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(U) **2015 Summary of Notable Section 702 Requirements**

(U) The Privacy and Civil Liberties Oversight Board ("PCLOB") has recommended that the Government submit to the Foreign Intelligence Surveillance Court ("FISC" or "Court"), "[a]s part of the periodic certification process," a document containing "the rules for operation of the Section 702 program that have not already been included in certification orders by the FISA court, and that at present are contained in separate orders and opinions, affidavits, compliance and other letters, hearing transcripts, and mandatory reports filed by the government." PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, at p. 142 (July 2, 2014). In accordance with that recommendation, the Government submits the following summary containing references to Court opinions, agency targeting and minimization procedures, hearing transcripts, or other relevant documents regarding the operation of certain aspects of the Section 702 program. This document does not, nor is it intended to, create any new rules or obligations regarding the operation of the Section 702 program. This document is not inclusive of all currently applicable rules and requirements for the operation of the Section 702 program, but is intended as a reference guide to prominent concepts governing the program. Accordingly, to the extent that any statement contained in this document conflicts with applicable targeting or minimization procedures, any prior representation to the Court, or any written Opinion, Order, or other requirement issued by the Court, such other documents are controlling. In all cases it is the actual representations made by the Government to the Court, representations of understanding made by the Court to the Government, and the written Opinions, Orders, and requirements issued by the Court (or where applicable the Foreign Intelligence Surveillance Court of Review) which constitute controlling precedent.

I. ~~(S//NF)~~ All Users of Section 702-Tasked Facilities Are Regarded as Targets of the Acquisition

~~(TS//SI//OC/NF)~~ Although the targeting procedures generally refer to the target or targets of acquisition, with limited exception, the Government has represented to the FISC that "any user of a tasked facility is regarded as a person targeted for acquisition." *In Re DNI/AG 702 Certifications* [redacted], Memorandum Opinion and Order ("2014 Mem. Op."), at p. 8 (August 26, 2014). This includes, for example, [redacted] There is

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one limited exception provided in the National Security Agency ("NSA") targeting [redacted] *Procedures Used by the National Security Agency for Targeting Non-United States Persons Reasonably Believed to Be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* ("2014 NSA Targeting Procedures"), at p. 1 (July 28, 2014). According to the FISC, this exception "should be understood to apply only where [redacted]." 2014 Mem. Op., at p. 10.

II. (U) Pre- and Post- Tasking Due Diligence

~~(TS//SI//OC/NF)~~ The Government has an obligation, both before and after tasking a selector, to exercise due diligence when assessing that any Section 702 target (1) is a non-U.S. person; (2) reasonably believed to be located outside the United States; and (3) possesses, is expected to receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. *See, e.g.*, 2014 NSA Targeting Procedures, pp. 2-4. The Government has represented to the Court that, "the statute requires [the Government] to have a reasonable belief that a [Section 702] target is located outside the United States. The targeting procedures are designed to ensure that NSA analyzes information that gives rise to that reasonable belief. So it is the targeting procedures that imposes [sic] the due diligence requirement on the NSA in that respect." *In re DNI/AG Certification* [redacted], Hearing Transcript, at p. 6 (August 27, 2008).

~~(TS//SI//OC/NF)~~ The Government has represented to the Court that the exercise of due diligence is a continuous obligation: "the government's due diligence does not end once the initial targeting decision is made. The targeting procedures require the [] post-targeting analysis for all tasked facilities, including regular review to ensure that the tasked facility is used by the intended target." [redacted] Similarly, the Court has found that "[d]iligent and prompt response to credible

indications that a tasked facility has been accessed from the United States goes to the heart of the requirement of 50 U.S.C. § 1881a(d)(1)(A) that targeting procedures be reasonably designed to ensure that acquisitions target persons reasonably believed to be outside the United States." 2014 Mem. Op., at p. 30. If there is information that indicates a target may be a United States person, the agencies are required to resolve that issue, and are required to [redacted] *In Re DNI/AG 702 Certifications* [redacted] Transcript of Hearing, at pp. 4-8 (Aug. 4, 2014). For example, [redacted] *Verified Response to Order, In Re DNI/AG 702(g) Certification* [redacted] *at 25-26 (July 18, 2014).* The FBI and NSA have issued similar guidance.

~~(TS//SI//OC/NF)~~ Finally, the Government has an obligation, both at the time of tasking and on a continuous basis thereafter, to assess that a target possesses, is expected to receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. *See, e.g.*, 2014 NSA Targeting Procedures, at p. 4. If the Government later assesses that the continued tasking of a target's selector is not expected to result in the acquisition of foreign intelligence information, prompt detasking is required, and delay may result in a reportable compliance incident. *See, e.g., Quarterly Report to the Foreign Intelligence Surveillance Court Concerning Compliance Matters under Section 702 of the Foreign Intelligence Surveillance Act*, at p. 46 (item 28) (March 2015) (hereinafter "March 2015 Quarterly Report").

III. (U) Totality of the Circumstances

~~(TS//SI//OC/NF)~~ According to Section I of NSA's Section 702 targeting procedures, "NSA determines whether a person is a non-United States person reasonably believed to be outside the United States in light of the totality of the circumstances[.]" 2014 NSA Targeting Procedures, at p. 1. The Government has represented to the Court that "[t]he facts used to make each of these required

determinations may include, for example [redacted]. NSA is permitted to make reasonable presumptions regarding the target's foreignness in light of the available evidence; the Court specifically noted, however, that a presumption of foreignness would be applied only after NSA had exercised due diligence in looking for other indicators of the target's location. *See In re DNI/AG Certification* [redacted], Mem. Op., at p.10 (September 4, 2008); *see also In re DNI/AG Certification* [redacted], Government's Preliminary Responses to Certain Questions Posed by the Court, at p. 5 (August 26, 2008) ("It is important to note that the use of the presumption is only one aspect of a broader range of information upon which a targeting determination is made. Targeting decisions under the targeting procedures are made 'in light of the totality of the circumstances based on information available with respect to the new target.'" (internal brackets removed)).

~~(S)~~ According to NSA's proposed targeting procedures, NSA "must also reasonably assess, based on the totality of the circumstances, that the target is expected to possess, receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. This assessment must be particularized and fact-based, informed by analytic judgment, the specialized training and experience of the analyst, as well as the foreign intelligence information expected to be obtained. In making this assessment NSA will consider the circumstances that led to NSA's identification of the intended target and other relevant factors." *In re DNI/AG 702(g) Certifications* [redacted] *Procedures Used by the National Security Agency for Targeting Non-United States Persons Reasonably Believed to Be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* , Ex. A, at p. 4 (filed July 15, 2015). This change to NSA's targeting procedures reflects NSA's current practice of also considering the totality of the circumstances in assessing the foreign intelligence purpose for targeting a person for acquisition under Section 702.

~~(TS//SI//NF)~~ Once a selector has been tasked, NSA must continue to assess, based on the totality of the circumstances, that the targets of Section 702 acquisition remain non-United States persons located outside the United States. [redacted]

[redacted]

IV. (U) Obligation to Review

~~(TS//SI//OC/NF)~~ "[B]ecause targets can travel, and even reasonable determinations can be called into question by new facts, the targeting procedures mandate an additional layer of protection in the form of post-tasking analysis. Specifically, the Government is required to conduct post-targeting analysis to detect those occasions when a target, i.e., a user of a selector tasked for acquisition under Section 702: 1) is located in the United States; or 2) is a United States person." [redacted] For example, [redacted] To that end, in order to ensure that content is reviewed in a timely manner, NSA has an [redacted] system that reminds analysts to review the content from tasked electronic communications accounts . . . at least five business days after the first acquisition of data and at least every thirty business days thereafter." [redacted]

V. ~~(TS//SI//NF)~~ Resolving [redacted] Within [redacted] Business Days

~~(TS//SI//OC/NF)~~ As discussed above, the Government must conduct post-tasking analysis of Section 702 collection and diligently and promptly respond "to credible indications that a tasked facility has been accessed from the United States." 2014 Mem. Op., at p. 30. This obligation "goes to the heart of the requirement of 50 U.S.C. § 1881a(d)(1)(A) that targeting procedures be reasonably designed to ensure that acquisitions target persons reasonably believed to be outside the United States." *Id.* To help identify targeted electronic communications accounts/addresses/identifiers used by targets located in the United States, NSA uses [redacted] . . . to generate and prioritize [redacted] possible use of targeted accounts in the United States." *In re*

DNI/AG 702(g) Certification [redacted]
Government's Supplemental Report Regarding NSA's Post-Targeting Analysis, at p. 1 (May 7, 2010). In a letter to the Court dated May 21, 2010, the Government represented that "[t]o ensure that [redacted] do not go unresolved for an unreasonable period of time, NSA [redacted] Letter from (b)(6); (b)(7)(C) , NSD, to the Hon. Mary A. McLaughlin, at p. 2 (May 21, 2010); *see also* 2014 Mem. Op., at pp. 29-30 ([redacted]) (emphasis added). As reflected in this quote from the Court's 2014 Memorandum Opinion, it is important to note, however, that [redacted] and NSA must resolve [redacted] as soon as possible.

[redacted]

[redacted]

[redacted]

~~(S//NF)~~ As has been represented to the Court, [redacted] like [redacted] should be resolved as soon as possible, and in no case [redacted]

VI. (U) Waivers

~~(TS//SI/NF)~~ NSA's, FBI's, and CIA's Section 702 minimization procedures all allow for waiver of the destruction requirement for any communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-U.S. person located outside the United States but who is located inside the United States at the time of acquisition or is subsequently determined to be a U.S. person on a communication-by-communication basis. *See Minimization Procedures Used by the National Security Agency in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended*, at pp. 9-10 (July 28, 2014) ("A communication identified as a domestic communication . . . will be promptly destroyed upon recognition unless the Director (or Acting Director) of NSA specifically determines, in writing and on a communication-by-communication basis, that the sender or intended recipient of the domestic communication had been properly targeted under section 702 of the Act, and the domestic communication satisfies one or more of the following conditions: (1) such domestic communication is reasonably believed to contain significant foreign intelligence information . . . (2) Such domestic communication does not contain foreign intelligence information but is reasonably believed to contain evidence of a crime that has been, is being, or is about to be committed. . . (3) such domestic communication is reasonably believed to contain technical data base information . . . or information necessary to understand or assess a communications security vulnerability . . . or (4) such domestic communication contains information pertaining to an imminent threat of serious harm to life or property."); *Minimization Procedures Used by the Federal Bureau of Investigation in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended*, at p. 6 (July 28, 2014) ("Any communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States but is in fact located inside the United States at the time such communication is acquired or is subsequently determined to be a United States person

will be removed from FBI systems upon recognition, unless the Director or Deputy Director of the FBI specifically determines in writing on a communication-by-communication basis that such communication is reasonably believed to contain significant foreign intelligence information, evidence of a crime that has been, is being, or is about to be committed, or information retained for cryptanalytic, traffic analytic, or signal exploitation purposes."); *Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended*, at p. 8 (July 28, 2014) ("Any communication received by CIA that is acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States but is in fact located inside the United States at the time such communication is acquired or was in fact a United States person at the time of targeting will be destroyed unless the Director of the CIA specifically determines in writing and on a communication-by-communication basis that such communication is reasonably believed to contain significant foreign intelligence information or evidence of a crime that has been, is being, or is about to be committed.").

~~(TS//SI/OC/NF)~~ The NSA, FBI and CIA waiver provisions are limited to situations in which the target, at the time of targeting, was "reasonably believed to be a non-United States person located outside the United States." *Id.*; *In re DNI/AG 702(g) Certification* [redacted] Mem. Op., at p. 40 (September 20, 2012) (hereinafter "2012 Mem. Op.") (noting that the change to NSA's minimization procedures requiring the NSA Director or Acting Director to determine in writing that "the sender or intended recipient of the domestic communication had been properly targeted under Section 702 of the Act . . . has the practical effect of limiting the reach of the waiver provision to domestic communications acquired with the reasonable but mistaken belief that the target is a non-U.S. person located outside the United States"). This means that the waiver provisions are not available for any communication or information acquired after agency personnel determine that the target is no longer reasonably believed to be a non-United States person located outside the United States, including, for example, any such communications or information acquired during a detasking delay. *See, e.g.*, 2012 Mem. Op. at 40. "Destruction waivers are most frequently sought when [redacted]" *Memorandum for Assistant Attorney General for National Security, United States Department of Justice, RE: Discussion with the Foreign Intelligence Surveillance Court on 24 July 2012 regarding the*

waiver provisions of NSA's minimization procedures governing data acquired pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended, at p. 1 (August 28, 2012). In any situation in which the waiver provisions would apply, agency determinations must be made on a case-by-case basis based on an individualized finding by appropriate personnel. *Id.*

VII. ~~(TS//SI/NF)~~ [redacted] Overcollection

~~(TS//SI/NF)~~ [redacted] Overcollection ("[redacted]O") "occurs when, while collecting communications [redacted] [NSA] also inadvertently acquires other communications that [redacted]" *In Re DNI/AG Certification* [redacted] Government's Supplement to its Response to the Court's Order of January 16, 2009, at p. 4 (March 17, 2009). "NSA has [redacted] to prevent [redacted]O. With regard to minimizing the retention of such information, NSA has enhanced [redacted] to ensure that overcollections are identified and purged before non-targeted information enters NSA's data repositories. Should any overcollected information regarding U.S. persons survive those safeguards, it would have to be destroyed upon recognition." *In Re DNI/AG Certification* [redacted] Mem. Op., at pp. 24-25 (April 7, 2009) (internal citations omitted). Accordingly, all agency personnel who have access to Section 702-acquired information must report any identified or potential incident resulting in overcollected data to their agency's oversight personnel to ensure that it is appropriately addressed.

IX. ~~(S/NF)~~ FBI's Use of a Target's [redacted] During its Process to Approve the Acquisition of [redacted]

~~(S//NF)~~ After the application of its own targeting procedures to task a selector to Section 702 acquisition for [redacted], NSA may request that the FBI [redacted] from such selector (a "[redacted]"). Prior to approving the acquisition of [redacted] FBI [redacted] *Procedures Used by the Federal Bureau of Investigation for Targeting Non-United States Persons Reasonably Believed to Be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* ("FBI Targeting Procedures"), at p. 2 (July 28, 2014). [redacted]

(b)(1); (b)(3); (b)(7)(E) [redacted]

~~(S//NF)~~ As explained to the Court in a September 2014 letter:

> In order to ensure that its queries of its systems are 'reasonably calculated' to uncover information about a target's location or United States person status, (b)(1); (b)(3); (b)(7)(E) [redacted]

Supplemental Notice Regarding the Acquisition of (b)(1); (b)(3); (b)(7)(E) OI Tracking No. 126097, at pp. 3-4 (September 30, 2014) (emphasis added). This Notice established the following requirements further clarifying the FBI's obligations with respect to implementing th(b)(1); (b)(3); (b)(7)(E) [redacted] used by the target:

- ~~(S//NF)~~ With certain limited exceptions,[1] '(b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 4-5 & n.4.

[1] ~~(S//NF)~~ "In certain situations, (b)(1); (b)(3); (b)(7)(E) [redacted]

- ~~(S//NF)~~ In addition, (b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 6.
- ~~(S//NF)~~ (b)(1); (b)(3); (b)(7)(E) [redacted] *Id.*

- ~~(S//NF)~~ "[T]he Government assesses tha(b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 6.
- ~~(S//NF)~~ (b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 10.

(b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 4 n.4.