Company, Inc., Larry Fahn, The Adrian Dominican Sisters, and Camilla Madden Charitable Trust (collectively, together with Jeremy Kagan, referred to hereinafter as "Proponents"). Proponents Kagan, Hersh and Calvert have requested that all communications be directed to As You Sow. For the reasons stated below, AT&T intends to omit this proposal from its 2007 proxy statement. It is important to note that AT&T has neither confirmed nor denied the existence of any of the programs that are the basis of this proposal, nor does AT&T now confirm or deny that it has participated in any such activities or programs. In fact, as described in the attached opinion from Sidley Austin LLP, to the extent AT&T were to have participated in any such programs, implementation of the proposal would cause AT&T to violate federal statutes prohibiting their disclosure.

Pursuant to Rule 14a-8(j), enclosed are six copies of each of: this statement, the opinion of Sidley Austin LLP, and the Proponents' letter submitting the proposal, which is attached to the referenced opinion. A copy of this letter and related cover letter are being mailed concurrently to As You Sow and Proponents Fahn, Adrian Dominican

Sisters and Camilla Madden Charitable Trust advising them of AT&T's intention to omit the proposal from its proxy materials for the 2007 Annual Meeting.

The Proposal

On October 27, 2006, AT&T received a letter from As You Sow, on behalf of Proponent Kagan, alleging that AT&T provided certain customer information to the National Security Agency ("NSA"), the Federal Bureau of Investigation ("FBI"), and other government agencies. The letter also contains a proposal, subsequently co-filed by the other Proponents, requesting that AT&T report on the technical, legal and ethical policy matters and other details relating to the alleged actions (the "Proposal"). Specifically, the Proposal states:

> RESOLVED: That shareholders request that the Board of Directors issue a report to shareholders in six months, at reasonable cost and excluding confidential and proprietary information, which describes the following:
>
> - The overarching technical, legal and ethical policy issues surrounding (a) disclosure of the content of customer communications and records to the Federal Bureau of Investigations, NSA and other government agencies without a warrant and its effect on the privacy rights of AT&T's customers and (b) notifying customers whose information has been shared with such agencies;
>
> - Any additional policies, procedures or technologies AT&T could implement to further ensure (a) the integrity of customers' privacy rights and the confidentiality of customer information, and (b) that customer information is only released when required by law; and
>
> - AT&T's past expenditures on attorney's fees, experts fees, operations, lobbying and public relations/media expenses, relating to this alleged program.[1]

The Proposal May be Omitted from the Proxy Statement Pursuant to Rule 14a-8(i)(2): Implementation of the Proposal by AT&T would violate federal law.

Rule 14a-8(i)(2) provides that a shareholder proposal may be excluded if it "would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." The underlying premise of the Proposal is that AT&T has provided certain customer information to the NSA and other government agencies and that any such action would constitute a violation of the law and the privacy rights of customers. The

[1] The full text of the Proposal and its Supporting Statement is attached as Exhibit 1 to the opinion of Sidley Austin LLP.

Proposal would require the company to publish a report on the technical, legal and ethical policy matters and other details relating to the alleged actions.

The Proposal, by its terms, directly addresses information regarding the alleged communications intelligence activities of the United States. Any such activities, if engaged in by AT&T, would be classified and disclosing them would be prohibited under Federal law.

AT&T has obtained a legal opinion from the law firm of Sidley Austin LLP which describes in detail the laws governing the disclosure of the alleged activities involving the NSA, FBI and other government agencies (the "Sidley Austin Opinion).[2] The Sidley Austin Opinion confirms that the actions called for by the Proposal, based on the premise of the Proposal, would cause AT&T to violate a series of Federal laws designed to protect the intelligence gathering activities of the United States, including 18 U.S.C. § 798(a), which specifically prohibits knowingly and willfully divulging to an unauthorized person classified information regarding the communications intelligence activities of the United States.

Because these issues are discussed at considerable length in the Sidley Austin Opinion, that discussion is incorporated in this letter and will not be repeated here.

Since implementation of the Proposal would violate federal law, AT&T can exclude the Proposal from its 2007 proxy materials in accordance with Rule 14a-8(i)(2).

The Proposal May be Omitted from the Proxy Statement Pursuant to Rule 14a-8(i)(7): The Proposal relates to ordinary business matters.

Rule 14a-8(i)(7) permits a company to omit a shareholder proposal from its proxy materials if the proposal deals with a matter relating to the company's ordinary business operations. The general policy underlying the "ordinary business" exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." This general policy reflects two central considerations: (i) "certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight"; and (ii) the "degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Exchange Act Release No. 34-40018 (May 21, 1998).

In applying the Rule 14a-8(i)(7) exclusion to proposals requesting companies to prepare reports on specific aspects of their business, the Staff has determined that it will consider whether the subject matter of the special report involves a matter of ordinary business. If it does, the proposal can be excluded even if it requests only the

[2] The Sidley Austin Opinion is attached to this letter as Attachment A.

preparation of the report and not the taking of any action with respect to such ordinary business matter. Exchange Act Release No. 34-20091 (August 16, 1983).[3]

The Proposal relates to ongoing litigation involving the company.

The Proposal may be omitted as a matter involving ordinary business because it would improperly interfere with AT&T's legal strategy and the discovery process in at least 20 pending proceedings that to Proponent Kagan allege unlawful acts by AT&T in relation to alleged provision of information to the NSA.

AT&T is presently the defendant in multiple pending lawsuits and other proceedings that generally allege that the company has violated customer privacy rights by providing information and assistance to government entities without proper legal authority, including allegedly providing information to the specific entities described in the proposal. For example, in *Terkel & American Civil Liberties Union of Illinois v. AT&T,* No. 06 C 2837 (N.D. Ill.), plaintiffs alleged that AT&T has provided the National Security Agency with access to calling records of millions of customers in the absence of a court order, warrant, subpoena, or certification from the Attorney General that no such process was required. Similarly, these same allegations were also made in *Hepting v. AT&T,* No. 3:06-CV-006720-VRW (N.D. Cal.), where the plaintiffs also alleged that AT&T had also acted unlawfully by providing the National Security Agency with the contents of communications in the absence of a court order, warrant, or certification from the Attorney General that no such process was required. There are over 20 pending cases that make one or both of these allegations, and these cases have been consolidated for coordinated pretrial proceedings in the United States District Court for the Northern District of California.

In addition, local chapters of the ACLU[4] have filed complaints with over 20 state utility commissions that allege that AT&T violated state or federal law by providing the NSA with access to customer calling records in the absence of proper legal process. In cases where a state commission has attempted to institute an investigation, the United States has filed actions against AT&T and the state commissions, seeking declarations that these investigations are preempted by federal law and other appropriate relief. [5]

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[3] This Release addressed Rule 14a-8(c)(7), which is the predecessor to Rule 14a-8(i)(7).

[4] We note that the web site of the American Civil Liberties Union claims responsibility for "The ACLU Freedom Files," a film, co-executive produced and directed by Proponent Kagan, and that, according to the ACLU web site, alleges that the civil liberties of America are threatened and describes how they have fought back. In the "Viewers Guide," the ACLU repeats the allegation that "Americans' phone calls and e-mails [are monitored] – without court approval. Proponent Kagan now seeks the same information through the shareholder approval process that the ACLU has sought through litigation.

[5] *See United States* v. *Zulima V. Farber, et al.*, Civil Action No. 3:06 cv 02683 (D.N.J.); *United States* v. *Palermino, et al.*, C.A. 3:06-1405 (D. Conn.); *United States* v. *Adams, et al.*, C.A. 1:06-97 (D. Me.); *United States* v. *Gaw, et al.*, C.A. 4:06-1132 (E.D. Mo); *United States* v. *Volz, et al.*, C.A. 2:06-00188 (D. Vt.).

The Proposal repeats the substance of the complaints by repeating the allegation that AT&T "has voluntarily provided customer phone records and communications data to the National Security Agency." The Proposal goes on to call for a report on the policies "surrounding (a) disclosure of the content of customer communications and records to the Federal Bureau of Investigation, NSA and other government agencies without a warrant", disclosure of "AT&T's past expenditures on attorney's fees, experts fees, operations . . . relating to this alleged program, and a report on actions AT&T could take to "further" protect customer information, presumably from the government. All of these matters go directly to the substance of the complaints. The proposal calls for the same information that the plaintiff ACLU and others seek in discovery but sidesteps and interferes with the discovery process.

The Staff has previously acknowledged that a shareholder proposal is properly excludable under the "ordinary course of business" exception when the subject matter of the proposal is the same as or similar to that which is at the heart of litigation in which a registrant is then involved. See, e.g., Reynolds American Inc. (February 10, 2006) (proposal to notify African Americans of the purported health hazards unique to that community that were associated with smoking menthol cigarettes while the company was a defendant in a case alleging the company marketed menthol cigarettes to the African American community was excludable as ordinary business.); R. J. Reynolds Tobacco Holdings, Inc. (February 6, 2004) (proposal requiring company to stop using the terms "light," "ultralight" and "mild" until shareholders can be assured through independent research that such brands reduce the risk of smoking-related diseases excludable under the "ordinary course" exception because it interfered with litigation strategy of class-action lawsuit on similar matters); R. J. Reynolds Tobacco Holdings, Inc. (March 6, 2003) (proposal requiring the company to establish a committee of independent directors to determine the company's involvement in cigarette smuggling excludable under the "ordinary course" exception because it relates to subject matter of litigation in which the registrant was named as a defendant).

This result is also consistent with the longstanding position of the Staff that a registrant's decision to institute or defend itself against legal actions, and decisions on how it will conduct those legal actions, are matters relating to its ordinary business operations and within the exclusive prerogative of management. See, e.g., NetCurrents, Inc. (May 8, 2001) (proposal requiring NetCurrents, Inc. to bring an action against certain persons excludable as ordinary business operations because it relates to litigation strategy); Microsoft Corporation (September 15, 2000) (proposal asking the registrant to sue the federal government on behalf of shareholders excludable as ordinary business because it relates to the conduct of litigation); Exxon Mobil Corporation[*21] (March 21, 2000) (proposal requesting immediate payment of settlements associated with Exxon Valdez oil spill excludable because it relates to litigation strategy and related decisions); Philip Morris Companies Inc. (February 4, 1997) (proposal recommending that Philip Morris Companies Inc. voluntarily implement certain FDA regulations while simultaneously challenging the legality of those regulations excludable under clause (c)(7), the predecessor to the current (i)(7)); Exxon Corporation (December 20, 1995) (proposal

that registrant forego any appellate or other rights that it might have in connection with litigation arising from the Exxon Valdez incident excludable because litigation strategy and related decisions are matters relating to the conduct of the registrant's ordinary business operations).

Therefore, the Proposal directly implicates issues that are the subject matter of multiple lawsuits involving AT&T. In effect, the Proposal recommends that AT&T facilitate the discovery of the opposing parties in these various lawsuits at the same time the company is challenging those parties' legal positions or claims. Compliance with the Proposal would improperly interfere with AT&T's litigation strategy in these cases and intrude upon management's appropriate discretion to conduct the ordinary business litigation as its business judgment dictates.

The Proposal relates to matters of customer privacy.

The Staff has, in the past, applied Rule 14a-8(i)(7) to allow for the exclusion of proposals requesting reports on issues related to customer privacy. In Bank of America Corp., a shareholder, in response to specific instances of lost and stolen customer records, submitted a proposal requesting that the company prepare a report on its policies and procedures for ensuring the confidentiality of customer information. The Staff concluded that the requested report involved matters of ordinary business in that it sought information regarding the company's "procedures for protecting customer information" and concurred in the company's decision to exclude the proposal pursuant to Rule 14a-8(i)(7). Bank of America Corp. (February 21, 2006); see also, Bank of America Corp. (March 7, 2005) (an almost identical proposal from the same proponent was excluded as relating to the company's ordinary business of protecting customer information); Applied Digital Solutions, Inc. (March 25, 2006) (a proposal requesting the company to prepare a report analyzing the public privacy implications of its radio frequency identification chips was excluded as relating to the company's ordinary business of managing the privacy issues related to its product development).

Like the proposals excluded in Bank of America Corp., the Proposal requests AT&T to produce a report assessing customer privacy issues and the company's policies and procedures for addressing such issues, in response to a perceived breach of that privacy. Thus, the Proposal explicitly deals with matters of customer privacy, which are a central function of AT&T's daily business operations and cannot, "as a practical matter, be subject to direct shareholder oversight."

The Proposal relates to matters of legal compliance.

The Proposal can also be properly excluded, pursuant to Rule 14a-8(i)(7), because it seeks to regulate the company's conduct of its legal compliance program. The Staff has long since identified a company's compliance with laws and regulations as a matter of ordinary business. In Allstate Corp., a shareholder proposal requested, in part, that the company issue a report discussing the illegal activities that were the subject of a number of state investigations and consent decrees involving Allstate. The Staff held

that a company's general conduct of a legal compliance program was a matter of ordinary business and agreed to Allstate's exclusion of the proposal under Rule 14a-8(i)(7). Allstate Corp. (February 16, 1999); see also, Duke Power Co. (February 1, 1988) (a proposal requesting the company to prepare a report detailing its environmental protection and pollution control activities was excluded as relating to the ordinary business matter of complying with government regulations); Halliburton Company (March 10, 2006) (a proposal requesting the company to produce a report analyzing the potential impact on reputation and stock value of the violations and investigations discussed in the Proposal and discussing how the company intends to eliminate the reoccurrence of such violations was excluded as relating to the ordinary business of conducting a legal compliance program); Monsanto Co. (November 3, 2005) (a proposal requesting the company to issue a report on its compliance with all applicable federal, state and local laws was excluded as relating to the ordinary business of conducting a legal compliance program).

The essence of the Proposal is to discover the relationship, if any, between AT&T and government agencies, including those agencies responsible for matters of tax collection, fugitive apprehension, criminal prosecution, and national security, among others. Specifically, the Proposal looks for the technical, legal and policy issues related to the company's cooperation with the NSA, FBI and other government agencies, the effects that such cooperation may have on customers, and the costs associated with such cooperation. In addition, the proposal requests consideration of "additional policies, procedures or technologies that AT&T could implement to further ensure . . . (b) that customer information is only released when required by law." The information requested by the Proposal relates to AT&T's compliance with government laws and regulations and is precisely the type of information that the Staff has identified as relating to matters of ordinary business.

It would be hard to find matters that are more intimately related to day-to-day business operations, or that pose a greater threat to micro-manage the company, than a company's compliance with its legal obligations. Legal compliance is exactly the type of "matter of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."

Moreover, AT&T believes that exclusion of the Proposal is justified because the Proposal involves the company in the political or legislative process relating to aspects of the company's operations. Numerous no-action precedents have indicated that proposals requesting a company to issue reports analyzing the potential impacts on the company of proposed national legislation may properly be excluded as "involving [the company] in the political or legislative process relating to an aspect of [the company's] operations." International Business Machines Corp. (March 2, 2000); see also, Electronic Data Systems Corp. (March 24, 2000) and Niagara Mohawk Holdings, Inc. (March 5, 2001) (in all three cases, proposals requesting the company to issue reports evaluating the impact on the company of pension-related proposals being considered by national policy makers were excluded as involving the company in the political or legislative process). Likewise, the Proposal essentially requests AT&T to evaluate the

impact that the alleged government surveillance programs would have on the company's business operations, including matters of customer privacy and company costs. In this way, the Proposal can be seen as involving AT&T in the political process, and, therefore, excludable as relating to the company's ordinary business.

The Proposal can be excluded as relating to matters of ordinary business, regardless of whether or not it touches upon a significant social policy issue.

Simply because a proposal touches upon a matter with possible public policy implications does not necessarily undermine the basis for omitting it under Rule 14a-8(i)(7). The Staff has indicated that the applicability of Rule 14a-8(i)(7) depends largely on whether implementing the proposal would have broad public policy impacts outside the company, or instead would deal only with matters of the company's internal business operations, planning and strategies. In fact, the Staff has consistently concurred with the exclusion of proposals that address ordinary business matters, even though they might also implicate public policy concerns. See, e.g. Microsoft (September 29, 2006) (excluding a proposal asking the company to evaluate the impact of expanded government regulation of the internet); Pfizer Inc. (January 24, 2006) and Marathon Oil (January 23, 2006) (excluding proposals requesting inward-looking reports on the economic effects of HIV/AIDS, tuberculosis and malaria pandemics on the companies' business strategies and risk profiles). The Proposal falls squarely in this group.

The Proposal requests that the company issue a report on matters relating to its ordinary business and, as such, may be properly omitted pursuant to Rule 14a-8(i)(7).

The Proposal May be Omitted from the Proxy Statement Pursuant to Rules 14a-8(i)(3) and 14a-8(i)(6): The Proposal is vague and indefinite and, therefore, AT&T would lack the power or authority to implement it.

Rule 14a-8(i)(3) permits a company to exclude a shareholder proposal if it is contrary to any of the Commission's proxy rules, including Rule14a-9's prohibition on materially false and misleading statements in proxy solicitation materials.

The Proposal, by its own terms, is inherently contradictory - according to the Proposal, AT&T is, at the same time, required to provide information and permitted to exclude the same information. The underlying premise of the Proposal is that AT&T has participated in programs requiring it to provide customer information to the NSA and other government agencies, and the Proposal requests the company to provide information regarding such participation. Although, as noted above, AT&T has not confirmed or denied its participation in any such programs, the Proposal, itself, acknowledges that, if AT&T were a participant in these programs, information regarding its participation would be considered confidential. The Sidley Austin Opinion confirms that the essential portion of the information requested by the Proposal, if it existed, would be identified by the United States as classified information and must be treated

confidentially.[6] However, the Proposal specifically allows AT&T to exclude all "confidential and proprietary information." These conflicting mandates make the Proposal inherently vague and indefinite and, as such, impossible for AT&T to implement. Therefore, the Proposal can be excluded under the Staff's interpretations of Rules 14a-8(i)(3) and 14a-8(i)(6).

Pursuant to the Staff's explanation of "materially false and misleading," a proposal can be properly exclude under Rule 14a-(8)(i)(3) where "the resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (CF) (September 15, 2004); see also, Philadelphia Electric Co. (July 30, 1992). Moreover, the Staff has found a proposal to be sufficiently vague and indefinite so as to justify exclusion under Rule 14a-8(i)(3) where a company and its shareholders might interpret the proposal so differently that "any action ultimately taken by the company upon implementation of the proposal could be significantly different from the actions envisioned by the shareholders voting on the proposal." Fuqua Industries, Inc. (March 12, 1991).

Furthermore, Rule 14a-8(i)(6) allows for the exclusion of a shareholder proposal if the company lacks the power or authority to implement it. The Staff has previously held that a proposal may be omitted under Rule 14a-8(i)(6) where the proposal is so vague and indefinite that the company is unable to determine what actions are required by the proposal and, as such, is "beyond the [company's] power to effectuate." Int'l Business Machines Corporation (January 14, 1992) (permitted the exclusion of a resolution stating only that "It is now apparent that the need for representation has become a necessity."); see also, The Southern Company (February 23, 1995) (permitted the exclusion of a proposal recommending that the company take the essential steps to ensure the highest standards of ethical behavior of employees appointed to serve in the public sector without providing any suggestions on how to achieve such an objective).

Since substantially all of the information requested by the Proposal is confidential, the Proposal essentially requests AT&T to produce a report excluding the very substance of the report. Thus, the terms of the Proposal are so vague and ambiguous that it is impossible for AT&T to be able to ascertain with any reasonable certainty the exact actions that it would be required to take with respect to the Proposal. As such, the Proposal, if adopted, would be beyond AT&T's "power to effectuate." If AT&T were to implement the Proposal as drafted, it would issue a report excluding substantially all of the information sought for by the Proposal; this could result in a significantly different outcome than that envisioned by the shareholders voting on the Proposal.

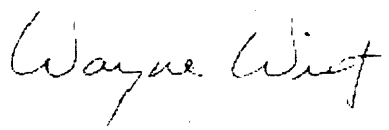
[6] For further analysis, refer to the Sidley Austin Opinion.

Because the terms of the Proposal are inherently vague and indefinite, AT&T believes that it can properly omit the Proposal from its proxy materials under Rules 14a-8(i)(3) and 14a-8(i)(6).

* * *

For the reasons set forth above, we ask the Staff to recommend to the Commission that no action be taken if the Proposal is omitted from AT&T's 2007 proxy statement. Please acknowledge receipt of this letter by date-stamping and returning the extra enclosed copy of this letter in the enclosed self-addressed envelope. If the Staff does not concur that AT&T may exclude the Proposal, we respectfully request that the decision be promptly appealed to the full Commission for reconsideration, and that we be promptly notified of that appeal.

Sincerely,



Wayne Wirtz
Assistant General Counsel

Enclosures

cc: As You Sow
Calvert Asset Management Co., Inc.
Larry Fahn
Camilla Madden Charitable Trust
Adrian Dominican Sisters

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FOUNDED 1866

November 22, 2006

Board of Directors
AT&T Inc.
c/o James D. Ellis
General Counsel
175 E. Houston, Room 205
San Antonio, Texas 78205

Re: Shareholder Proposal

Ladies and Gentlemen:

You have requested our legal opinion whether implementation by AT&T Inc. ("AT&T" or the "Company") of a shareholder proposal submitted by Jeremy Kagan on October 24, 2006, along with several co-filers (the "Proposal") to the Company for inclusion in its 2007 proxy statement for AT&T Inc. ("Proxy") would violate federal law.[1]

The Proposal. The Proposal calls for the AT&T Board of Directors to issue a report to shareholders describing, *inter alia*, "[t]he overarching technical, legal and ethical policy issues surrounding (a) disclosure of the content of customer communications and records to the Federal Bureau of Investigation, NSA [National Security Agency] and other government agencies without a warrant and its effect on the privacy rights of AT&T's customers and (b) notifying customers whose information has been shared with such agencies. . . ." The Proposal also would require the disclosure of past corporate expenditures, including for "operations" of specified intelligence programs allegedly undertaken by the NSA.

The cover letter accompanying the Proposal makes clear that it is based on the widely publicized allegations that AT&T and other telecommunications carriers have assisted the United States government, and in particular the NSA, in connection with foreign intelligence-gathering activities.[2] These media reports alleged two types of activities. First, on December 19, 2005, in response to a report in the *New York Times*, President Bush acknowledged the existence of a counterterrorism program involving the interception of international telephone calls made or

[1] The Proposal and cover letter are attached hereto as Exhibit 1.

[2] *See* Letter from Conrad B. MacKerron, Director, Corporate Social Responsibility Program to Edward E. Whitacre, CEO, AT&T Inc. (October 24, 2006) ("MacKerron Letter") (Exhibit 1) ("We are concerned about reports that AT&T provided customer information to the National Security Agency without a warrant.").

received by suspected al Qaeda agents (the "Terrorist Surveillance Program").[3] The United States Department of Justice subsequently published an explanation of the legal authority for the program acknowledged by the President and defended by the Attorney General.[4] The United States has never publicly confirmed or denied the participation of any particular telecommunications carrier in the Terrorist Surveillance Program.

Subsequently, on May 11, 2006, *USA Today* published a story suggesting that the NSA's intelligence-gathering activities may also have included some form of access to domestic call records databases ("Calling Records Program").[5] The United States has never publicly confirmed or denied either the existence of a Calling Records Program or the participation of any particular telecommunications carrier in a Calling Records Program. We shall refer to the Terrorist Surveillance Program and Calling Records Program together as the "Programs."

AT&T cannot confirm or deny any reports alleging participation in federal intelligence activities, including the Programs. For purposes of responding to your request only, we accept at face value the asserted facts reported in the newspapers and targeted by the Proposal. No inference can or should be drawn from these assumptions made only for purposes of this analysis regarding the truth or falsity or any such allegations, and nothing herein should be construed as an admission or denial of any allegation relating to such Programs.

Analysis. The United States has expressly and formally advised AT&T on several occasions that disclosing whether or not it has assisted the United States in connection with the Programs would violate federal law, including some laws that carry felony sanctions. For example, on June 14, 2006, in connection with the New Jersey Attorney General's effort to subpoena information relating to the alleged Calling Records Program, AT&T was advised in writing by the United States Department of Justice that "[r]esponding to the subpoenas – including by disclosing whether or to what extent any responsive materials exist – would violate federal laws and Executive Orders."[6] Specifically, the United States directed AT&T that confirming or denying participation in the Programs would violate the National Security Agency Act of 1959, 18 U.S.C. § 798, and Executive Orders governing access to and handling of national security information.

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[3] *See* Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/ 20051219-2.html.

[4] *See* US Dept. of Justice, *Legal Authorities Supporting The Activities Of The National Security Agency Described By The President* (Jan. 19, 2006) http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf.

[5] *See* Leslie Cauley, "NSA Has Massive Database of Americans' Phone" Calls, *USA Today*, May 11, 2006, at A1.

[6] Letter from Assistant Attorney General Peter D. Keisler to Bradford A. Berenson *et al.* (Exhibit 2).

Federal Criminal Prohibition On Disclosure Of Classified Information Concerning The Communication Intelligence Activities Of The United States. It is a felony under federal law to knowingly and willfully divulge to an unauthorized person classified information regarding the communications intelligence activities of the United States. In particular, 18 U.S.C. § 798(a) provides:

> Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States, or for the benefit of any foreign government to the detriment of the United States any classified information –
>
> * * * *
>
> (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or
>
> (3) concerning the communication intelligence activities of the United States or any foreign government . . .
>
> * * * *
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

Id.[7]

[7] As defined by this statute, the term "classified information" means "information which, at the time of a violation of this section, is for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution. . . ." 18 U.S.C. § 798(b). The term "unauthorized person" means "any person, who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government to engage in communication intelligence activities for the United States." *Id.*

Disclosure of classified information pertaining to the Programs to any "unauthorized person," which would include members of the general public such as the Company's shareholders, would violate federal law and thereby subject the Company to potential criminal liability under this section. As Assistant Attorney General Peter D. Keisler, made clear to the former Attorney General of New Jersey, the Honorable Zulima V. Farber, regarding her attempt to investigate these same Programs,

> It . . . is a federal crime to divulge to an unauthorized person specified categories of classified information, including information 'concerning the communication intelligence activities of the United States.' . . . To the extent your subpoenas seek to compel disclosure of such information to state officials, responding to them would obviously violate federal law."[8]

Letter from Assistant Attorney General Peter Keisler to New Jersey Attorney General Zulima Farber, at 4 (June 14, 2006) (Exhibit 4).[9]

Other official government statements further confirm that any information relating to the Terrorist Surveillance Program beyond what the United States has publicly confirmed or any information at all concerning an alleged Calling Records Program would be classified, if such information exists. The Attorney General of the United States has personally noted that the Terrorist Surveillance Program is among the most highly classified programs in the entire

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[8] *See also* Section 6 of the National Security Agency Act, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note ("nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or of any information with respect to the activities thereof"); *Linder* v. *National Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996) ("[t]he protection afforded by section 6 is, by its very terms, absolute"); *Founding Church of Scientology* v. *National Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979); *Hayden* v. *National Security Agency*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). When petitioned to investigate the Programs, the Federal Communications Commission declined to do so stating that "[t]he Commission has no power to order the production of classified information," and noting further that, because section 6 of the National Security Act of 1959 independently prohibits disclosure of information relating to NSA activities, the Commission lacks the authority to compel the production of the information necessary to undertake an investigation. *See* Letter from Kevin J. Martin, Chairman Federal Communications Commission to the Honorable Edward J. Markey, at 1-2 (May 22, 2006) (Exhibit 3).

[9] *See also* Press Conference of Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. ("This is a very classified program. It is probably the most classified program that exists in the United States government. . . .").

government. *See* Press Conference of Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. ("This is a very classified program. It is probably the most classified program that exists in the United States government. . . .").

The United States, through the personal, sworn declaration of the Director of National Intelligence, has indeed formally identified much of the information called for by the Proposal, if such information exists, as classified. *See* Unclassified Declaration of the Honorable John D. Negroponte, ¶ 11 (Exhibit 5).[10] As Director Negroponte stated, "[m]y assertion of the state secrets and statutory privileges in this case includes any information tending to confirm or deny (a) alleged intelligence activities, such as the alleged collection by the NSA of records pertaining to a large number of telephone calls, (b) an alleged relationship between the NSA and AT&T (either in general or with respect to specific alleged intelligence activities), and (c) whether particular individuals or organizations have had records of their telephone calls disclosed to the NSA."). *Id.* ¶ 11.[11] As noted, the United States has formally directed that AT&T may not publicly disclose any responsive information concerning the claimed Programs. Furthermore, a recent decision of the United States District for the District of Columbia in *People for the American Way Foundation v. NSA et al.*, Civil Action No. 06-206 (ESH) (Nov. 20, 2006), held, pursuant to 5 U.S.C. § 552(b)(1), that even basic numerical or statistical information about the Terrorist Surveillance Program was and remains classified and therefore exempt from disclosure under the Freedom of Information Act. *See* slip op. at 14-18 (Exhibit 6). Although there are pending challenges to the scope of the United States' state secrets assertion, we are aware of no

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[10] The Director of National Intelligence made his declaration relating to the Programs in the course of formally invoking the constitutionally-based state secrets doctrine, also known as the military and state secrets privilege ("state secrets privilege"). *See United States* v. *Reynolds*, 345 U.S. 1, 7 (1953). This privilege belongs exclusively to the federal government and protects any information which if disclosed would result in "impairment of the nation's defense capabilities" or "disclosure of intelligence-gathering methods or capabilities." *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Given the significance of the privilege, the invocation of state secrets is made only formally through a personal declaration or affidavit by "the head of the department which has control over the matter, after actual personal consideration by the officer." *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953); *see also, e.g., Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

[11] The United States has repeatedly asserted this "state secrets privilege" with regard to the information that the Company would be required to disclose if the Proposal were implemented. For example, in *Terkel* v. *AT&T Corp.*, Case No. 06-cv-2837 (N.D. Ill.), the United States submitted the declaration of Director Negroponte, in which he concluded that "[e]ven confirming that a certain intelligence activity or relationship does *not* exist, either in general or with respect to specific targets or channels, would cause harm to national security because alerting our adversaries to channels or individuals that are not under surveillance could likewise help them avoid detection." *Id.*

challenges to the United States' assertion that information pertaining to the Programs is classified.[12]

The subjects covered by the criminal prohibition on disclosure of communications intelligence are thus the same subjects which the Proposal concerns. For instance, assuming *arguendo* that the Company participated in the Terrorist Surveillance Program or the Calling Records Program, notifying customers that their information had been shared as part of a Program would (1) confirm the existence of one or both Programs, (2) confirm AT&T's participation in one or both Programs, and (3) apprise targets of federal intelligence activities that they were the subject of surveillance by federal national security agencies. Likewise, detailing the expenditures made by the Company for the "operations" associated with these Programs would confirm their existence, confirm AT&T's participation in them, and furnish information concerning their scope.

Additional restrictions on disclosure. The Proposal further would require a report that would detail, among other things, specified information concerning all forms of "disclosure of the content of customer communications or records to the Federal Bureau of Investigation, NSA, and other government agencies without a warrant." MacKerron Letter (Exhibit 1). This implicates several other statutory prohibitions on disclosure.

First, although the alleged Programs underlying the Proposal are claimed by the Proponent to have occurred outside the statutory regime established by the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 et seq., the terms of the Proposal would require disclosure of any FISA surveillance. 50 U.S.C. § 1802(a)(4) provides that where electronic surveillance occurs pursuant to FISA without any type of court order (as it may under certain circumstances), a carrier may be directed by the Attorney General to protect the secrecy of such surveillance and adhere to prescribed security procedures to ensure that is done, and the carrier must comply with that directive. The same is true for electronic surveillance accomplished pursuant to a FISA order, which does not constitute a conventional "warrant" issued upon probable cause within the meaning of the Proposal. *See id.* §§ 1805(c)(2)(B) & (C).

Furthermore, pursuant to 50 U.S.C. § 1861, the Federal Bureau of Investigation is authorized to obtain customer information from telecommunications carriers upon application to

[12] As you are aware, we represent AT&T Inc. and affiliated entities in MDL 06-1791 VRW: *In re National Security Agency Telecommunications Records Litigation* and related cases. As you are also aware, we have no financial interest in the outcome of that litigation. Although we have briefed and argued various legal issues related to the Programs during the course of MDL 1791 and related cases, we base this Opinion solely on the analysis presented herein. It should be understood that this Opinion does not, and should not be construed to, predict the outcome of any pending litigation.

a court for a FISA order but without a conventional warrant. When such business records are produced, the carrier is prohibited from disclosing "to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section," subject to certain exceptions not applicable here. *Id.* § 1861(d).

Finally, under applicable provisions of the Stored Communications Act, the Director of the FBI is authorized to demand and obtain from a wire or electronic communication service provider transactional, billing, or calling records without any form of court order, and in many circumstances, the carrier is categorically barred from disclosing receipt or fulfillment of such a request, again subject to exceptions not applicable here. *See* 18 U.S.C. § 2709(c).

The Proposal would require the disclosure of information in each of the above categories, to the extent such information exists.

Opinion. Based on the foregoing facts and analysis regarding the Proposal as recited herein, and subject to the qualifications, assumptions and discussion contained herein, we are of the opinion that the Proposal would, if implemented, cause the AT&T to violate one or more federal laws to which it is subject.[13]

Very truly yours,

SIDLEY AUSTIN LLP

Sidley Austin LLP

[13] Our analysis is limited to the facts and assumptions as they are presented herein and is subject to the qualification that there are no additional facts that would materially affect the validity of the assumptions and conclusions set forth herein or upon which this opinion is based. Our conclusions are based on the law specifically referenced here as of the date hereof, we express no opinion as to the laws, rules or regulations not specifically referenced, and we assume no obligation to advise you of changes in the law or fact (or the effect thereof on the Opinion expressed or the statements made herein) that hereafter may come to our attention. Our opinions are limited to the specific opinions expressed in this "Opinion" section. The foregoing assessment is not intended to be a guarantee as to what a particular court would actually hold, but an assessment of a reviewing court's action if the issues were properly presented to it and the court followed what we believe to be the applicable legal principles. This opinion may not be relied upon in whole or in part by any other person or entity other than its addressee without our specific prior written consent. We understand that you intend to attach a copy of this opinion to your letter relating to the Proposal to the Securities & Exchange Commission under the procedures set forth in 17 CFR 240.14a-8, and we hereby consent to the use of this opinion for that purpose.