Internet transactions that are most likely to contain discrete wholly domestic communications and non-target communications to or from United States persons or persons located in the United States: (1) those as to which the "active user" is located inside the United States; and (2) those as to which the location of the active user is unknown. See Amended NSA Minimization Procedures at 4 (§ 3(b)(5)(a)); see also Oct. 3 Opinion at 37-41. Segregated transactions cannot be moved or copied to repositories that are generally available to NSA analysts until a specially-trained analyst has determined that it contains no discrete wholly domestic communications.[7] See Amended NSA Minimization Procedures at 4 (§ 3(b)(5)(a)(1)). If a transaction is determined to contain a wholly domestic communication, it must be destroyed. See id. (§ 3(b)(5)(a)(1)(a)). Even after a transaction that has been determined to contain no discrete wholly domestic communications is removed from segregation and made more generally available to NSA analysts, it retains a marking to identify it as having come from segregation and thus warranting careful scrutiny for information subject to protection under FISA and the Fourth Amendment. See id. at 5 (§ 3(b)(5)(a)(1)(c)).

MCTs that are not segregated or that have been removed from segregation also are subject to additional restrictions and requirements. See id. at 4 (§ 3(b)(5)(a)(1)(b), (a)(2)). An analyst seeking to use a discrete communication within such a transaction must make and

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[7] The effectiveness of the amended NSA minimization procedures will depend in substantial part on the training received by analysts with access to segregated Internet transactions and on the training that is provided to analysts generally regarding the rules for handling transactions that are not (or are no longer) segregated. The Court expects that the appropriate Executive Branch officials will ensure that this training is adequate and effective.

document a series of determinations before doing so. See id. at 5-6 (§ 3(b)(5)(b)(1)-(b)(2)).[8] Transactions found to contain a discrete wholly domestic communication must be destroyed. See Nov. 15 Submission at 2. Discrete non-target communications that are to or from a United States person or a person in the United States must be marked as such (if such marking is feasible) and cannot be used except when necessary to protect against an imminent threat to human life. See Amended NSA Minimization Procedures at 5-6 (§ 3(b)(5)(b)(2)(c)). Other discrete communications (i.e., those that are to, from, or about a targeted selector and those that are not to or from an identifiable United States person or person in the United States) may be used and disseminated subject to the other applicable provisions of the NSA minimization procedures. Id. at 5 (§ 3(b)(5)(b)(2)(a)-(2)(b)). Taken together, these measures for handling Internet transactions tend to substantially reduce the risk that non-target information concerning United States persons or persons inside the United States will be used or disseminated by NSA.

Finally, the two-year retention period for upstream acquisitions, rather than the five-year period previously proposed, strikes a more reasonable balance between the government's national security needs and the requirements that non-target information concerning United States persons and persons in the United States be protected. See id. at 7 (§ (3)(c)(2)). The two-year period gives NSA substantial time to review its upstream acquisitions for foreign intelligence information but ensures that non-target information that is subject to protection

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[8] The act of documenting the required determinations will help to ensure that analysts do not use or disseminate wholly domestic communications or non-target information of or concerning United States persons or persons located in the United States. Moreover, the records created will provide a basis for subsequent auditing and oversight.

under FISA or the Fourth Amendment is not retained any longer than is reasonably necessary.[9]

Based on the foregoing discussion, the Court is satisfied that the amended NSA minimization procedures adequately address the deficiencies identified in the October 3 Opinion with respect to information acquired pursuant to Certifications [redacted]. The principal problem with the measures previously proposed by the government for handling MCTs was that rather than requiring the identification and segregation of information "not relevant to the authorized purpose of the acquisition" or the destruction of such information promptly following acquisition, NSA's proposed handling of MCTs tended to promote the retention of such information, including information of or concerning United States persons with no direct connection to any target. See October 3 Opinion at 59-60. The same is not true of the revised process, which requires the segregation of those categories of Internet transactions that are most likely to contain non-target information subject to statutory or constitutional protection, includes special handling and marking requirements for transactions that are not segregated, and mandates a substantially shorter default retention period. Accordingly, the Court concludes that the amended NSA minimization procedures, as NSA is applying them to MCTs, are "reasonably designed . . . to minimize the . . . retention[] . . . 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." 50 U.S.C. § 1801(h)(1). The Court

[9] The shorter retention period is particularly appropriate given that such information is acquired only because of current technological limitations. As the Court emphasized in its October 3 Opinion, it is incumbent upon NSA to continue working to enhance its capability to limit acquisitions only to targeted communications. Oct. 3 Opinion at 58 n.54.

is also satisfied that the revised minimization procedures, taken together with the applicable targeting procedures, are consistent with the requirements of the Fourth Amendment.

4. The New [redacted] Provision

The amended NSA minimization procedures contain a new provision that is not directly related to the government's efforts to address the deficiencies identified by the Court in its October 3 Opinion. [redacted]

[redacted]

> [redacted]

[redacted]

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10 [redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] In light of the foregoing, the new [redacted] provision poses no obstacle to the Court's conclusion that NSA's minimization procedures, viewed as a whole, meet the applicable statutory and constitutional requirements.

5. Handling of MCTs Acquired Under Prior Certifications

The government has not yet formally amended the NSA minimization procedures applicable to Internet transactions acquired by NSA under prior Section 702 certifications – i.e., [redacted] The government has recently explained, however, that in handling information collected under the prior certifications, NSA has been applying a modified version of the amended NSA minimization procedures that are discussed above. See Notice filed on Nov. 29, 2011 ("Nov. 29 Notice") at 3-4. According to the government, it is not technically feasible for NSA to segregate Internet transactions acquired under the prior certifications in accordance with the requirements of Section 3(b)(5)(a) of the amended NSA minimization procedures. See id.; see also

Government's Response to the Court's Briefing Order of October 13, 2011 ("Nov. 22 Submission") at 43. Hence, NSA has not been segregating such transactions in the manner discussed above and will not be able to do so. See Nov. 22 Submission at 44. The government reports, however, that NSA has implemented a process for reviewing upstream acquisitions made under the prior certifications that is consistent with the special handling requirements set forth in Section 3(b)(5)(b), which are discussed above. See Nov. 29 Notice at 4; Nov. 22 Submission at 43-44. The government is also in the process of implementing the two-year retention limitation reflected in Section 3(c) of the amended procedures for upstream acquisitions made pursuant to the past Section 702 certifications. See Nov. 29 Notice at 4; Nov. 22 Submission at 43.

The government is now working to formally amend the minimization procedures applicable to information acquired under the prior Section 702 certifications. Nov. 29 Notice at 3-4. Once the amended minimization procedures have been approved by the Attorney General and Director of National Intelligence and submitted to the Court, the Court will review them in accordance with the requirements of FISA to determine whether the government has cured the deficiencies identified in the October 3 Opinion with respect to the handling of information acquired pursuant to the prior certifications.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that, with regard to information acquired pursuant to Certifications [redacted], the government has adequately corrected the deficiencies identified in the October 3 Opinion. The Court therefore finds, pursuant to 50

U.S.C. § 1881a(i)(3)(A), that, as amended on October 31, 2011, Certifications [redacted] contain all the elements required by 50 U.S.C. § 1881a(g), and that the targeting and minimization procedures approved for use in connection with those amended certifications are consistent with the requirements of 50 U.S.C. §1881a(d)-(e) and with the Fourth Amendment. An order approving the amended certifications and the use of the procedures is being entered contemporaneously herewith.

ENTERED this 30th day of November, 2011.

JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

I [redacted], Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original [redacted]

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the in the Memorandum Opinion issued contemporaneously herewith, and in reliance upon the entire record in this matter, the Court concludes that, with regard to information acquired pursuant to Certifications [redacted], the government has adequately corrected the deficiencies identified in the Court's Memorandum Opinion of October 3, 2011. The Court therefore finds, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that, as amended on October 31, 2011, Certifications [redacted] contain all the elements required by 50 U.S.C. § 1881a(g), and that the targeting and minimization procedures approved for use in connection with those amended 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 such

amended certifications and the use of such procedures are approved.

ENTERED this 30th day of November 2011, at 10:46 a.m. Eastern Time.

JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

I, [redacted], Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original [redacted]