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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION AND ORDER

This matter is before the Foreign Intelligence Surveillance Court ("FISC" or "Court") on the "Government's Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications," which was filed on July 28, 2014 ("July 28, 2014 Submission"). For the reasons explained below, the government's request for approval is granted, subject to certain reporting requirements. The Court's approval of the certifications, amended certifications, and accompanying targeting procedures and minimization procedures is set out in separate orders that are being entered contemporaneously herewith.

I. BACKGROUND

The July 28, 2014 Submission includes [redacted] certifications that have been executed by the Attorney General ("AG") and the Director of National Intelligence ("DNI") pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("FISA"), which is codified at 50 U.S.C. § 1881a: [redacted] certifications (collectively referred to as "the 2014 Certifications") is accompanied by the supporting affidavits of the Acting Director of the National Security Agency ("NSA"), the Director of the Federal Bureau of Investigation ("FBI"), and the Director of the Central Intelligence Agency ("CIA"); two sets of targeting procedures, for use by the NSA and FBI respectively;[1] and four sets of minimization procedures, for use by the NSA, FBI, CIA, and the National Counterterrorism Center ("NCTC"), respectively.[2] The July 28 Submission also includes an explanatory memorandum prepared by the Department of Justice ("DOJ") ("July 28, 2014 Memorandum").

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[1] The targeting procedures for [redacted] 2014 Certifications are identical. The targeting procedures for the NSA ("NSA Targeting Procedures") appear as Exhibit A to [redacted] 2014 Certifications. The targeting procedures for the FBI ("FBI Targeting Procedures") appear as Exhibit C to [redacted] 2014 Certifications.

[2] The minimization procedures for [redacted] 2014 Certifications are identical. The minimization procedures for the NSA ("NSA Minimization Procedures") appear as Exhibit B to [redacted] 2014 Certifications. The minimization procedures for the FBI ("FBI Minimization Procedures") appear as Exhibit D to [redacted] 2014 Certifications. The minimization procedures for the CIA ("FBI Minimization Procedures") appear as Exhibit E to [redacted] 2014 Certifications. The minimization procedures for the NCTC ("NCTC Minimization Procedures") appear as Exhibit G to [redacted] 2014 Certifications.

FISC review of targeting and minimization procedures under Section 702 is not confined to the procedures as written; rather, the Court also examines how the procedures have been and will be implemented. See, e.g., [redacted] Memorandum Opinion entered on April 7, 2009, at 22-24 ("April 7, 2009 Opinion"); [redacted], Memorandum Opinion entered on Aug. 30, 2013, at 6-11 ("August 30, 2013 Opinion"). Accordingly, for purposes of its review of the July 28, 2014 Submission, the Court has examined quarterly compliance reports submitted by the government[3] since the most recent FISC review of Section 702 certifications and procedures was completed on December 13, 2013,[4] as well as individual notices of non-compliance relating to implementation of Section 702. Based on its review of these submissions, the Court, through its staff, orally conveyed a number of compliance-related questions to the government, to which the government has responded in writing.[5] On August 4, 2014, the Court conducted a hearing, which addressed certain revisions to the targeting and minimization procedures included in the July 28, 2014 Submission, as well as certain compliance matters.

[redacted] 2014 Certifications involves "the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence

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[3] See Quarterly Reports to the FISC Concerning Compliance Matters Under Section 702 of FISA, submitted on June 20, 2014; March 21, 2014; and Dec. 20, 2013.

[4] See [redacted] Memorandum Opinion entered on Dec. 13, 2013 ("December 13, 2013 Opinion").

[5] See July 28, 2014 Memorandum at 18-22; Letter from Kevin J. O'Connor, Chief, Oversight Section, Office of Intelligence, National Security Division, U.S. Department of Justice, filed on July 30, 2014 ("July 30, 2014 Letter").

information." [redacted]

[redacted] 2014 Certifications generally proposes to continue acquisitions of foreign intelligence information that are now being conducted under certifications that were made in 2013 ("the 2013 Certifications"). July 28, 2014 Memorandum at 2. The 2013 Certifications, [redacted] were approved by the FISC on December 13, 2013. See December 13, 2013 Opinion.[6] The 2013

[6] More specifically, the 2013 Certifications were first submitted on July 31, 2013. The FISC approved the 2013 Certifications and accompanying minimization and targeting procedures on August 30, 2013. See August 30, 2013 Opinion. At that time, however, the Court was unable to make the statutory findings required to approve the accompanying amendments to minimization procedures governing information acquired under prior Section 702 certifications. See id. at 4 n.2. On November 15, 2013, the government filed amendments to all Section 702 (continued...)

Certifications, in turn, generally renewed authorizations to acquire foreign intelligence information under a series of certifications made by the AG and DNI pursuant to Section 702 that date back to 2008.[7] In its July 28, 2014 Submission, the government also seeks approval of amendments to the certifications in all of the Prior 702 Dockets, such that the NSA, CIA, and FBI henceforward will apply the same minimization procedures to information previously obtained under prior certifications as they will to information to be obtained under the 2014 Certifications. See July 28 Memorandum at 2-3; [redacted].[8]

II. REVIEW OF CERTIFICATIONS [redacted] AND OF THEIR PREDECESSOR CERTIFICATIONS AS AMENDED BY THE JULY 28, 2014 SUBMISSION.

The Court must review a certification submitted pursuant to Section 702 "to determine whether [it] contains all the required elements." 50 U.S.C. § 1881a(i)(2)(A). The Court's examination of [redacted] confirms that:

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[6](...continued)
certifications that had been issued to that date, including the 2013 Certifications. See December 13, 2013 Opinion at 1-2. Those amendments, which provided for use of revised minimization procedures, were approved by the FISC. See id. at 2.

[7] See [redacted] These dockets, together with [redacted] are collectively referred to as "the Prior 702 Dockets").

[8] The July 28, 2014 Submission does not propose any changes to the minimization procedures applied by the NCTC. July 28, 2014 Memorandum at 3 n.3.

(1) the certifications have been made under oath by the AG and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A), see [redacted]

(2) the certifications contain each of the attestations required by 50 U.S.C. § 1881a(g)(2)(A), see [redacted]

(3) as required by 50 U.S.C. § 1881a(g)(2)(B), [redacted] certifications is accompanied by the applicable targeting procedures and minimization procedures;

(4) [redacted] certifications is supported by the affidavits of appropriate national security officials, as described in 50 U.S.C. § 1881a(g)(2)(C);[9] and

(5) [redacted] certifications includes an effective date for the authorization in compliance with 50 U.S.C. § 1881a(g)(2)(D) – specifically, the certifications become effective on August 28, 2014, or on the date upon which this Court issues an order concerning the certification under § 1881a(i)(3), whichever is later, see [redacted].[10]

The Court therefore finds that [redacted] contain all the required statutory elements. See 50 U.S.C. § 1881a(i)(2)(A).

Similarly, the Court has reviewed the certifications in the Prior 702 Dockets, as amended by the 2014 Certifications, and finds that they also contain all the elements required by the statute. Id.[11]

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[9] See Affidavits of Richard H. Ledgett, Jr., Acting Director, NSA (Tab 1 to [redacted] ("Ledgett Affidavits"); Affidavits of James B. Comey, Director, FBI (Tab 2 to [redacted] "Comey Affidavits"); and Affidavits of John O. Brennan, Director, CIA (Tab 3 to [redacted] ("Brennan Affidavits").

[10] The statement described in 50 U.S.C. § 1881a(g)(2)(E) is not required in this case because there has been no "exigent circumstances" determination under Section 1881a(c)(2).

[11] The effective dates for the amendments to the certifications in the Prior 702 Dockets (continued...)

III. REVIEW OF THE TARGETING AND MINIMIZATION PROCEDURES

The Court is also required, pursuant to 50 U.S.C. § 1881a(i)(2)(B) and (C), to review the targeting and minimization procedures to determine whether they are consistent with the requirements of 50 U.S.C. § 1881a(d)(1) and (e)(1). Pursuant to 50 U.S.C. § 1881a(i)(3)(A), the Court further determines whether the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment.

Section 1881a(d)(1) requires targeting procedures that are "reasonably designed" to "ensure that any acquisition authorized under [the certification] is limited to targeting persons reasonably believed to be located outside the United States" and to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." In addition to these statutory requirements, the government uses the targeting procedures as a means of complying with Section 1881a(b)(3), which provides that acquisitions "may not intentionally target a United States person reasonably believed to be located outside the United States." See NSA Targeting Procedures at 1, 3-4, 7; FBI Targeting Procedures at 1-4. The FISC considers steps taken pursuant to these procedures to avoid targeting United States persons as relevant to its assessment of whether the procedures are consistent with the requirements of the Fourth Amendment. See Docket No. 702(i)-08-01, Memorandum Opinion entered on Sept. 4, 2008, at 14 ("September 4, 2008 Opinion").

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[11](...continued)
are the same as the effective dates for the 2014 Certifications. See [redacted]

Section 1881a(e)(1) requires minimization procedures that "meet the definition of minimization procedures under [50 U.S.C. §§] 1801(h) or 1821(4)]." The applicable statutory definition is fully set out at pages 15-16 below.

A. As Written, the NSA and FBI Targeting Procedures Comply With Statutory Requirements and Are Reasonably Designed to Prevent the Targeting of United States Persons.

Under the procedures adopted by the government, NSA is the lead agency in making targeting decisions under Section 702. Pursuant to its targeting procedures, NSA may target for acquisition a particular "selector" (i.e., a facility such as a telephone number or email address). The FBI Targeting Procedures come into play in cases where the government [redacted] that has been tasked under the NSA Targeting Procedures. See FBI Targeting Procedures at 1. "Thus, the FBI Targeting Procedures apply in addition to the NSA Targeting Procedures, whenever [redacted] are acquired." September 4, 2008 Opinion at 20 (emphasis in original).

In comparison to the targeting procedures previously approved by the FISC and now being implemented, the July 28, 2014 Submission presents two substantive revisions to the NSA Targeting Procedures and one substantive revision to the FBI Targeting Procedures.

1. Defining the Target of Acquisition

The first revision to the NSA Targeting Procedures concerns who will be regarded as a "target" of acquisition or a "user" of a tasked facility for purposes of those procedures. As a general rule, and without exception under the NSA targeting procedures now in effect, any user of a tasked facility is regarded as a person targeted for acquisition. This approach has sometimes

resulted in NSA's becoming obligated to detask a selector when it learns that [redacted] See July 28, 2014 Memorandum at 4-5.

The relevant revision would permit continued acquisition for such a facility. It provides that

[redacted]

NSA Targeting Procedures at 1. In support of this revision, the government contends that, in the narrow circumstances described in this provision, [redacted]. See July 28, 2014 Memorandum at 5-6.

For purposes of electronic surveillance conducted under 50 U.S.C. §§ 1804-1805, the "target" of the surveillance "'is the individual or entity . . . about whom or from whom information is sought.'" In re Sealed Case, 310 F.3d 717, 740 (FISA Ct. Rev. 2002) (quoting H.R. Rep. 95-1283, at 73 (1978)). As the FISC has previously observed, "[t]here is no reason to think that a different meaning should apply" under Section 702. September 4, 2008 Memorandum Opinion at 18 n.16. It is evident that the Section 702 collection on a particular facility does not seek information from or about [redacted]

[redacted]

This amended provision might be read literally to apply where [redacted] But those circumstances fall outside the accepted rationale for this amendment. The provision should be understood to apply only where [redacted]

Finally, implementation of this provision is not expected to slow the required analysis of whether tasked facilities have come to be used by a United States person or someone located in the United States. See NSA Targeting Procedures at 6-7. That post-tasking analysis relies importantly on [redacted]

[redacted] See July 28, 2014 Memorandum at 7.

2. [redacted]

[redacted] Id.[12] NSA remains responsible for routinely conducting separate [redacted] reviews for indicia that a user of a targeted facility is in the United States.[13]

Because the only change effected by this revision is to assign [redacted] to the agency that is most fully engaged in the review of the same communications for foreign intelligence purposes, the Court concludes that this revision does not present problems in finding the NSA Targeting Procedures satisfy the requirements of Section 1881a(d)(1) and are reasonably designed to prevent the targeting of United States persons.

3. [redacted]

[12] [redacted]

[13] See NSA Targeting Procedures at 6-7; July 28, 2014 Memorandum at 7; see also, e.g., August 30, 2013 Opinion at 7 (government had represented that [redacted] and reviewed by experienced NSA analysts [redacted]; Court had "expressly relied upon these assurances in concluding that NSA's targeting procedures are reasonably designed to ensure that targeting is limited to non-U.S. persons reasonably believed to be located outside the United States and consistent with the Fourth Amendment").

[redacted]

[redacted][14] [redacted]

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14 [redacted]

4. Conclusion

For the reasons stated above and in the Court's opinions in the Prior 702 Dockets, the Court concludes that the NSA Targeting Procedures and the FBI Targeting Procedures, as written, are reasonably designed, as required by Section 1881a(d)(1): (1) to ensure that any acquisition authorized under the 2014 Certifications is limited to targeting persons reasonably believed to be located outside the United States, and (2) to prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States. Moreover, for the reasons stated above and in the Court's opinions in the Prior 702 Dockets, the Court concludes that the NSA and FBI Targeting Procedures, as written, are reasonably designed to prevent United States persons from being targeted for acquisition – a finding that is relevant to the Court's analysis of whether those procedures are consistent with the requirements of the Fourth Amendment. See pages 38-40 below.

B. As Written, the FBI, NSA, and CIA Minimization Procedures Comply With Statutory Requirements.

The FBI, NSA, and CIA all have access to unreviewed information obtained under Section 702. Each agency is governed by its own set of minimization procedures in its handling of Section 702 information. Under Section 1881a(i)(2)(C), the Court must determine whether the agencies' respective minimization procedures included as part of the July 28, 2014 Submission meet the statutory definition of minimization procedures set forth at 50 U.S.C. §§

1801(h) or 1821(4), as appropriate. Sections 1801(h) and 1821(4) define "minimization procedures" in pertinent part as:

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance [or physical search], to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;[15]
>
> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. § 1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is

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[15] Section 1801(e) defines "foreign intelligence information" as

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against –
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> > (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
> >
> > (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
> >
> > (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
>
> (2) information with respect to a foreign power or a foreign territory that relates to, and if concerning a United States person is necessary to –
>
> > (A) the national defense or the security of the United States; or
> >
> > (B) the conduct of the foreign affairs of the United States.

> being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]

50 U.S.C. § 1801(h); see also id. § 1821(4).[16]

In comparison to the FBI minimization procedures now in effect, the FBI Minimization Procedures before the Court include three substantive revisions. The CIA and NSA Minimization Procedures now before the Court include one substantive revision, which pertains to [redacted]

1. Provision of Information by the FBI to the National Center for Mission and Exploited Children

The FBI Minimization Procedures include new provisions respecting the transmittal of information to the National Center for Missing and Exploited Children (NCMEC). See July 28, 2014 Memorandum at 10-13; FBI Minimization Procedures at 28, 30-31. Specifically, the FBI may "disseminate, for law enforcement purposes, FISA-acquired information[17] that reasonably appears to be evidence of a crime related to child exploitation material, including child pornography, to [the NCMEC]." FBI Minimization Procedures at 28. "The FBI may also disclose, for the purpose of obtaining technical or linguistic assistance, FISA-acquired

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[16] The definitions of "minimization procedures" set forth in these provisions are substantively identical (although Section 1821(4)(A) refers to "the purposes . . . of the particular physical search") (emphasis added). For ease of reference, subsequent citations refer only to the definition set forth at Section 1801(h)).

[17] For purposes of these procedures, "FISA-acquired information" refers to communications and information acquired under Section 702. See FBI Minimization Procedures at 1.

information that reasonably appears to be evidence of a crime related to child exploitation material, including child pornography, to NCMEC for further processing and analysis." Id. at 30. Such disclosures to obtain technical or linguistic assistance are subject to several restrictions: for example, the NCMEC may not make use of the information except to provide such assistance; shall restrict such information to personnel involved in providing such assistance; and may not retain such information permanently. Id. at 30-31. These restrictions are similar to those now in effect when the FBI discloses unreviewed Section 702 information to other federal agencies for the purpose of obtaining technical or linguistic assistance. See FBI minimization procedures submitted on Nov. 15, 2013, as Exhibit D to the amended 2013 Certifications at 29-30 ("2013 FBI Minimization Procedures").

[redacted] The FISC stated:

> Congress established NCMEC in 1984 as a non-governmental organization and it is funded through grants administered by the Department of Justice. One of its purposes is to assist law enforcement in identifying victims of child pornography and other sexual crimes. Indeed, Congress has mandated Department of Justice coordination with NCMEC on these and related issues. Furthermore, this Court has approved modifications to [minimization procedures] in individual cases to permit the Government to disseminate information to NCMEC. Because of its unique role as a non-governmental organization with a law enforcement function, and because it will be receiving what reasonably

> appears to be evidence of specific types of crimes for law enforcement purposes, the [proposed amendments] comply with FISA under Section 1801(h)(3).

[redacted] The Court adopts the same reasoning and finds that the NCMEC-related amendments to the FBI Minimization Procedures under Section 702 comport with the applicable statutory definition of "minimization procedures."[18]

2. Provision of Information to Mitigate Serious Harm

The FBI minimization procedures now in effect permit the FBI to disseminate

> information that reasonably appears to be foreign intelligence information, is necessary to understand foreign intelligence information or assess its importance, or is evidence of a crime and that it reasonably believes may assist in the mitigation or prevention of computer intrusions or attacks to private entities or individuals that have been or are at risk of being victimized by such intrusions or attacks, or to private entities or individuals . . . capable of providing assistance in mitigating or preventing such intrusions or attacks. Wherever reasonably practicable, such dissemination should not include United States person identifying information unless the FBI reasonably believes it is necessary to enable the recipient to assist in the mitigation or prevention of computer intrusions or attacks.

2013 FBI Minimization Procedures at 32 (emphasis added).[19]

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[18] [redacted]

[19] The FISC first approved a version of this provision under Section 702 on September 20, 2012, in connection with a prior Section 702 certification. See [redacted] Memorandum opinion entered on Sept. 20, 2012, at 22 ("September 20, 2012 Opinion"). At that time, the FISC noted that the provision at issue [redacted]

(continued...)

The government anticipates situations that would require dissemination of Section 702 information to someone in the private sector in order to mitigate other forms of serious harm, such as "a plot to destroy a building or monument." See July 28, 2014 Memorandum at 16. The FBI Minimization Procedures now before the Court would permit the FBI to make certain disseminations to the private sector that are unrelated to computer intrusion or attack. Specifically, the FBI could disseminate

> information that reasonably appears to be foreign intelligence information, is necessary to understand foreign intelligence information or assess its importance, or is evidence of a crime to a private individual or entity in situations where the FBI determines that said private individual or entity is capable of providing assistance in mitigating serious economic harm or serious physical harm to life or property. Wherever reasonably practicable, such dissemination should not include United States person identifying information unless the FBI reasonably believes it is necessary to enable the recipient to assist in the mitigation or prevention of the harm. The FBI will report to [the DOJ, National Security Division (NSD)] all disseminations made pursuant to this paragraph within ten business days of such dissemination.

FBI Minimization Procedures at 33. Although the procedures currently authorize the FBI to act in apparent departure from their requirements in order "to protect against an immediate threat to human life" under circumstances where it is not feasible to obtain timely modification of the procedures, see id. at 3, this new provision enables the FBI to disseminate information to private parties in less extreme cases.

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[19](...continued)

[redacted] The FISC approved the current version of this provision under Section 702 on August 30, 2013. See August 30, 2013 Opinion at 17-19.

The definition of "minimization procedures" at Section 1801(h) does not speak specifically to the circumstances warranting dissemination to private sector individuals or entities. That definition does, however, provide that such procedures should be "reasonably designed" to prohibit dissemination of United States person information, "consistent with the need of the United States" to "disseminate foreign intelligence information." See Section 1801(h)(1). "Foreign intelligence information," in turn, is defined in substantial part by reference to several types of harm threatened by foreign powers and their agents (e.g., sabotage and acts of international terrorism) against which foreign intelligence information may be used to protect. See Section 1801(e)(1) (quoted in note 15 above). In combination, these definitions suggest that foreign intelligence information may be disseminated to responsible parties – including those in the private sector – who are in a position to mitigate serious harm, and that such disseminations may include United States person information when necessary to mitigate that harm.[20] Moreover, FISA's legislative history expressly contemplates that information may be disseminated to the private sector in appropriate cases.[21] Accordingly, the Court concludes that this provision is consistent with the statute's minimization requirements.

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[20] Similarly, disseminations of evidence of a crime to private individuals and entities so that they can mitigate serious harm would serve a law enforcement purpose and for that reason fall under Section 1801(h)(3).

[21] "Federal agents may learn of a terrorist plot to kidnap a business executive. Certainly in such cases they should be permitted to disclose such information to the executive and his company in order to provide for the executive's security." H.R. Rep. 95-1283, at 88 (1978).

3. Preservation of Information for Litigation Purposes by the FBI

As a general rule, Section 702 information retained by the FBI that has not been "identified as information that reasonably appears to be foreign intelligence, to be necessary to understand foreign intelligence information or assess its importance, or to be evidence of a crime" is subject to a retention/destruction schedule. See FBI Minimization Procedures at 20-21.[22] The FBI Minimization Procedures now before the Court would permit the FBI to retain information otherwise subject to destruction under this schedule if "the FBI and NSD determine that such information is reasonably believed to be necessary for, or potentially discoverable in, administrative, civil, or criminal litigation. Such determination shall be made in writing and shall identify the specific information to be retained and the particular litigation for which it is retained." Id. at 21-22. Information retained under this provision may only be accessed for litigation-related purposes by personnel working on the particular litigation in question. Id. The FBI shall promptly destroy the information as required by the generally applicable destruction schedule once the litigation need to preserve the information has passed. Id. The government

[22] In brief, information that the FBI retains on an electronic and data storage system, but has not reviewed, generally must be destroyed after "[redacted] from the expiration date of the certification authorizing the collection." FBI Minimization Procedures at 20. Information retained on such systems that has been reviewed, "but not identified as information that reasonably appears to be foreign intelligence, to be necessary to understand foreign intelligence information or assess its importance, or to be evidence of a crime" is generally subject to special access controls after [redacted] from such expiration date, and shall be destroyed after [redacted] from such date. Id. at 20-21. Information retained by the FBI in any other form "shall be destroyed in accordance with the Attorney General Guidelines and relevant National Archives and Records Administration procedures regarding the retention of information in FBI investigations," except that "an original copy" that cannot be accessed through an electronic and data storage system may be retained indefinitely, subject to special access controls after five years. Id. at 21.

undertakes to report to the FISC on an annual basis regarding implementation of this provision. See July 28, 2014 Memorandum at 15.

[redacted] restrictions on access that the Government proposes, along with the reporting requirements that would be required, strike an appropriate balance between the competing concerns of not retaining data longer than necessary and having the Government comply with its litigation obligations. [redacted] The annual reporting requirement regarding Section 702 information is set out below at page 42.

4. [redacted]

[redacted][23]

[23] For example, under other provisions of the NSA Minimization Procedures, the NSA may not retain telephony and certain forms of Internet communications for "longer than five years from the expiration date of the certification authorizing the collection" unless the NSA determines that specified retention criteria are met. NSA Minimization Procedures at 7. For "Internet transactions acquired through NSA's upstream collection techniques," that retention period is two years from such expiration date. Id.

[redacted] the Court is satisfied that this approach – [redacted] – strikes a proper balance between the protection of United States person information, on the one hand, and [redacted] Nonetheless, two points regarding these provisions merit further discussion.

First, the provisions do not permit [redacted]

[redacted] In the interests of efficiency and consistency, the Court encourages the government to consider further revision of these procedures to address such situations with generally applicable rules, rather than on a piecemeal basis.

The second point concerns [redacted] That approach appears sensible: [redacted]

The July 28, 2014 Submission contains similar, but broader language:

[redacted]

[redacted] The FISC has a continuing role in determining and enforcing compliance with these procedures. See 50 U.S.C. § 1803(h); FISC Rule 13(b). Section 702 explicitly provides a mechanism for the AG and DNI to modify minimization procedures, subject to FISC approval, whenever circumstances warrant.[24] In view of these considerations, and because the government has provided no support for its suggestion that equivalent relief can or should be obtained [redacted] the Court expects the government to bring to the FISC issues arising [redacted] Because the point does not arise under the language of the [redacted], it does not preclude the Court from finding that those minimization procedures are consistent with the definition at Section 1801(h).

[24] Section 702 permits the AG and the DNI to amend previously adopted minimization procedures "as necessary at any time," subject to FISC review. See § 1881a(i)(1)(C).

5. Conclusion

For the reasons stated above and in the Court's opinions in the Prior 702 Dockets, the Court concludes that the NSA, FBI, and CIA Minimization Procedures, as written, comport with the definition of minimization procedures at Section 1801(h).

C. The Compliance and Implementation Issues Reported by the Government Do Not Preclude a Finding That the NSA and FBI Targeting Procedures and the NSA, FBI, and CIA Minimization Procedures Comply With Statutory Requirements.

As noted above at page 3, the FISC examines the government's implementation of, and compliance with, the targeting and minimization procedures as part of assessing whether those procedures comply with the applicable statutory (and Fourth Amendment) requirements.

In conducting this assessment, the Court is mindful that the controlling norms are ones of reasonableness, not perfection.[25] This distinction is particularly important in the context of a large and complex endeavor such as the government's implementation of Section 702. While in absolute terms, the scope of acquisitions under Section 702 is substantial, the acquisitions are not conducted in a bulk or indiscriminate manner. Rather, they are effected through [redacted] discrete targeting decisions for individual facilities.[26] Each targeting decision requires

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[25] See Section 1881a(d)(1) (requiring targeting procedures that are "reasonably designed" to limit targeting to "persons reasonably believed to be located outside the United States" and to "prevent the intentional acquisition" of communications to which all parties are known to be in the United States); Section 1801(h)(1) (requiring minimization procedures that are "reasonably designed" to minimize acquisition and retention, and to prohibit dissemination, of information concerning United States persons, consistent with foreign intelligence needs); United States v. Knights, 534 U.S. 112, 118 (2001) ("The touchstone of the Fourth Amendment is reasonableness . . . .").

[26] For example, the NSA reports that, "on average, approximately [redacted] individual (continued...)

application of the pre-tasking provisions of the applicable targeting procedures. See NSA Targeting Procedures at 1-6; FBI Targeting Procedures at 1-3. For each facility while it is subject to tasking, there are post-tasking requirements designed to ascertain, for example, whether the targeted user of the facility has entered the United States. See NSA Targeting Procedures at 6-7. And pursuant to the minimization procedures, there are detailed rules concerning the retention, use, and dissemination of information obtained pursuant to Section 702. See NSA Minimization Procedures at 3-15; FBI Minimization Procedures at 5-33; CIA Minimization Procedures at 1-9.

Given the number of decisions and volume of information involved, it should not be surprising that occasionally errors are made. Moreover, the government unavoidably relies on [redacted], see, e.g., July 28, 2014 Memorandum at 18-20; August 30, 2013 Opinion at 7-9, [redacted] See, e.g., April 7, 2009 Opinion at 17-22. Because of factors such as changes in communications technology or inadvertent error, these processes do not always function as intended.

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[26](...continued)
[redacted] were tasked for acquisition "at any given time between March 1 and May 31, 2014." Quarterly Report to the FISC Concerning Compliance Matters Under Section 702 of FISA, submitted on June 20, 2014, at 1 (footnote omitted) ("June 20, 2014 Compliance Report"). Facilities tasked for acquisition include "telephone numbers, e-mail accounts [redacted] Additionally, between March 1 and May 31, 2014, the [FBI] reports that it received and processed approximately [redacted] requests." Id. at 1.

It is apparent to the Court that the implementing agencies, as well as the Office of the Director of National Intelligence (ODNI) and NSD, devote substantial resources to their compliance and oversight responsibilities under Section 702. As a general rule, instances of non-compliance are identified promptly and appropriate remedial actions are taken, to include purging information that was improperly obtained or otherwise subject to destruction requirements under applicable procedures.[27] Accordingly, the Court's overall assessment of the implementation of, and compliance with, the targeting and minimization procedures permits a finding that the these procedures, as implemented, satisfy the applicable statutory requirements. Nonetheless, the Court believes it is useful to discuss the following aspects of implementation and, in some respects, to direct the government to provide additional information.

1. Timely Resolution of [redacted] by the NSA

The NSA is required to discontinue acquisition for a facility if it determines that the user of the facility is in the United States. NSA Minimization Procedures at 7, 9; see also 50 U.S.C. § 1881a(b)(1) (the government "may not intentionally target any person known at the time of acquisition to be located in the United States"). The NSA routinely checks each electronic communications facility that is subject to tasking for acquisition [redacted] for indications that a tasked facility may have been accessed from inside the United States. NSA Targeting Procedures at 6-7; July 28, 2014 Memorandum at 18.

[27] A notable exception involved protracted delays in detasking facilities used by [redacted] there was reason to believe was a United States person. See June 20, 2014 Compliance Report at 14-15. The FISC probed the reasons for such delay at a hearing on June 26, 2014, [redacted]

The Court, through its staff, inquired why, in some cases, it may take [redacted] from the receipt of such an indication – [redacted] – for the NSA to determine that the user of the tasked facility is in the United States and discontinue collection. See, e.g., June 20, 2014 Compliance Report at 31.

In response, the government has advised that the NSA employs [redacted] to conduct these checks and to prioritize the results for research by NSA analysts. July 28, 2014 Memorandum at 18-19. These [redacted] a large percentage of false positives: "Although the number fluctuates, NSA reports that for 2014 more than 90% of the [redacted] generated were false positives, i.e., not indicative of access of the facility by a user inside the United States." Id. at 19 n.6.

The NSA further prioritizes within the subset of [redacted] that are deemed to indicate potential access from within the United States. '[redacted] that are assessed to be [redacted] of a user inside the United States" result in immediate detasking. Id. at 20. [redacted]

[redacted]

Diligent 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. Nonetheless, given the high rate of false positives associated with these [redacted] and the potentially complex nature of the analysis required to resolve them, the Court believes that the NSA's current practices in responding to [redacted] are consistent with a finding that the NSA Targeting Procedures comply with that statutory requirement.

2. [redacted] Under the FBI Targeting Procedures

The FBI Targeting Procedures state:

[redacted]

[redacted]

28 [redacted]

[redacted]

a. [redacted]

[redacted]

29 [redacted]

[redacted]

b. [redacted]

c. [redacted]

[redacted]

The Court has questions about whether [redacted] comply with this requirement in every context. The Court assesses, however, that these outstanding questions about compliance with the FBI Targeting Procedures do not preclude a finding that the government's targeting procedures satisfy the requirements of Section 1881a(d)(1). Recently reported instances of non-compliance with the FBI Targeting Procedures do not appear to have resulted in the acquisition of [redacted] from an account used by a United States

person or someone located in the United States. See, e.g., June 20, 2014 Compliance Report at 54, 56-57; Quarterly Report to the FISC Concerning Compliance Matters Under Section 702 of FISA, submitted on March 22, 2014, at 67-69. Moreover, as noted above, see page 8, the FBI Targeting Procedures apply in addition to the NSA Targeting Procedures for accounts from which [redacted] are sought, so that every account subject to the FBI Targeting Procedures will already have been approved pursuant to the NSA Targeting Procedures. The Court is, however, directing the government to report further on the questions raised by the August 6, 2014 Letter. See page 42 below.

3. Purge Issues

Various types of data are generally required to be purged: for example, information obtained from a tasked facility during a time when it is later assessed that a user of that facility was in the United States or a United States person.[30] Purge processes for the CIA, NSA, and FBI all permit data otherwise subject to purge requirements to be retained on backup systems, with access limited to technical personnel. June 20, 2014 Compliance Report at 3-5. NSA's purge processes also do not reach [redacted] (as distinct from the repositories of information used for intelligence analysis), certain systems that [redacted] Id. at 3 n.6.

Implementation of these purge requirements relies substantially on [redacted] processes, as well as [redacted] Experience has shown that purge processes are not always perfectly

[30] See, e.g., NSA Minimization Procedures at 8-10; FBI Minimization Procedures at 6; CIA Minimization Procedures at 8.

effective in identifying and destroying data in all repositories subject to those processes. The NSA reports substantial improvement in the efficacy of its purges,[31] but difficulties on certain systems or for certain types of data are still encountered.[32] Given the volume of information acquired under Section 702 and the complexities of routing, processing, storing, and analyzing that information, the Court finds that the reported limitations on purge processes, and the government's efforts to overcome these limitations, are consistent with finding that the targeting and minimization procedures presented in the July 28, 2014 Submission comply with the applicable statutory requirements. The Court encourages and expects the government to continue to work toward improving the efficacy of its purge processes, both as applied to systems or records currently within their compass and as potentially extended to other systems or records [redacted].

[31] The NSA has performed annual studies that examined samples of [redacted] to see if they had actually been removed from systems subject to its purge processes. The 2011 study found [redacted] objects that had not been purged; the 2012 study found [redacted] objects that had not been purged; the 2013 study found [redacted] objects that had not been purged; and the 2014 study found [redacted] objects that had not been purged. June 20, 2014 Compliance Report at 50-51.

[32] See Letter from Kevin J. O'Connor, Chief, Oversight Section, Office of Intelligence, NSD, DOJ, filed on July 25, 2014, at 2-5 ("July 25, 2014 Letter") (describing [redacted] July 30, 2014 Letter at 7-8 (describing incomplete NSA purges of metadata for [redacted].

4. The FBI's Non-compliance With Attorney-Client Minimization Procedures

FISA's definition of minimization procedures at Section 1801(h) does not, by its terms, afford any special protection to communications subject to the attorney-client privilege.[33] Nevertheless, the minimization procedures under review have specific rules for handling attorney-client communications. See NSA Minimization Procedures at 9; FBI Minimization Procedures at 12-16, 25-27; CIA Minimization Procedures at 5. Because the FBI has law enforcement responsibilities and often works closely with prosecutors in criminal cases, its procedures have detailed requirements for cases in which a target is known to be charged with a federal crime. Unless otherwise authorized by the NSD, the FBI must establish a separate review team whose members "have no role in the prosecution of the charged criminal matter" to conduct the initial review of such a target's communications. FBI Minimization Procedures at 12 [redacted]

Since February 2014, the FISC has received written notice of [redacted]eparate instances in which the responsible FBI case agent knew that a person targeted under Section 702 faced federal criminal charges, but did not establish the required review team. See July 30, 2014 Letter at 5-6. Although the government attributes those lapses to "individual failures or confusion and not a

[33] FISA does provide that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of [FISA] shall lose its privileged character." 50 U.S.C. § 1806(a).

systematic issue," id. at 7, the government at the August 4, 2014 hearing provided partial information about [redacted] more recent cases where the FBI failed to establish the required review team.

The record does not indicate what percentage of Section 702 targets have been charged with federal crimes; however, given that these targets are reasonably believed to be non-United States persons located outside the United States, one would expect the percentage to be fairly small. For that reason, the Court regards [redacted] recent cases as a potentially significant rate of non-compliance. Nonetheless, because circumstances triggering the obligation to establish a review team presumably arise infrequently in the context of Section 702 acquisitions, the Court does not believe that these instances of non-compliance prevent a finding that the minimization procedures under review comply with the requirements of Section 1801(h). The Court intends to monitor compliance with this provision of the FBI Minimization Procedures closely, and to that end is directing that the government fully report on the [redacted] additional instances of non-compliance noted above. See pages 42-43 below.

5. Anticipated Delay in the CIA's Implementation of Destruction Requirements

As a general rule under the CIA Minimization Procedures, "[un]minimized communications that may contain United States person information that does not otherwise qualify for retention . . . may be retained . . . for no longer than five years from the expiration date of the certification authorizing the collection . . . ." CIA Minimization Procedures at 2. On August 18, 2014, the government orally advised the Court, through its staff, that the first two sets of communications subject to this provision are due to be destroyed on September 4 and

September 18, 2014, respectively, and that the CIA did not expect to have completed their destruction by those dates. The government principally attributes this delay to the amount of time it took to finalize guidance from the DOJ to the CIA regarding [redacted]. It is expected that the destruction of these communications will have been completed within th irty days after the applicable due date.

The Court does not see a basis for finding that retention for an additional month would render these minimization procedures non-compliant with the requirements of Section 1801(h). The government is being directed, however, to report to the Court on the CIA's implementation of this destruction requirement.

D. The NCTC Minimization Procedures Comply With Statutory Requirements.

The NCTC does not have access to raw Section 702 information, but it does have access to minimized Section 702 information on certain FBI data systems. See June 20, 2014 Compliance Report at 1-2 n.4. The NCTC Minimization Procedures now before the Court are identical to those approved in the August 30, 2013 Opinion, see July 28, 2014 Memorandum at 2 n.1, as well as those approved in the September 20, 2012 Opinion. See August 30, 2013 Opinion at 23. For the same reasons that these procedures were approved in 2012, see September 20, 2012 Memorandum Opinion at 22-25, and because no significant compliance issues have arisen under these procedures, the Court again finds that the procedures satisfy the requirements of Section 1801(h).

E. The Targeting and Minimization Procedures Are Consistent with the Fourth Amendment.

Finally, the Court must determine whether the targeting and minimization procedures included in the July 28, 2014 Submission are consistent with the requirements of the Fourth Amendment. See 50 U.S.C. § 1881a(i)(3)(A). The Fourth Amendment does not require the government to obtain a warrant to conduct surveillance "to obtain foreign intelligence for national security purposes . . . [that] is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States." In re Directives Pursuant to Section 105B of FISA, Docket No. 08-01, Opinion at 18-19 (FISA Ct. Rev. Aug. 22, 2008) ("In re Directives").[34] This exception to the Fourth Amendment's warrant requirement applies even when a United States person is the target of such a surveillance. See id. at 25-26 (discussing internal Executive Branch criteria for targeting United States persons). The FISC has previously concluded that the acquisition of foreign intelligence information pursuant to Section 702 falls within this "foreign intelligence exception" to the warrant requirement of the Fourth Amendment. See September 4, 2008 Opinion at 34-36; accord United States v. Mohamud, 2014 WL 2866749 at *15-18 (D. Or. June 24, 2014).

It follows that the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment if those procedures, as implemented, are reasonable. In assessing the reasonableness of a governmental action under the Fourth Amendment, a court

[34] A declassified version of the opinion in In re Directives is available at 551 F.3d 1004 (FISA Ct. Rev. 2008).

must "balance the interests at stake" under the totality of the circumstances presented. In re Directives at 19-20.

> If the protections that are in place for individual privacy interests are sufficient in light of the governmental interest at stake, the constitutional scales will tilt in favor of upholding the government's actions. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.

Id. at 20.

The government's national security interest in conducting acquisitions pursuant to Section 702 "'is of the highest order of magnitude.'" September 4, 2008 Opinion at 37 (quoting In re Directives at 20). With regard to the individual privacy interests involved, the Court has concluded, as discussed above, that the targeting procedures now before it are reasonably designed to target non-United States persons who are located outside the United States. Such persons fall outside the ambit of Fourth Amendment protection. See September 4, 2008 Opinion at 37 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990)).

That is not the end of the matter, however, because the government acquires under Section 702 communications to which United States persons and persons within the United States are parties. Such acquisitions can occur when those non-targeted persons are parties to a communication that is to or from, or that contains a reference to, a tasked selector. See September 4, 2008 Opinion at 15-20. Such communications may also be acquired when they constitute part of a larger "Internet transaction" (e.g., [redacted] that also contains one or more communications that are to or from, or that contain a reference to, a tasked selector. In the latter case, the entire

transaction may be unavoidably acquired by the NSA's "upstream" collection. See [redacted] Memorandum Opinion entered on Oct. 3, 2011, at 5, 30-31 ("October 3, 2011 Opinion").[35]

In the Prior 702 Dockets, the FISC has found that earlier versions of the various agencies' targeting and minimization procedures adequately protected the substantial Fourth Amendment interests that are implicated by the acquisition of communications of such United States persons. See, e.g., August 30, 2013 Opinion at 24-25; September 20, 2012 Opinion at 43-44. In the FISC's assessment, the combined effect of these procedures has been "to substantially reduce the risk that non-target information concerning United States persons or persons inside the United States will be used or disseminated" and to ensure that "non-target information that is subject to protection under FISA or the Fourth Amendment is not retained any longer than is reasonably necessary." See August 30, 2013 Opinion at 24-25 (internal quotations omitted). Neither the amendments before the Court nor the compliance concerns discussed above undermine that conclusion. The Court has balanced the completing interests at stake and found that the targeting and minimization procedures put forward in the July 28, 2014 Submission are consistent with the requirements of the Fourth Amendment.

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[35] FISA minimization protects the privacy interests of United States persons in communications in which they are discussed, regardless of whether they were parties to such communications. See Section 1801(h)(1) (protecting "nonpublicly available information concerning unconsenting United States persons") (emphasis added). In contrast, non-targets generally do not have a Fourth Amendment-protected interest in communications in which they are discussed, unless they are also parties to the communication. See Alderman v. United States, 394 U.S. 165, 174-76 (1969).

IV. CONCLUSION

For the foregoing reasons, the Court finds that: (1) the 2014 Certifications, as well as the certifications in the Prior 702 Dockets as amended by the 2014 Certifications, contain all the required statutory elements; (2) the targeting and minimization procedures to be implemented regarding acquisitions conducted pursuant to the 2014 Certifications comply with 50 U.S.C. §1881a(d)-(e) and are consistent with the requirements of the Fourth Amendment; and (3) the minimization procedures to be implemented regarding information acquired under prior Section 702 certifications comply with 50 U.S.C. §1881a(d)-(e) and are consistent with the requirements of the Fourth Amendment. Orders approving the certifications, amended certifications, and use of the accompanying procedures are being entered contemporaneously herewith.

For the reasons discussed above, it is HEREBY ORDERED as follows:

1. On or before December 31 of each calendar year, the government shall submit in writing a report to the Court containing the following information: (a) the number of Section 702-acquired products disseminated or disclosed to the NCMEC; and (b) the number of disseminations or disclosures by the NCMEC to other law enforcement entities of Section 702-acquired information. Additionally, prior to implementing changes to policies or practices concerning: (c) the release of Section 702-acquired information from the NCMEC to Interpol's International Child Sexual Exploitation database; or (d) approval to use Section 702-acquired information disseminated to the NCMEC in any proceeding, the government shall make a written submission to the Court describing such changes and explaining why implementing them would be consistent with applicable minimization procedures and statutory minimization requirements.

[redacted]

2. On or before December 31 of each calendar year, the government shall submit in writing a report to the Court containing the following information [redacted]: (a) all administrative, civil, or criminal litigation matters necessitating preservation of Section 702 information that would otherwise be subject to destruction requirements under applicable minimization procedures; (b) the docket numbers and court information for those administrative, civil, or criminal litigation matters; (c) a description of the Section 702-acquired information preserved for each such litigation matter; and (d) a description of the status of each such litigation matter. [redacted]

3. On or before September 30, 2014, the government shall submit in writing a report describing in detail the [redacted]

4. On or before September 30, 2014, the government shall submit in writing a report describing in detail the [redacted] recent instances of non-compliance with the attorney-client minimization requirements of the FBI Minimization Procedures that have not been reported in writing to the FISC, as referenced on pages 35-36 above. This report shall also provide an assessment of the adequacy of the government's training, guidance, and oversight efforts with

regard to those requirements, to include a statement of any planned modifications or enhancements.

5. On or before October 24, 2014, the government shall submit in writing a report about the status of the CIA's efforts to comply with the destruction deadlines of September 4 and September 18, 2014, as discussed on pages 36-37. The government shall submit subsequent reports on that subject at monthly intervals thereafter, until it is reported that the destruction of information subject to such requirements has been completed.

ENTERED this 26th day of August 2014, in [redacted]

[redacted]

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

(b)(6) I, [redacted] Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.

[redacted] (b)(6)

~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the Memorandum Opinion and Order issued contemporaneously herewith, and in reliance upon the entire record in this matter, the Court finds pursuant to 50 U.S.C. § 1881a(i)(3)(A) that the certifications referenced above, as amended in the above-captioned docket numbers, contain all the required statutory elements and that the revised

minimization procedures adopted for use in connection with those amended certifications are consistent with the requirements of Section 1881a(e) and with the Fourth Amendment.

Accordingly, it is hereby ORDERED pursuant to Section 1881a(i)(3)(A) that the amended certifications and the use of such procedures are approved.

ENTERED this 26th day of August 2014, in [redacted]

[redacted]

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

(b)(6) I, [redacted] Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.

[redacted] (b)(6)

~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the Memorandum Opinion and Order issued contemporaneously herewith, and in reliance upon the entire record in this matter, the Court finds, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that the certifications referenced above contain all the required statutory elements and that the targeting procedures and minimization procedures approved for use in connection with those certifications are consistent with the requirements of 50 U.S.C. §1881a(d)-(e) and with the Fourth Amendment.

Accordingly, it is hereby ORDERED, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that the certifications and the use of such procedures are approved.

ENTERED this 26th day of August 2014, i[redacted]

[redacted]

Thomas F. Hogan

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

(b)(6) [redacted] Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.

[redacted] (b)(6)