

Legal Authorities

International Terrorism Online Certification Course

AGC



SSA



Office of the General Counsel
National Security Law Branch

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Legal Authorities

- **Legal Authorities Associated With Undercover Activities:**
 - Titles 18 and 28 U.S.C.
 - AGG-DOM
 - National Security Undercover Operations Policy Implementation Guide (NSUCOPG)
 - AGG-CHS and CHSPM
 - DIOG
 - EO 12333
 - Supreme Court decisions

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Undercover Activity

Any investigative activity involving the use of an assumed identity by an undercover employee for an official purpose, investigative activity, or function.

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Undercover Employee

An employee of the FBI, another federal, state, or local law enforcement agency, another entity of the USIC, or another foreign intelligence agency working under the direction and control of the FBI whose relationship with the FBI is concealed from third parties by the maintenance of a cover or alias identity for an official purpose, investigative activity, or function.

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Undercover Employee

- An FBI employee
 - Or another federal, state, or local law enforcement agency, another entity of the USIC, or another foreign intelligence agency working under the direction and control of the FBI
- Concealing FBI affiliation
- For an official purpose, investigative activity, or function.

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Undercover Operation

■ UCO

- More than 5 separate substantive contacts
- by an undercover employee
- with the individual(s) under investigation.



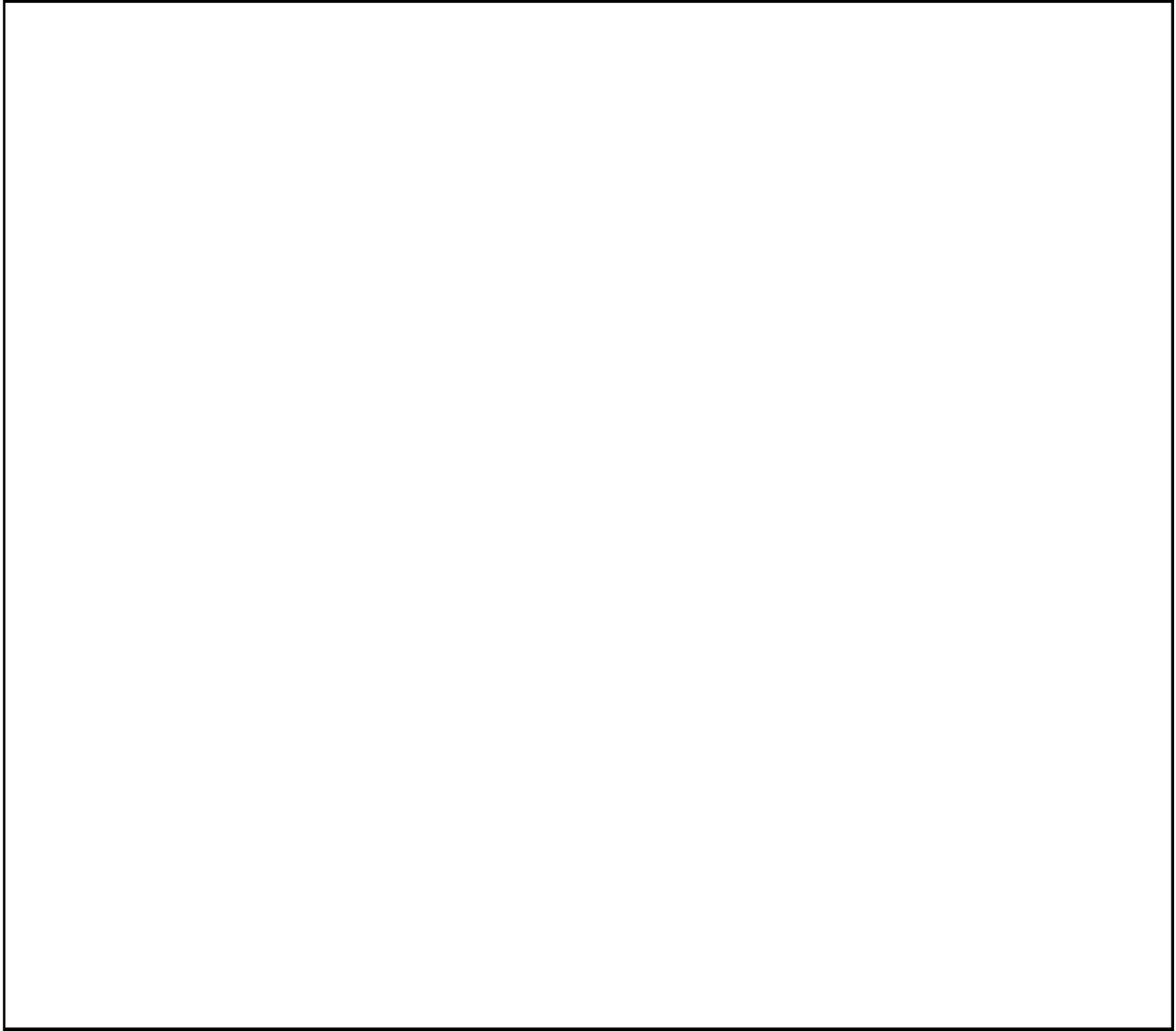
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Undercover Operation



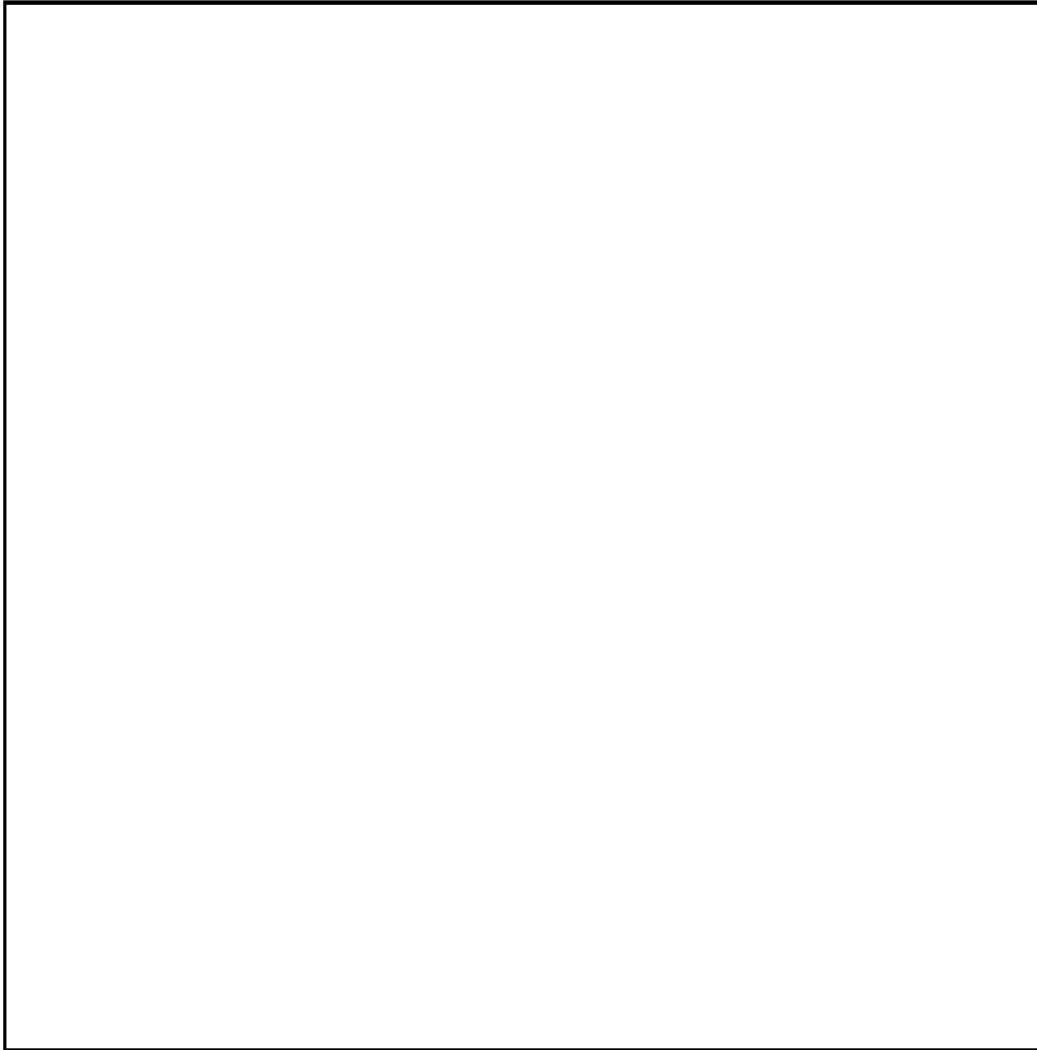
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Undercover Operation



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Undercover Operation

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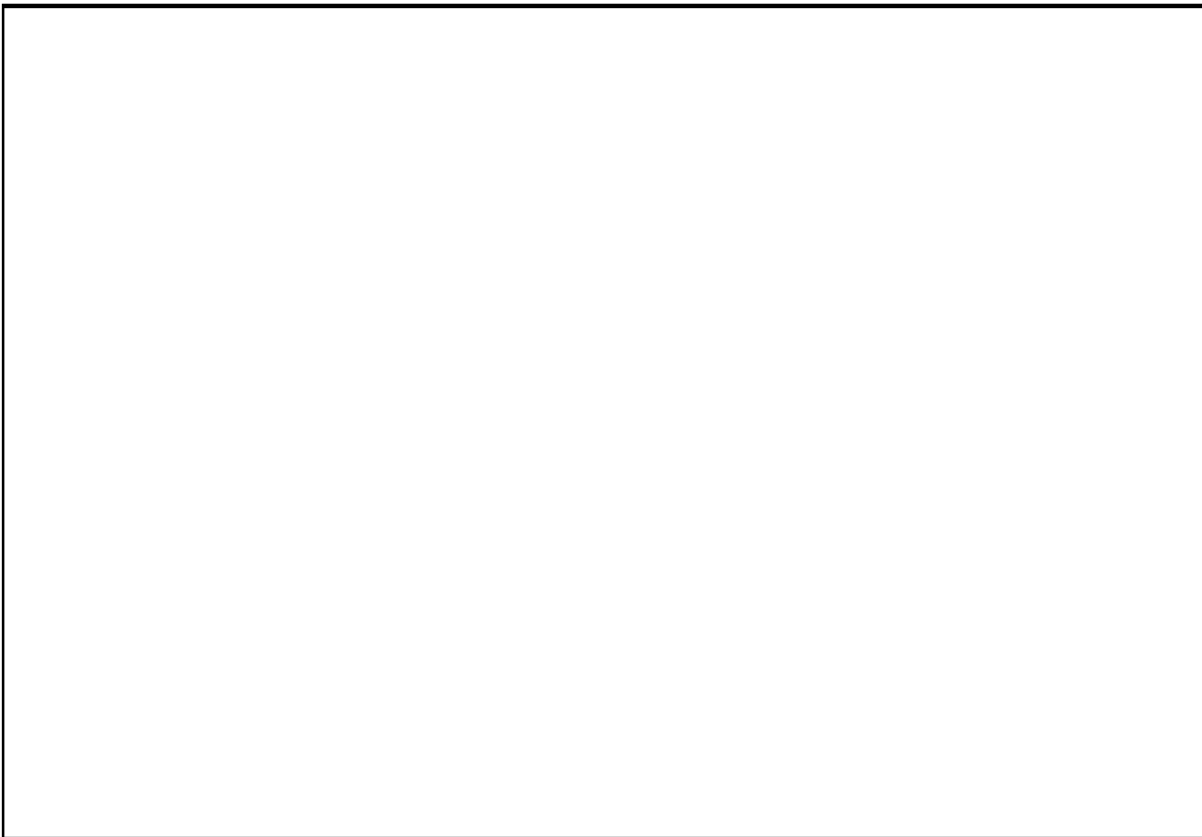
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Undercover Operation

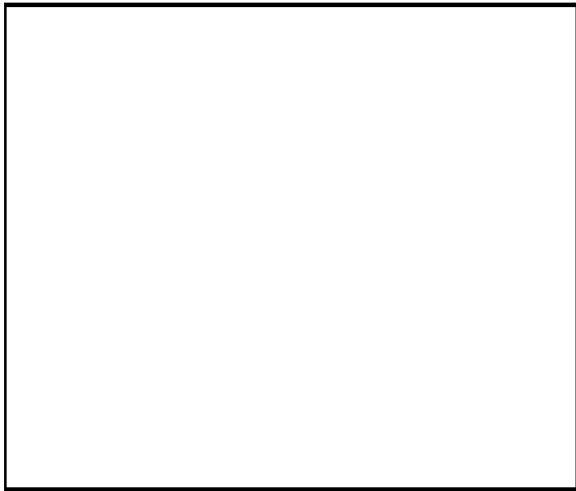
- With Individual(s) Under Investigation:



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Legal Authorities



- OIA
- UDP

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- 1st Amendment
- Entrapment
- Consensual Monitoring



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First Amendment

No targeting of individuals based solely on 1st Amendment protected speech or activities.

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Entrapment

- **What is it?**
- **How to avoid a successful entrapment defense**

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Entrapment

Definition

- Entrapment is an inducement to engage in crime, made by a government agent to a person who is not predisposed to commit the crime, for the purpose of prosecuting the person for committing the crime.

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Entrapment

- Entrapment is a relatively new legal defense
- Traced back to a series of Supreme Court cases starting in the 1930s
- These opinions broke with the traditional view that it was irrelevant how the defendant was led into temptation
- Following Supreme Court's lead, virtually every jurisdiction in U.S. has adopted a version of the defense.

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Entrapment

- Same principles for entrapment apply in national security matters as in criminal cases:

1. Avoid government inducement – gov't agent cannot be the “tempter” or “inducer”;

2. Need predisposition on part of target,

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Entrapment

Predisposition

- Willingness to commit a crime
- Must exist before government inducement, but may be proved by actions or events in response to a legal inducement.
- Evidence discovered during or after crime is committed may be used to prove predisposition.

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Entrapment

Indicators of Predisposition

- Expects to “profit” from the crime -- doesn’t have to be monetary, may be increase in political/religious status;
- Shows no reluctance at OCE/CHS’s mere suggestion to commit the crime;
- Criminal suggested the crime;
- Has a motive to commit the crime.

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Entrapment

Indicators of Predisposition

- Prior, recent convictions/arrests for similar conduct;
- Having (or bragging) that he/she has experience or expertise in suggested illegal activity;
- Associating with and/or expressed sympathies with other predicated terrorists/criminals;

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Entrapment

- Subjective version of Entrapment
 - Followed in the federal courts and in a substantial majority of the states
 - Usually judicially created and lacks a statutory formulation
 - 2-part structure: 1. Defendant must establish by POE that gov't agent induced him to commit the crime (will was overcome by impermissible inducement); 2. If successful, burden shifts to gov't to show defendant was predisposed to commit the crime.

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Entrapment

Inducement

- Establishing the inducement
 - “Inducement” defined as soliciting, proposing, initiating, broaching, or suggesting the commission of the offense charged
 - Merely providing an opportunity is not inducement

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Entrapment

Impermissible Inducement

- Exploiting a terrorist/criminal's weakness or fear.
 - Repeated requests, made in an atmosphere of camaraderie among veterans. See Sorrells, 287 U.S. at 439-41
- Repeated solicitation, threats or coercion to induce the commission of a crime.

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Entrapment

Permissible Inducement

- Mere suggestion to predicated criminal/terrorist activity once predisposition exists;
- Giving criminal/terrorist opportunities to commit an offense;
- Aiding criminal/terrorist with some of the resources necessary to commit the offense.

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Entrapment

Impermissible Inducement

- Promises of reward, or pleasure based on need, sympathy or friendship (Davis, 9th Cir.)
 - Establishing a friendly relationship with the defendant, and then playing on his sympathy for the supposed suffering of a fellow drug user. See Sherman, 356 U.S. at 371.
- Religious or ideological appeals.
 - Exploiting the terrorist/criminal's beliefs that his ethnic or religious group is a victim and deserves retribution;
 - Exploiting the need for revenge by one who has survived real or perceived individual, familial or ethnic persecution

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Entrapment

- Key to avoiding entrapment –
 - Make sure there is adequate predication of the identified subjects
 - Predication is established through facts that show a “reasonable indication” that subject is engaging, has engaged or intends to engage in the criminal activity proposed, or similar activity.

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Entrapment

- Was the defendant predisposed to commit the offense before being approached by the government agent?
- Any questions, ask CDC, AUSA, NSLB

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Consensual Monitoring

- Monitoring of communications for which a court order or warrant is not legally required because of the consent of a party to the communication.



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Consensual Monitoring

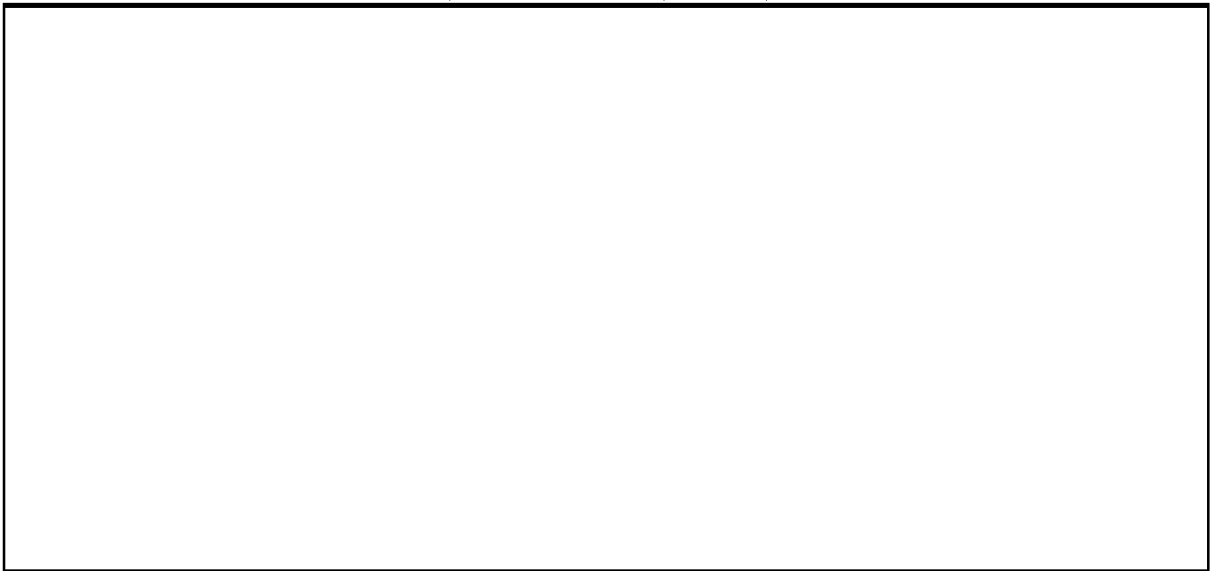
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- Generally SSA may approve if info likely to be obtained is relevant to an investigation
- Consenting party (UCE/OCE/CHS) must sign FD-472, 473, 1071, etc.
- SA must complete FD-759
 - If the facts on the FD-759 change (e.g. more than one consenting party, different interceptees, different periods of authority) separate FD-759s must be executed. DIOG, 11.5.6(D)

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Consensual Monitoring

- Two-party consent states without a law enforcement exception:
 - CA, IL, MD, MT, NH, NV, PA, WA



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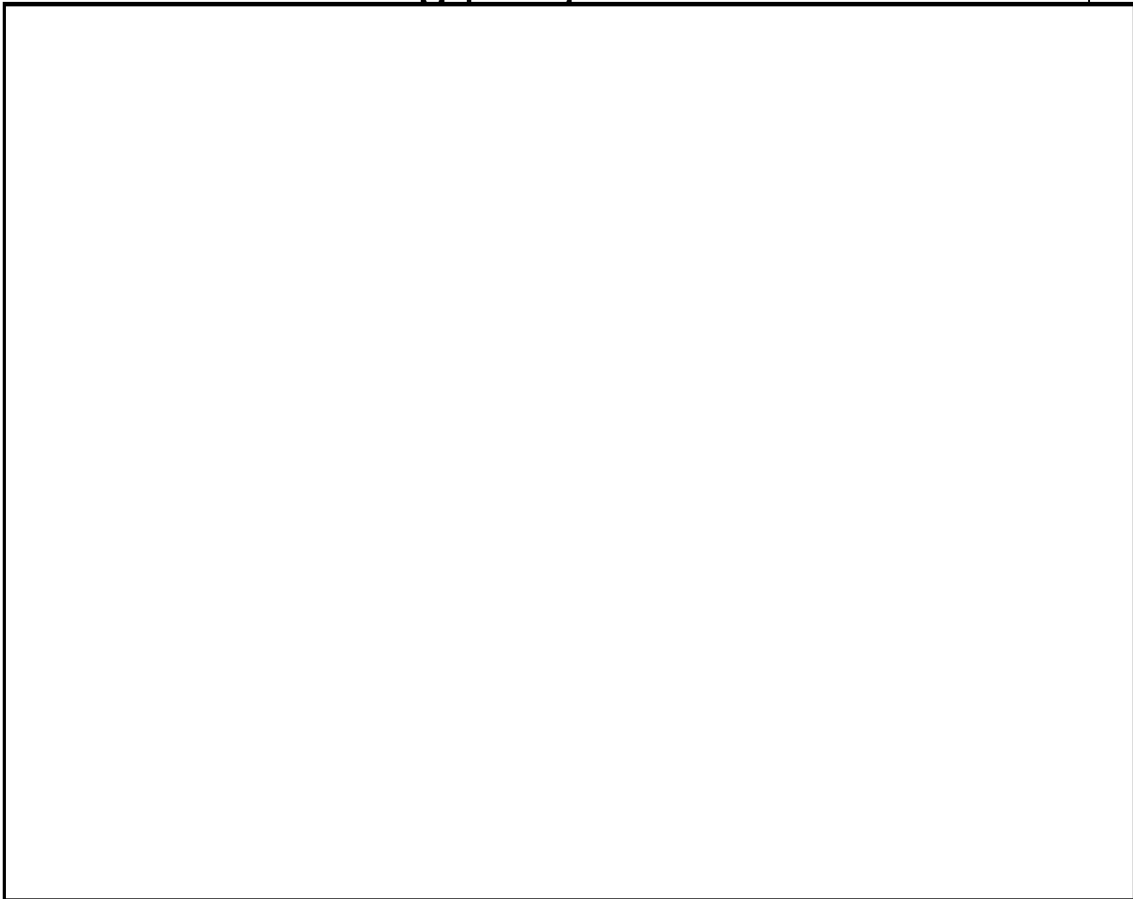
Consensual Monitoring

- General Approval Requirements:
 - SSA approval conditioned on
 - Showing monitoring is related to an investigative purpose
 - CDC or OGC review
 - Party to the communication has consented and consent has been properly documented
 - Monitoring will not intentionally include a 3rd-party not of interest to the investigation
 - Consenting party will remain a party to the communication throughout the monitoring
 - Duration may be for the duration of the investigation

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Consensual Monitoring

- Additional Approval is required:
 - If non-consenting party is located OCONUS,



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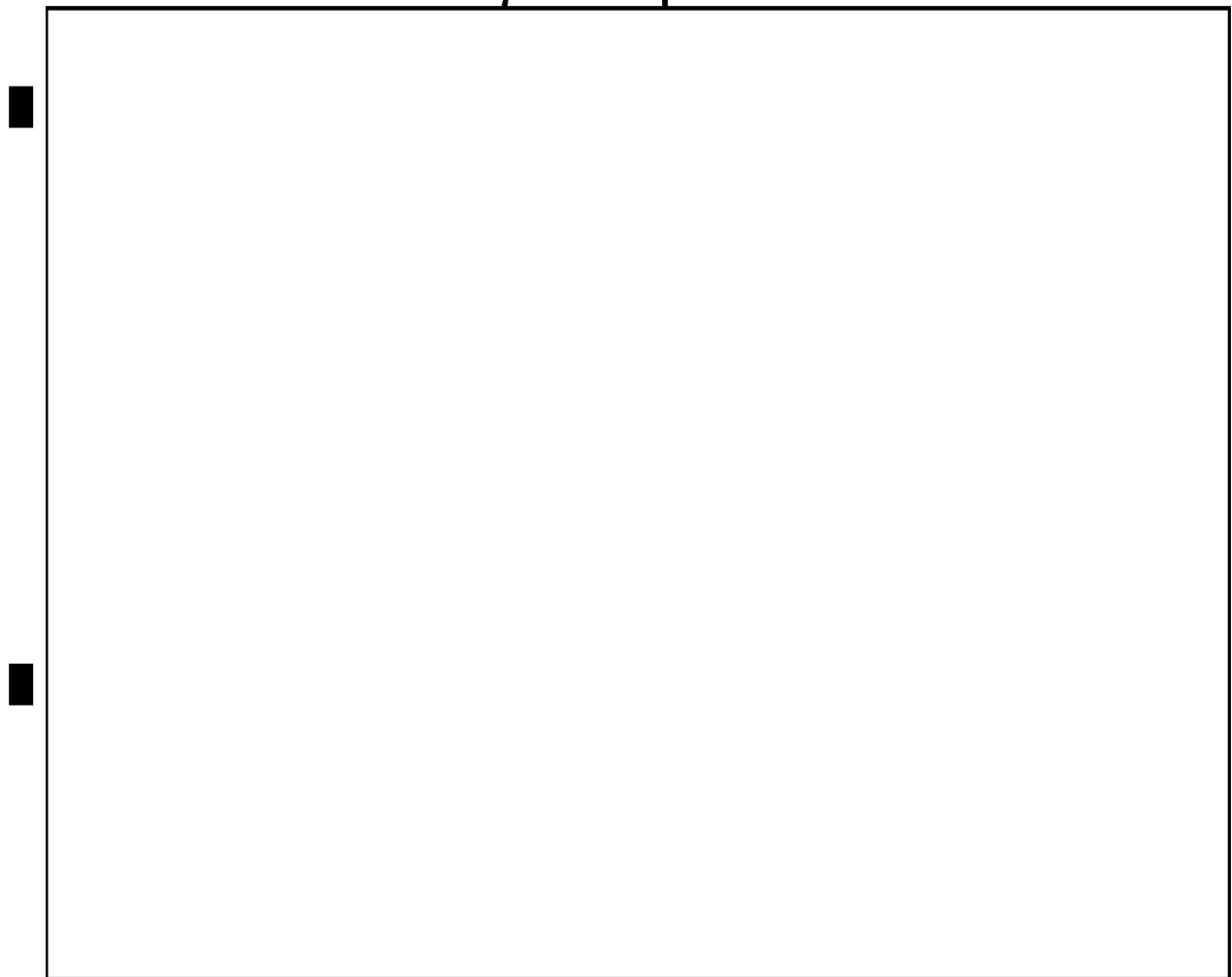
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Consensual Computer Monitoring

- OCEs/CHSs may visit public web sites



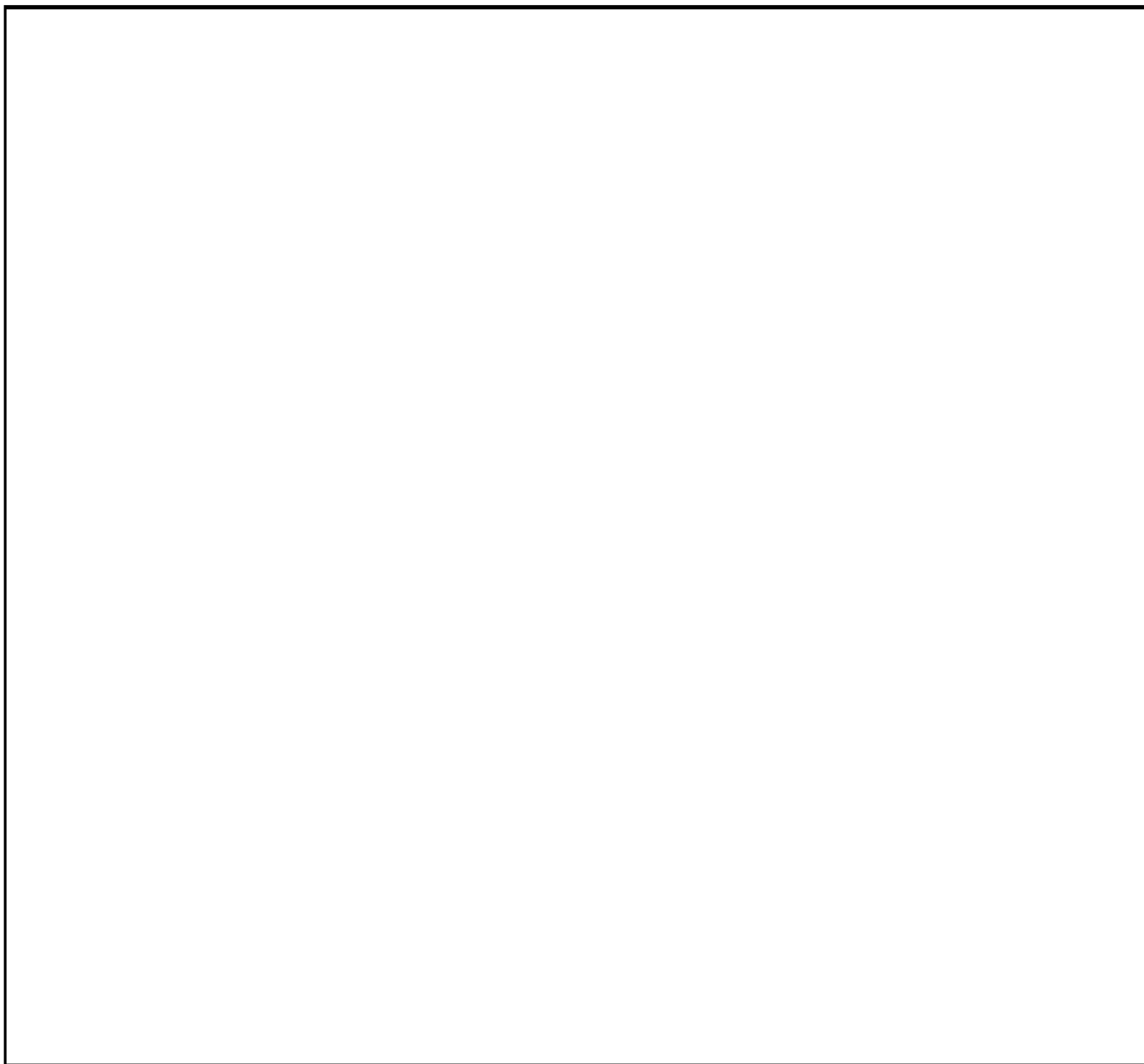
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Consensual Computer Monitoring



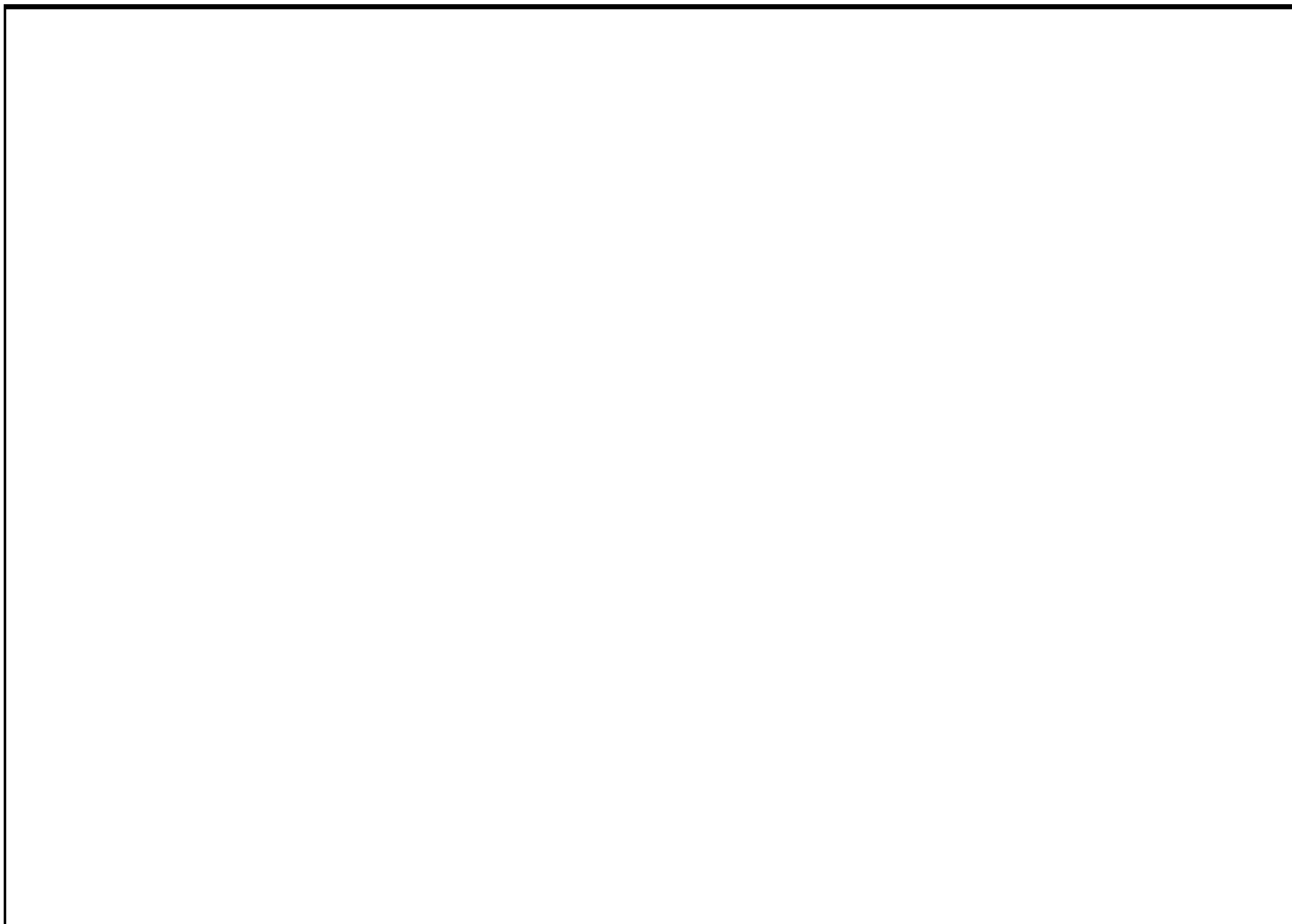
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Consensual Computer Monitoring



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Consensual Computer Monitoring



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Consensual Computer Monitoring



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Consensual Computer Monitoring



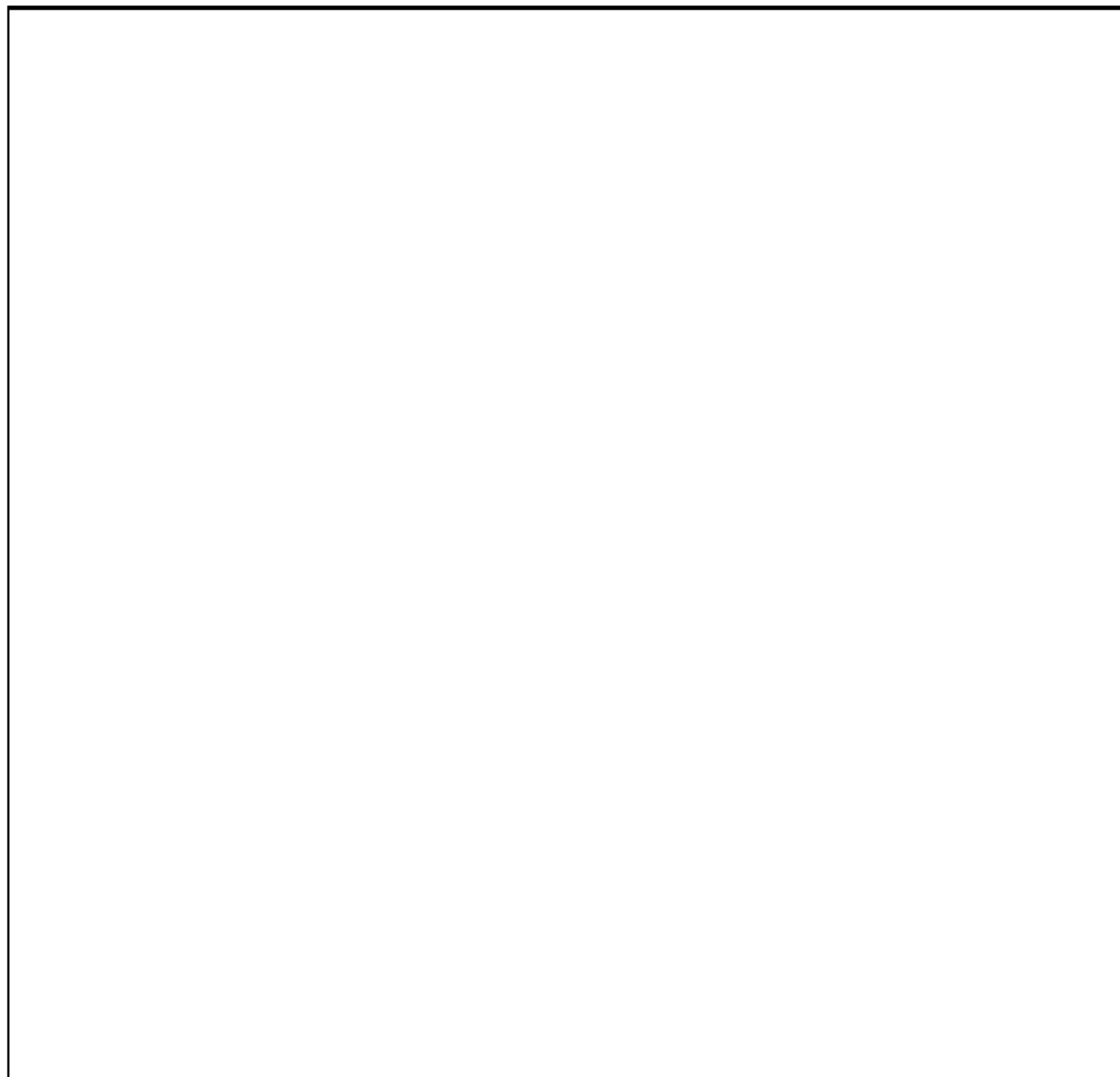
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Consensual Computer Monitoring



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Otherwise Illegal Activity (OIA)

- Otherwise illegal activity is conduct in the course of duties by an FBI employee (UCE/OCE) or CHS which constitutes a crime under local, state, or federal law if engaged in by a person acting without authorization.

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Otherwise Illegal Activity (OIA)

- OIA may be authorized for a UCE or CHS to obtain information or evidence necessary for the success of an investigation when:

- that information or evidence is not reasonably available without OIA;



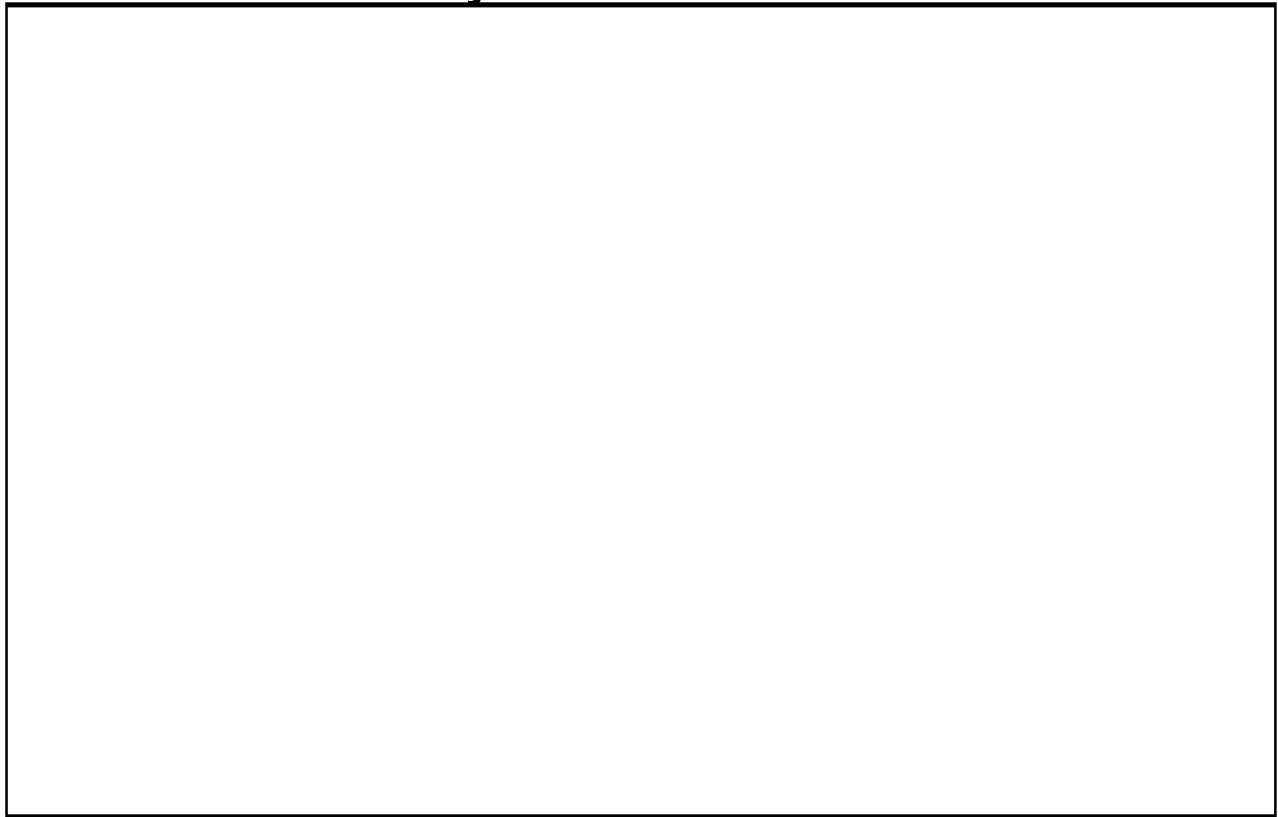
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- necessary to prevent serious bodily injury or death.

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Otherwise Illegal Activity (OIA) -- CHSs

- Authority -- Part V of the 2007 AG Guidelines for CHSs, and Section 10 of the CHS Policy Manual



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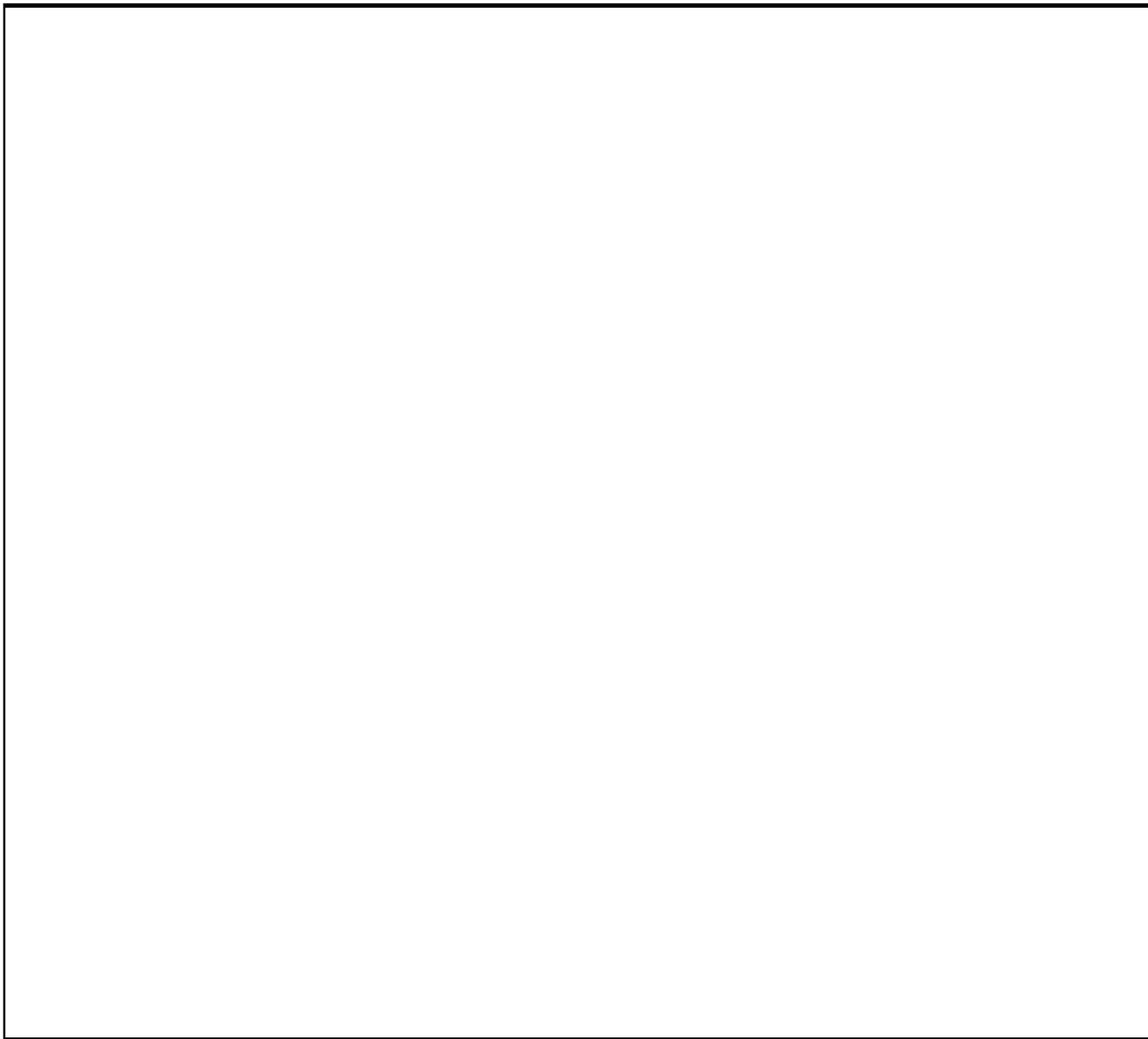
Otherwise Illegal Activity (OIA) -- UCEs

- Authority – Part V.C of the AGG-DOM
 - See also DIOG, Section 17

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Otherwise Illegal Activity (OIA) – UCEs and CHSs



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Otherwise Illegal Activity (OIA) – UCEs and CHSs

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- Verbal approval from DOJ within 24 hours; written confirmation within 72.

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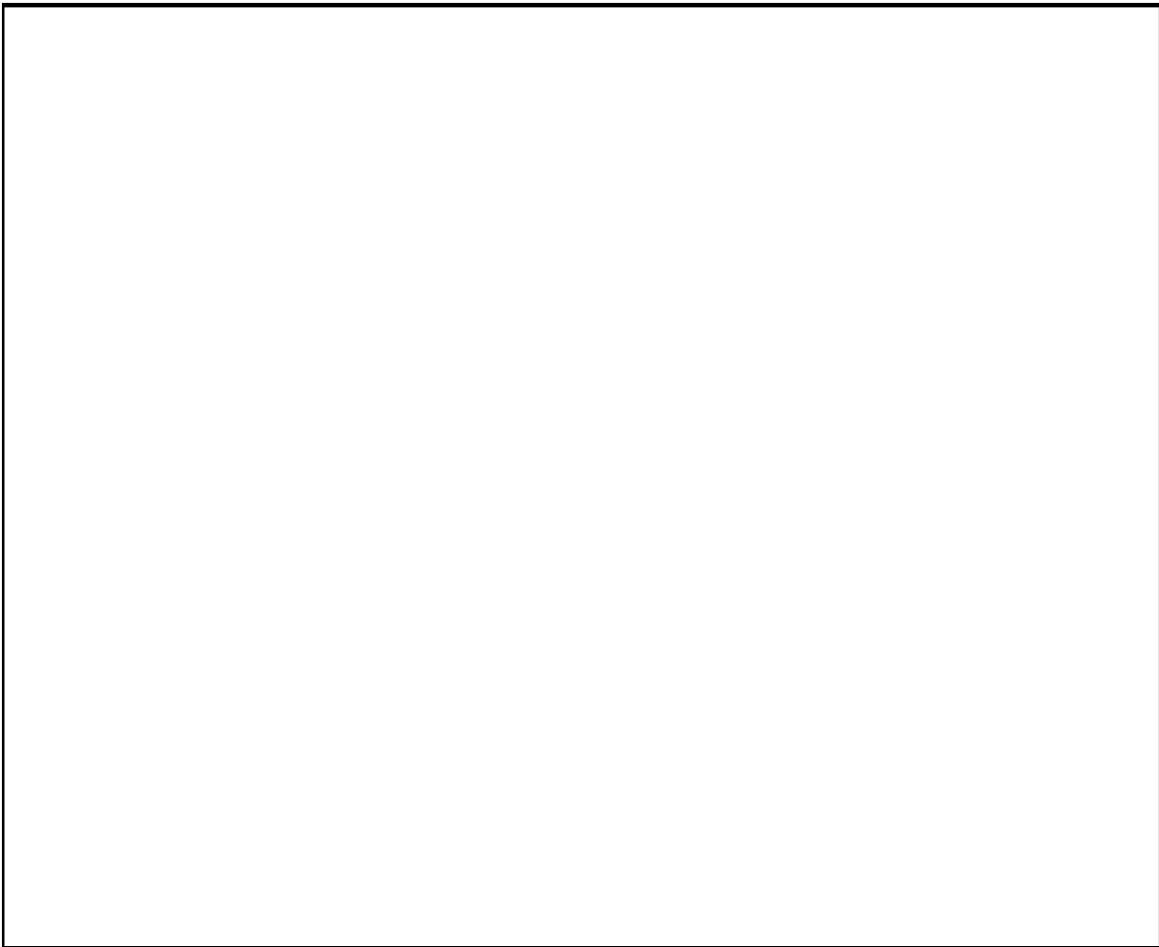
Undisclosed Participation (UDP)

- UDP occurs when a CHS or UCE, acting on behalf of the FBI, joins or participates in the activity of an organization (in the United States) without disclosing FBI affiliation to an appropriate official in the organization.

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UDP - Websites

■ Organization



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UDP - Websites

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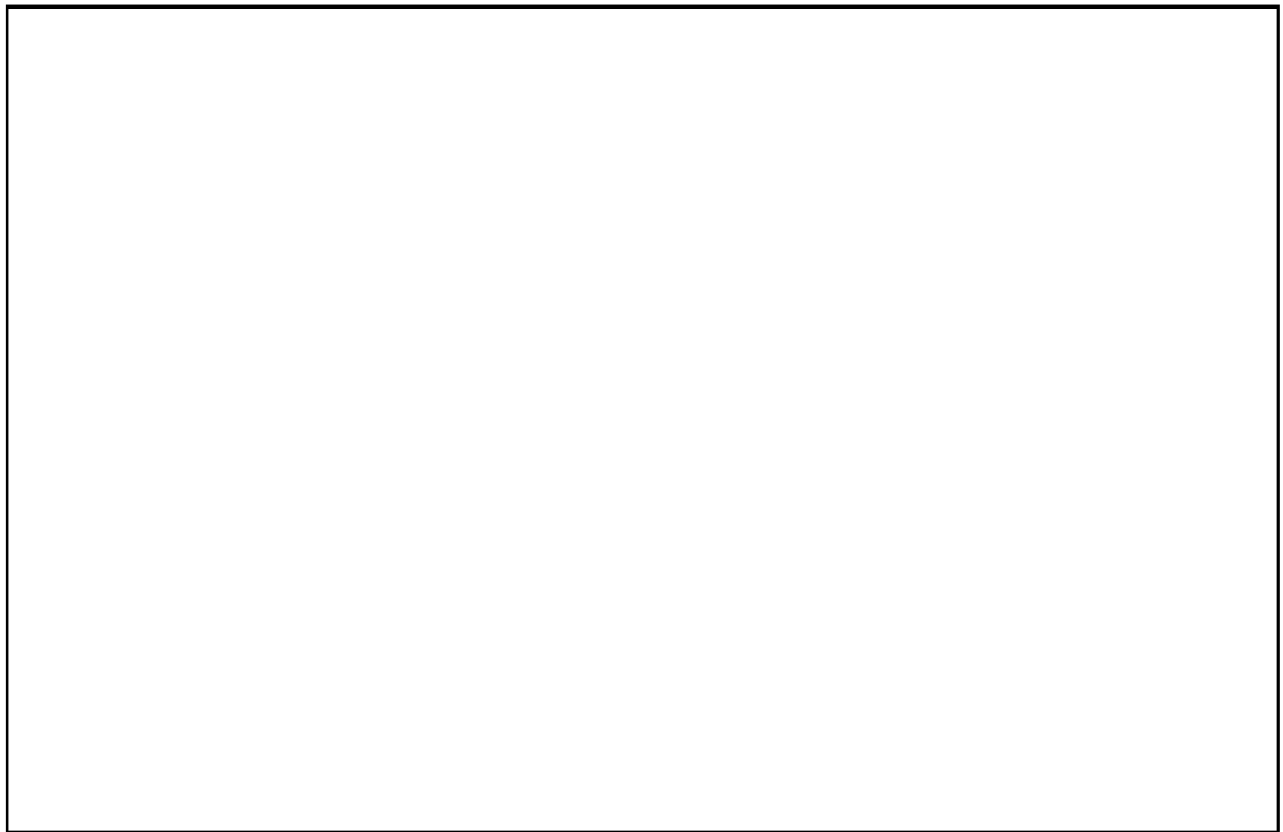
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UDP - Websites

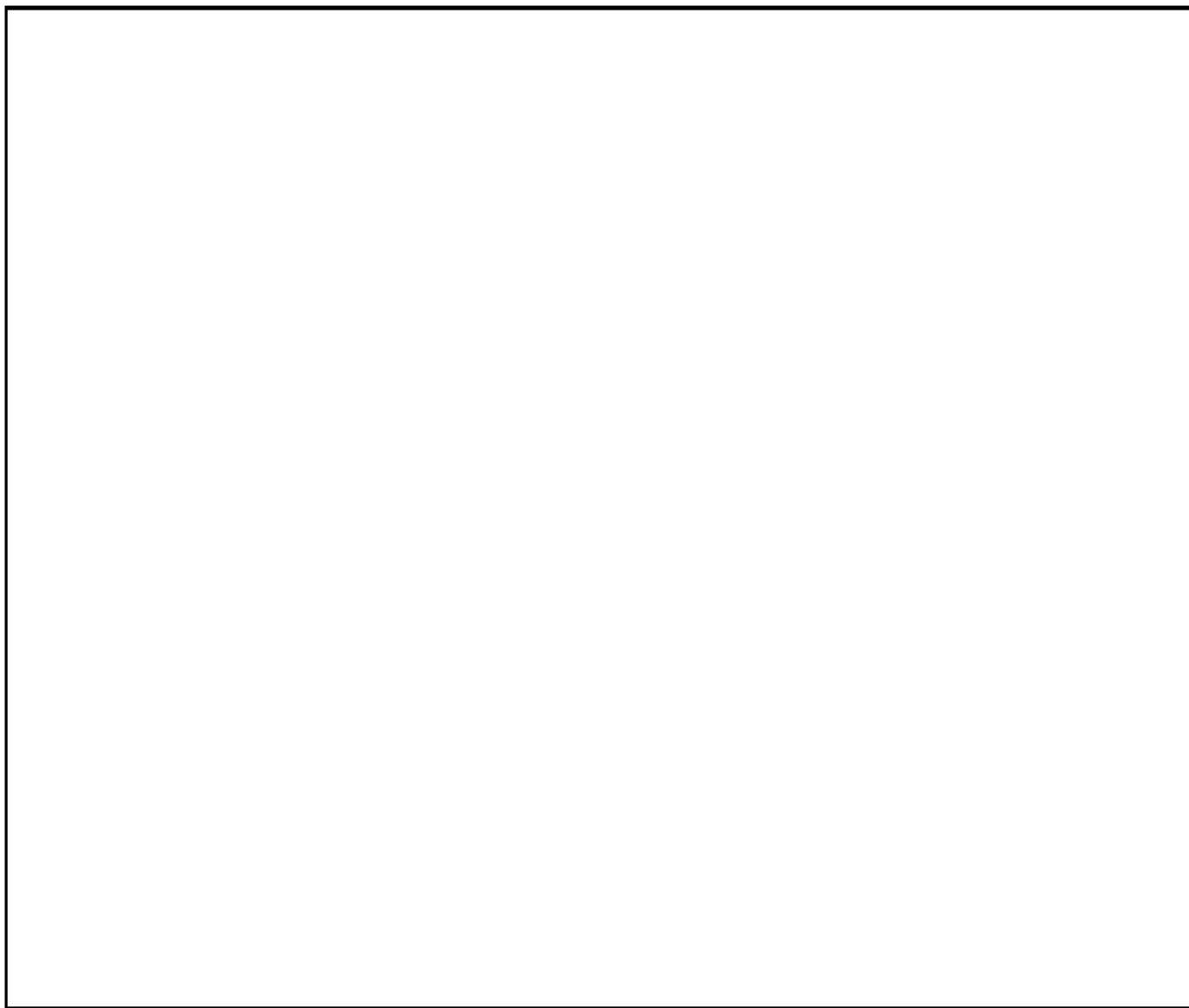
- An OCE/CHS can view any public website without UDP. (DIOG, 5.9(A)(1))



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UDP - Websites



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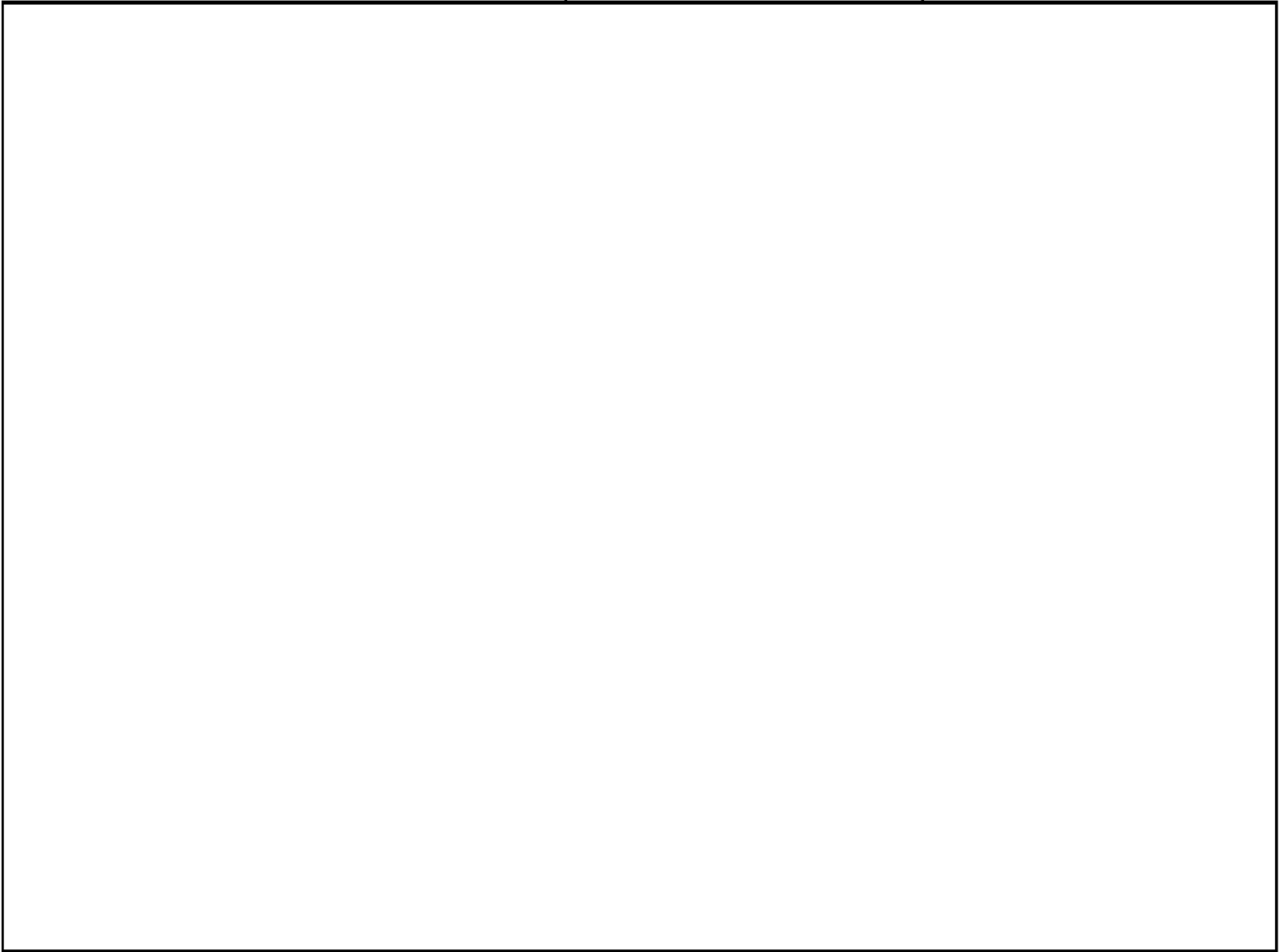
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UDP - Websites

■ “Organization” -



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ACLURM044607

FBI043507

UDP - Websites

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ACLURM044608

FBI043508

UDP - Websites

■ “Participation”:



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UDP - Websites

■ Participation:



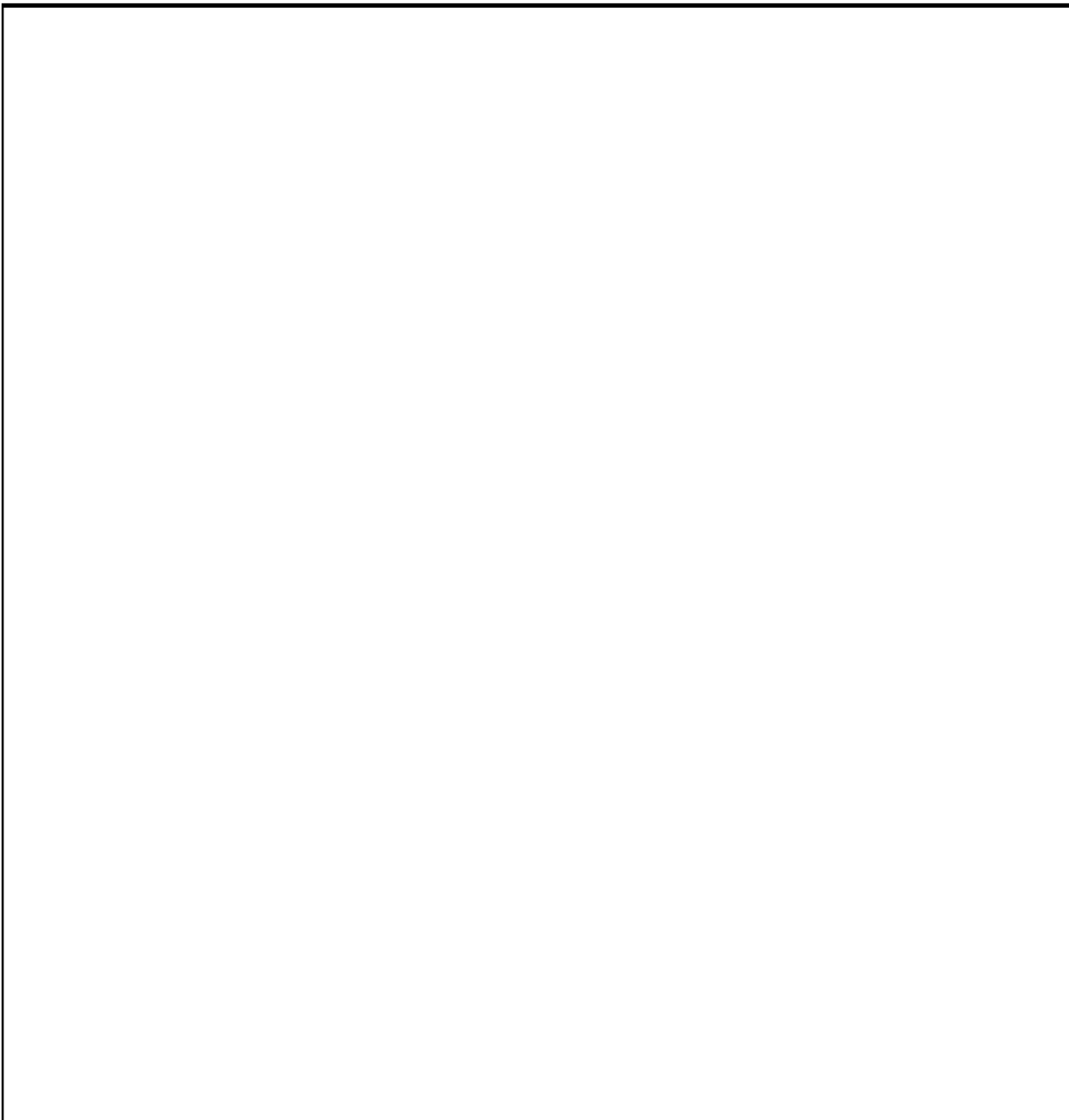
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UDP - Websites



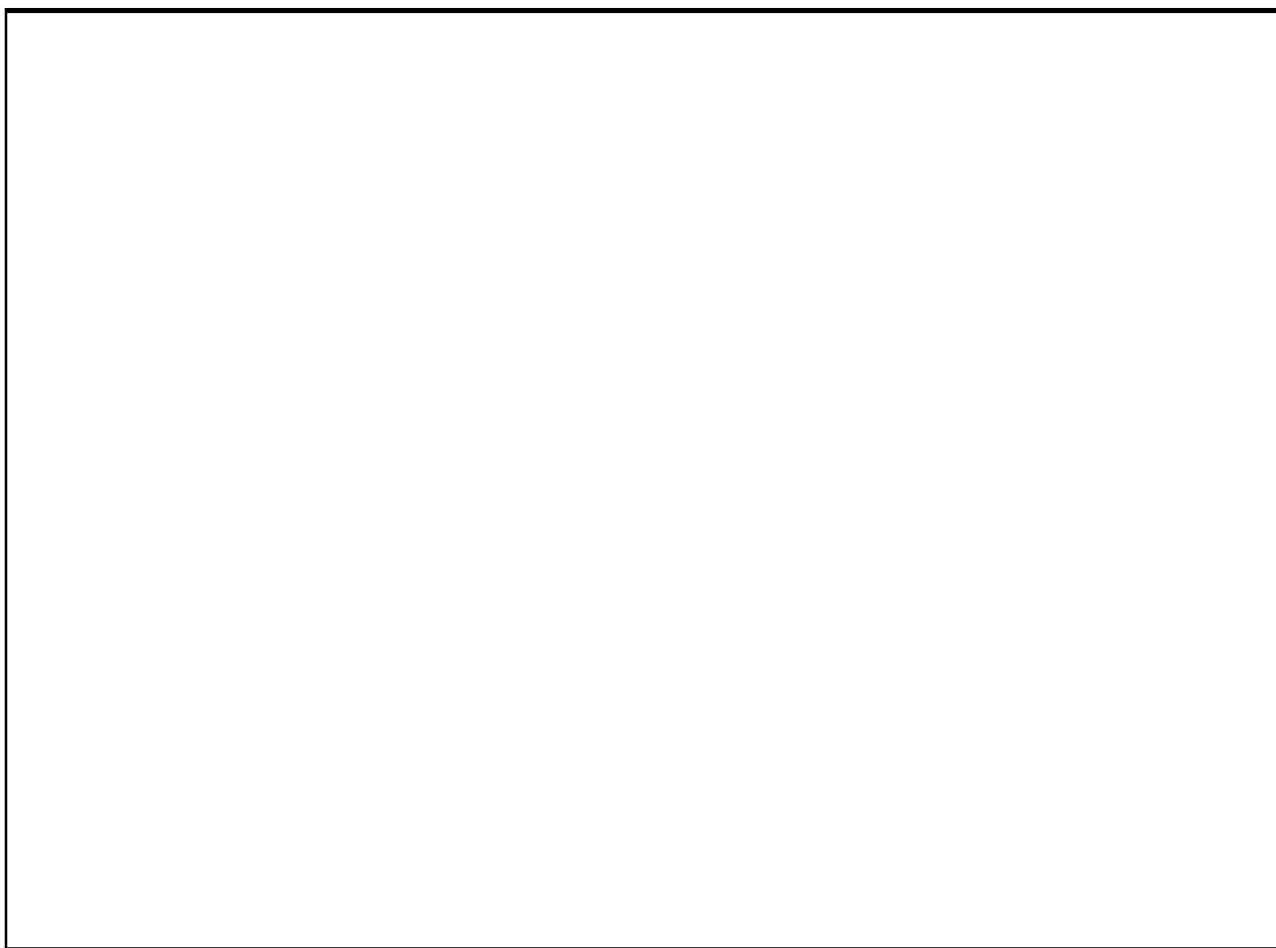
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UDP - Websites



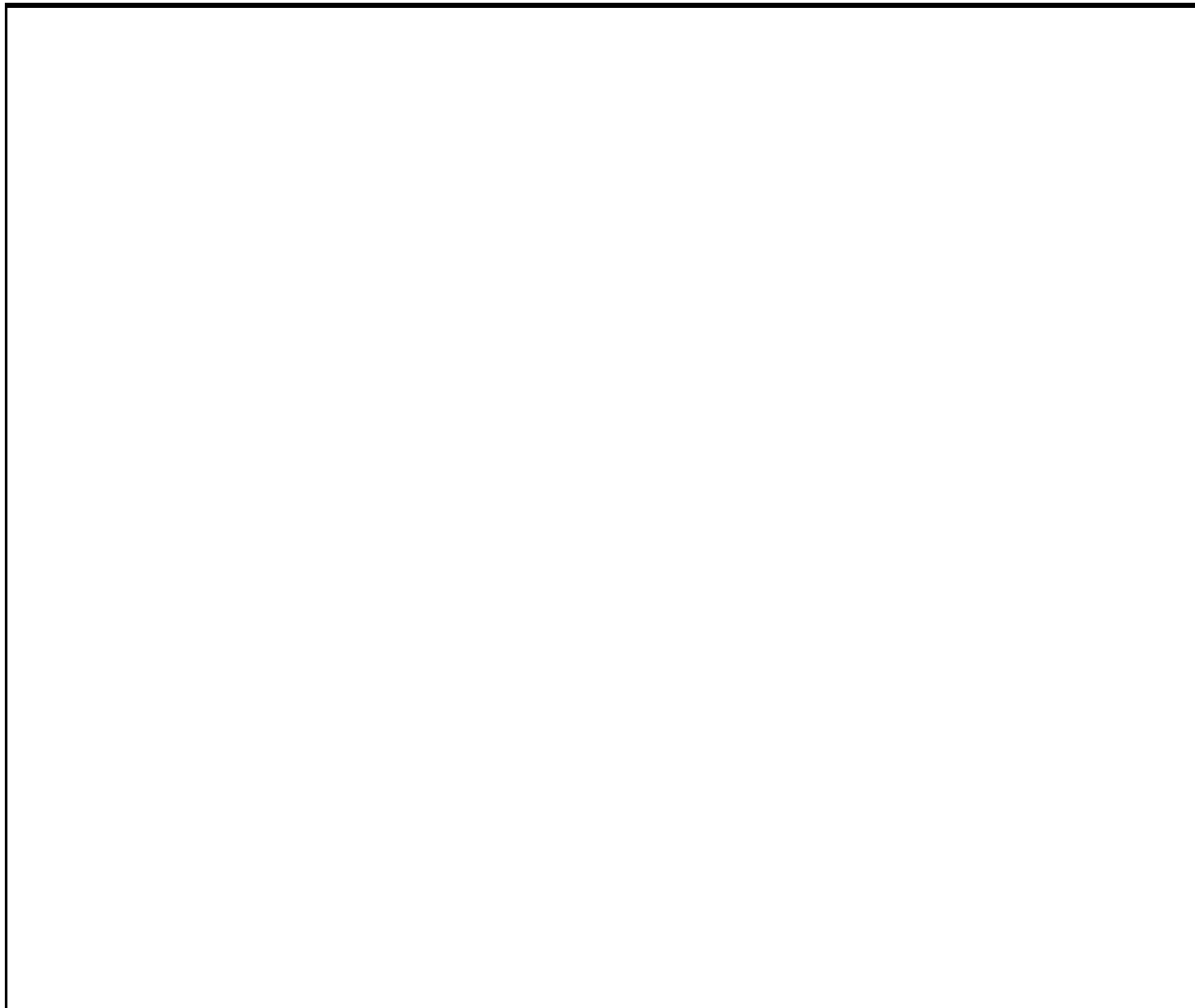
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UDP - Websites



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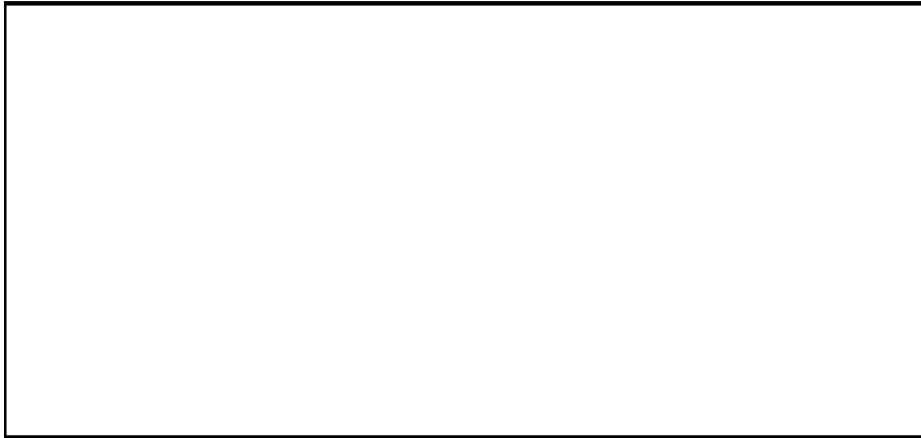
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QUESTIONS ?

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