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Domestic Investigations and Operations Guide



Federal Bureau of Investigation (FBI)

December 16, 2008

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GENERAL INFORMATION: Questions or comments pertaining to the DIOG can be directed to;

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or

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(U) Preamble

December 1, 2008

(U) As the primary investigative agency of the federal government, the FBI has the authority and responsibility to investigate all violations of federal law that are not exclusively assigned to another federal agency. The FBI is further vested by law and by Presidential directives with the primary role in carrying out criminal investigations and investigations of threats to the national security of the United States. This includes the lead domestic role in investigating international terrorist threats to the United States, and in conducting counterintelligence activities to counter foreign entities' espionage and intelligence efforts directed against the United States. The FBI is also vested with important functions in collecting foreign intelligence as a member agency of the United States Intelligence Community (USIC). (AGG-Dom, Introduction)

(U) While investigating crime, terrorism, and threats to the national security, and collecting foreign intelligence, the FBI must fully comply with all laws and regulations, including those designed to protect civil liberties and privacy. Through compliance, the FBI will continue to earn the support, confidence and respect of the people of the United States.

(U) To assist the FBI in its mission, the Attorney General signed *The Attorney General's Guidelines for Domestic FBI Operations* (AGG-Dom) on September 29, 2008. The primary purpose of the AGG-Dom and the Domestic Investigations and Operations Guide (DIOG) is to standardize policy so that criminal, national security, and foreign intelligence investigative activities are accomplished in a consistent manner, whenever possible (e.g., same approval, notification, and reporting requirements). In addition to the DIOG, each FBIHQ substantive Division has a policy implementation guide (PG) that supplements this document. Numerous FBI manuals, electronic communications, letterhead memoranda, and other policy documents are incorporated into the DIOG and the substantive Division policy implementation guides, thus, consolidating the FBI's policy guidance. The FBIHQ Corporate Policy Office (CPO) plays an instrumental role in this endeavor. Specifically, the CPO maintains the most current version of the DIOG on its website. As federal statutes, executive orders, Attorney General guidelines, FBI policies, or other relevant authorities change, CPO will electronically update the DIOG after appropriate coordination and required approvals.

(U) The changes implemented by the DIOG should better equip you to protect the people of the United States against crime and threats to the national security and to collect foreign intelligence. This is your document, and it requires your input so that we can provide the best service to our nation. If you discover a need for change, please forward your suggestion to FBIHQ CPO.

(U) Thank you for your outstanding service!

Robert S. Mueller, III

Director

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1. (U) Scope and Purpose

1.1. (U) Scope

(U) The DIOG applies to all investigative activities and intelligence collection activities conducted by the FBI within the United States or outside the territories of all countries. This policy document does not apply to investigative and intelligence collection activities of the FBI in foreign countries; those are governed by *The Attorney General's Guidelines for Extraterritorial FBI Operations*.

1.2. (U) Purpose

(U) The purpose of the DIOG is to standardize policy so that criminal, national security, and foreign intelligence investigative activities are consistently and uniformly accomplished whenever possible (e.g., same approval, notification, and reporting requirements).

(U) This policy document also stresses the importance of oversight and self-regulation to ensure that all investigative and intelligence collection activities are conducted within Constitutional and statutory parameters and that civil liberties and privacy are protected.

(U) In addition to this policy document, each FBIHQ substantive Division has a PG that supplements the DIOG. As a result, numerous FBI manuals, electronic communications, letterhead memoranda, and other policy documents are incorporated into the DIOG and Division PGs, thus, consolidating FBI policy guidance.

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2. (U) General Authorities and Principles

2.1. (U) Scope of the Attorney General's Guidelines for Domestic FBI Operations

(U) The *Attorney General's Guidelines for Domestic FBI Operations* (AGG-Dom) apply to investigative and intelligence collection activities conducted by the FBI within the United States, in the United States territories, or outside the territories of all countries. They do not apply to investigative and intelligence collection activities of the FBI in foreign countries, which will be governed by the *Attorney General's Guidelines for Extraterritorial FBI Operations*, when published. (Reference: AGG-Dom, Part I.A.)

(U) The AGG-Dom replaces the following six guidelines:

- (U) *The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations* (May 30, 2002)
- (U) *The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection* (October 31, 2003)
- (U) *The Attorney General's Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence* (November 29, 2006)
- (U) *The Attorney General Procedure for Reporting and Use of Information Concerning Violations of Law and Authorization for Participation in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence or International Terrorism Intelligence Investigations* (August 8, 1988).
- (U) *The Attorney General's Guidelines for Reporting on Civil Disorders and Demonstrations Involving a Federal Interest* (April 5, 1976)
- (U) *The Attorney General's Procedures for Lawful, Warrantless Monitoring of Verbal Communications* (May 30, 2002) [only portion applicable to FBI repealed]

(U) The Attorney General will be issuing a separate set of new guidelines for extraterritorial operations, the *Attorney General's Guidelines for Extraterritorial FBI Operations*. However, certain of the existing guidelines that are repealed by the AGG-Dom currently apply in part to extraterritorial operations, including the *Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection*, and the *Attorney General Procedure for Reporting and Use of Information Concerning Violations of Law and Authorization for Participation in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence or International Terrorism Intelligence Investigations*. To ensure that there is no gap in the existence of guidelines for extraterritorial operations, these existing guidelines will remain in effect in their application to extraterritorial operations until the *Attorney General's Guidelines for Extraterritorial FBI Operations* are issued and take effect, notwithstanding the general repeal of these existing guidelines by the AGG-Dom.

(U) Also, the classified *Attorney General Guidelines for Extraterritorial FBI Operation and Criminal Investigations* (1993) will continue to apply to FBI criminal investigations, pending the execution of the new guidelines for extraterritorial operations, as discussed above. Finally, for national security and foreign intelligence investigations, FBI investigative activities will continue to be processed as set forth in the classified *Memorandum of Understanding Concerning*

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Overseas and Domestic Activities of the Central Intelligence Agency and the Federal Bureau of Investigation (2005).

2.2. (U) General FBI Authorities under AGG-Dom

(U) The AGG-Dom recognizes four broad, general FBI authorities. (AGG-Dom, Part I.B.)

A. (U) Conduct Investigations and Collect Intelligence and Evidence

(U) The FBI is authorized to collect intelligence and to conduct investigations to detect, obtain information about, and prevent and protect against federal crimes and threats to the national security and to collect foreign intelligence, as provided in the DIOG (AGG-Dom, Part II).

(U) By regulation, the Attorney General has directed the FBI to investigate violations of the laws of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency. The FBI's authority to investigate and collect evidence involving criminal drug laws of the United States is concurrent with such authority of the Drug Enforcement Administration (28 C.F.R. § 0.85[a]).

B. (U) Provide Investigative Assistance

(U) The FBI is authorized to provide investigative assistance to other federal, state, local, or tribal agencies, and foreign agencies as provided in Section 12 of the DIOG (AGG-Dom, Part III).

C. (U) Conduct Strategic Analysis and Planning

(U) The FBI is authorized to conduct intelligence analysis and planning as provided in Section 15 of the DIOG (AGG-Dom, Part IV).

D. (U) Retain and Share Information

(U) The FBI is authorized to retain and share information obtained pursuant to the AGG-Dom, as provided in Section 14 of the DIOG (AGG-Dom, Part VI).

2.3. (U) FBI as an Intelligence Agency

(U) The FBI is an intelligence agency as well as a law enforcement agency. Its basic functions accordingly extend beyond limited investigations of discrete matters, and include broader analytic and planning functions. The FBI's responsibilities in this area derive from various administrative and statutory sources. See Executive Order 12333; 28 U.S.C. § 532 note (incorporating P.L. 108-458 §§ 2001-2003) and 534 note (incorporating P.L. 109-162 § 1107).

(U) Part IV of the AGG-Dom authorizes the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The functions authorized under that Part includes: (i) development of overviews and analyses concerning threats to and vulnerabilities of the United States and its interests; (ii) research and analysis to produce reports and assessments (see note below) concerning matters relevant to investigative activities or other authorized FBI activities; and (iii) the operation of intelligence systems that facilitate and support investigations through the compilation and analysis of data and information on an ongoing basis.

(U) **Note:** In the DIOG, the word "assessment" has two distinct meanings. The AGG-Dom authorizes as an investigative activity an "assessment" which requires an authorized purpose as

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discussed in the DIOG Section 5. The United States Intelligence Community (USIC), however, also uses the word "assessment" to describe written intelligence products as discussed in the DIOG Section 15.7.B.

2.4. (U) FBI Lead Investigative Authorities

A. (U) Introduction

(U//FOUO) The FBI's primary investigative authority is derived from the authority of the Attorney General as provided in 28 U.S.C. §§ 509, 510, 533 and 534. Within this authority, the Attorney General may appoint officials to detect crimes against the United States and to conduct such other investigations regarding official matters under the control of the Department of Justice (DOJ) and the Department of State (DOS) as may be directed by the Attorney General (28 U.S.C. § 533). The Attorney General has delegated a number of his statutory authorities and granted other authorities to the Director of the FBI (28 C.F.R. § 0.85[a]). Some of these authorities apply both inside and outside the United States.

B. (U) Terrorism and Counterterrorism Investigations

(U) The Attorney General has directed the FBI to exercise Lead Agency responsibility in investigating all crimes for which DOJ has primary or concurrent jurisdiction and which involve terrorist activities or acts in preparation of terrorist activities within the statutory jurisdiction of the United States. Within the United States, this includes the collection, coordination, analysis, management and dissemination of intelligence and criminal information, as appropriate. If another federal agency identifies an individual who is engaged in terrorist activities or in acts in preparation of terrorist activities, the other agency is required to promptly notify the FBI. Terrorism, in this context, includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, to further political or social objectives (28 C.F.R. § 0.85[a]).

C. (U) "Federal Crimes of Terrorism"

(U) Pursuant to the delegation in 28 C.F.R. § 0.85(a), the FBI exercises the Attorney General's lead investigative responsibility under 18 U.S.C. § 2332b(f) for all "federal crimes of terrorism" as identified in that statute. Many of these statutes grant the FBI extraterritorial investigative responsibility. Check the cited statute for the full particulars concerning elements of the offense, jurisdiction, etc. Under 18 U.S.C. § 2332b(g)(5), the term "federal crime of terrorism" means an offense that is: (i) calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct; and (ii) is a violation of federal statute relating to:

1. (U) Destruction of aircraft or aircraft facilities (18 U.S.C. § 32);
2. (U) Violence at international airports (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 37);
3. (U) Arson within "special maritime and territorial jurisdiction of the United States" (SMTJ is defined in 18 U.S.C. § 7) (18 U.S.C. § 81);
4. (U) Prohibitions with respect to biological weapons (extraterritorial federal jurisdiction if offense committed by or against a United States national) (18 U.S.C. § 175);

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5. (U) Possession of biological agents or toxins by restricted persons (18 U.S.C. § 175b);
6. (U) Variola virus (includes smallpox and other derivatives of the variola major virus) (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 175c);
7. (U) Prohibited activities regarding chemical weapons (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 229) (E.O. 13128 directs any possible violation of this statute be referred to the FBI);
8. (U) Congressional, Cabinet, and Supreme Court assassination, kidnapping and assault (18 U.S.C. § 351[a]-[d]) (18 U.S.C. § 351[g] directs that the FBI shall investigate violations of this statute);
9. (U) Prohibited transactions involving nuclear materials (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 831);
10. (U) Participation in nuclear and weapons of mass destruction threats to the United States (extraterritorial federal jurisdiction) (18 U.S.C. § 832);
11. (U) Importation, exportation, shipping, transport, transfer, receipt, or possession of plastic explosives that do not contain a detection agent (18 U.S.C. § 842[m] and [n]);
12. (U) Arson or bombing of government property risking or causing death (18 U.S.C. § 844[f][2] or [3]) (18 U.S.C. § 846[a] grants FBI and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) concurrent authority to investigate violations of this statute);
13. (U) Arson or bombing of property used in or affecting interstate or foreign commerce (18 U.S.C. § 844[i]) (18 U.S.C. § 846[a] grants FBI and ATF concurrent authority to investigate violations of this statute);
14. (U) Killing or attempted killing during an attack on a federal facility with a dangerous weapon (18 U.S.C. § 930[c]);
15. (U) Conspiracy within United States jurisdiction to murder, kidnap, or maim persons at any place outside the United States (18 U.S.C. § 956[a][1]);
16. (U) Using a computer for unauthorized access, transmission, or retention of protected information (18 U.S.C. § 1030[a][1]) (18 U.S.C. § 1030[d][2] grants the FBI "primary authority" to investigate Section 1030[a][1] offenses involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data as defined in the Atomic Energy Act, except for offenses affecting United States Secret Service (USSS) duties under 18 U.S.C. § 3056[a]);
17. (U) Knowingly transmitting a program, information, code, or command and thereby intentionally causing damage, without authorization, to a protected computer (18 U.S.C. § 1030[a][5][A][i]);
18. (U) Killing or attempted killing of officers or employees of the United States, including any member of the uniformed services (18 U.S.C. § 1114);

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19. (U) Murder or manslaughter of foreign officials, official guests, or internationally protected persons (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 1116) (Attorney General may request military assistance in the course of enforcement of this section);
20. (U) Hostage taking (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 1203);
21. (U) Willfully injuring or committing any depredation against government property or contracts (18 U.S.C. § 1361);
22. (U) Destruction of communication lines, stations, or systems (18 U.S.C. § 1362);
23. (U) Destruction or injury to buildings or property within special maritime and territorial jurisdiction of the United States (18 U.S.C. § 1363);
24. (U) Destruction of \$100,000 or more of an "energy facility" property as defined in the statute (18 U.S.C. § 1366);
25. (U) Presidential and Presidential staff assassination, kidnapping, and assault (18 U.S.C. § 1751[a], [b], [c], or [d]) (extraterritorial jurisdiction) (Per 18 U.S.C. § 1751[i], 1751 violations must be investigated by the FBI; FBI may request assistance from any federal [including military], state, or local agency notwithstanding any statute, rule, or regulation to the contrary);
26. (U) Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air (includes a school bus, charter, or sightseeing transportation; or any means of transport on land, water, or through the air) (18 U.S.C. § 1992);
27. (U) Destruction of national defense materials, premises, or utilities (18 U.S.C. § 2155);
28. (U) Production of defective national defense materials, premises, or utilities (18 U.S.C. § 2156);
29. (U) Violence against maritime navigation (18 U.S.C. § 2280);
30. (U) Violence against maritime fixed platforms (located on the continental shelf of the United States or located internationally in certain situations) (18 U.S.C. § 2281);
31. (U) Certain homicides and other violence against United States nationals occurring outside of the United States (18 U.S.C. § 2332);
32. (U) Use of weapons of mass destruction (against a national of the United States while outside the United States; against certain persons or property within the United States; or by a national of the United States outside the United States) (18 U.S.C. § 2332a) (WMD defined in 18 U.S.C. § 2332a[c][2]);
33. (U) Acts of terrorism transcending national boundaries (includes murder, kidnapping, and other prohibited acts occurring inside and outside the United States under specified circumstances – including that the victim is a member of a uniform service; includes offenses committed in the United States territorial sea and airspace above and seabed below; includes offenses committed in special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7) (18 U.S.C. § 2332b);

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34. (U) Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities (applies to offenses occurring inside or outside the United States in certain situations; does not apply to activities of armed forces during an armed conflict) (18 U.S.C. § 2332f);
35. (U) Missile systems designed to destroy aircraft (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 2332g);
36. (U) Radiological dispersal devices (applies to offenses occurring outside the United States in certain situations) (18 U.S.C. § 2332h);
37. (U) Harboring or concealing terrorists (18 U.S.C. § 2339);
38. (U) Providing material support or resources to terrorists (18 U.S.C. § 2339A);
39. (U) Providing material support or resources to designated foreign terrorist organizations (extraterritorial federal jurisdiction) (18 U.S.C. § 2339B) (“The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.” 18 U.S.C. § 2339B[e][1]);
40. (U) Prohibitions against the financing of terrorism (applies to offenses occurring outside the United States in certain situations including on board a vessel flying the flag of the United States or an aircraft registered under the laws of the United States) (18 U.S.C. § 2339C) (Memorandum of Agreement between the Attorney General and the Secretary of Homeland Security, dated May 13, 2005: FBI leads all terrorist financing investigations and operations);
41. (U) Relating to military-type training from a foreign terrorist organization (extraterritorial jurisdiction) (18 U.S.C. § 2339D);
42. (U) Torture applies only to torture committed outside the United States in certain situations; torture is defined in 18 U.S.C. § 2340 (18 U.S.C. § 2340A);
43. (U) Prohibitions governing atomic weapons (applies to offenses occurring outside the United States in certain situations) (42 U.S.C. § 2122) (FBI shall investigate alleged or suspected violations per 42 U.S.C. § 2271[b]);
44. (U) Sabotage of nuclear facilities or fuel (42 U.S.C. § 2284) (FBI shall investigate alleged or suspected violations per 42 U.S.C. § 2271[b]);
45. (U) Aircraft piracy (applies to offenses occurring outside the United States in certain situations) (49 U.S.C. § 46502) (FBI shall investigate per 28 U.S.C. § 538);
46. (U) Assault on a flight crew with a dangerous weapon (applies to offenses occurring in the “special aircraft jurisdiction of the United States” as defined in 49 U.S.C. § 46501[2]); (second sentence of 49 U.S.C. § 46504) (FBI shall investigate per 28 U.S.C. § 538);
47. (U) Placement of an explosive or incendiary device on an aircraft (49 U.S.C. § 46505[b][3]) (FBI shall investigate per 28 U.S.C. § 538);
48. (U) Endangerment of human life on aircraft by means of weapons (49 U.S.C. § 46505[c]) (FBI shall investigate per 28 U.S.C. § 538);
49. (U) Application of certain criminal laws to acts on aircraft (if homicide or attempted homicide is involved) (applies to offenses occurring in the “special aircraft jurisdiction of

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the United States” as defined in 18 U.S.C. § 46501[2]); (49 U.S.C. § 46506) (FBI shall investigate per 28 U.S.C. § 538);

50. (U) Damage or destruction of interstate gas or hazardous liquid pipeline facility (49 U.S.C. § 60123[b]); and
51. (U) Section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).

D. (U) Additional offenses not defined as “Federal Crimes of Terrorism”

(U) Title 18 U.S.C. § 2332b(f) expressly grants the Attorney General primary investigative authority for additional offenses not defined as “Federal Crimes of Terrorism.” These offenses are (Note: nothing in this section of the DIOG may be construed to interfere with the USSS under 18 U.S.C. § 3056):

1. (U) Congressional, Cabinet, and Supreme Court assaults (18 U.S.C. § 351[e]) (18 U.S.C. § 351[g]) directs that the FBI investigate violations of this statute);
2. (U) Using mail, telephone, telegraph, or other instrument of interstate or foreign commerce to threaten to kill, injure, or intimidate any individual, or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or explosive (18 U.S.C. § 844[e]); (18 U.S.C. § 846[a] grants FBI and ATF concurrent authority to investigate violations of this statute);
3. (U) Damages or destroys by means of fire or explosive any building, vehicle, or other personal or real property, possessed, owned, or leased to the United States or any agency thereof, or any institution receiving federal financial assistance (18 U.S.C. § 844[f][1]) (18 U.S.C. § 846[a] grants FBI and ATF concurrent authority to investigate violations of this statute);
4. (U) Conspiracy within United States jurisdiction to damage or destroy property in a foreign country and belonging to a foreign country, or to any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated (18 U.S.C. § 956[b]);
5. (U) Destruction of \$5,000 or more of an “energy facility” property as defined in 18 U.S.C. § 1366(c) (18 U.S.C. § 1366[b]); and
6. (U) Willful trespass upon, injury to, destruction of, or interference with fortifications, harbor defenses, or defensive sea areas (18 U.S.C. § 2152).

E. (U//FOUO) NSPD-46/HSPD-15, “U.S. Policy and Strategy in the War on Terror”

(U//FOUO) Annex II (Consolidation and Updating of Outdated Presidential Counterterrorism Documents), dated January 10, 2007, to National Security Presidential Directive (NSPD) 46/Homeland Security Presidential Directive (HSPD) 15, dated March 6, 2006, establishes FBI lead responsibilities, as well as those of other federal entities, in the “War on Terror.”



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(U//FOUO) Areas addressed in Annex II [redacted]

[redacted]

Both NSPD-

46/HSPD-15 and Annex II thereto are classified.

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F. (U) Counterintelligence and Espionage Investigations

(U//FOUO) A representative list of federal statutes applicable to counterintelligence and espionage investigations appears below. For additional information, refer to the Counterintelligence Program Implementation Guide and the current list of espionage and counterintelligence authorities.

1. (U) Espionage Investigations of Persons in United States Diplomatic Missions Abroad

(U) Section 603 of the Intelligence Authorization Act of 1990 (P.L. 101-193) states that, subject to the authority of the Attorney General, "the FBI shall supervise the conduct of all investigations of violations of the espionage laws of the United States by persons employed by or assigned to United States diplomatic missions abroad. All departments and agencies shall provide appropriate assistance to the FBI in the conduct of such investigations." Consult the Attorney General's extraterritorial guidelines and other applicable policy or agreements.

2. (U) Investigations of Unauthorized Disclosure of Classified Information to a Foreign Power or Agent of a Foreign Power

(U) The National Security Act of 1947, as amended, establishes procedures for the coordination of counterintelligence activities (50 U.S.C. § 402a). Part of that statute requires that, absent extraordinary circumstances as approved by the President in writing on a case-by-case basis, the head of each executive branch department or agency must ensure that the FBI is "advised immediately of any information, regardless of its origin, which indicates that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power."

G. (U) Criminal Investigations

(U//FOUO) In addition to the statutes listed above and below, refer to the Criminal Investigative Division (CID) Program Implementation Guide (PG) for additional criminal jurisdiction information.

1. (U) Investigations of aircraft privacy and related violations

(U) The FBI shall investigate any violation of 49 U.S.C. § 46314 (Entering aircraft or airport areas in violation of security requirements) or chapter 465 (Special aircraft jurisdiction of the United States) of Title 49, United States Code. (28 U.S.C. § 538)

2. (U) Violent crimes against foreign travelers

(U) The Attorney General and Director of the FBI shall assist state and local authorities in investigating and prosecuting a felony crime of violence in violation of the law of any State in which the victim appears to have been selected because he or she is a traveler from a foreign nation. (28 U.S.C. § 540A[b])

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3. (U) Felonious killings of state and local law enforcement officers (28 U.S.C. § 540); and
4. (U) Investigations of serial killings (28 U.S.C. § 540B)

H. (U) Authority of an FBI Special Agent

(U) An FBI Special Agent has the authority to:

1. (U) Investigate violations of the laws, including the criminal drug laws, of the United States (21 U.S.C. § 871; 28 U.S.C. §§ 533, 534 and 535; 28 C.F.R. § 0.85).
2. (U) Collect evidence in cases in which the United States is or may be a party in interest (28 C.F.R. § 0.85 [a]) as redelegated through exercise of the authority contained in 28 C.F.R. § 0.138 to direct personnel in the FBI.
3. (U) Make arrests (18 U.S.C. §§ 3052 and 3062).
4. (U) Serve and execute arrest warrants and seize property under warrant; issue and/or serve administrative subpoenas; serve subpoenas issued by other proper authority; and make civil investigative demands (18 U.S.C. §§ 3052, 3107; 21 U.S.C. § 876; 15 U.S.C. § 1312).
5. (U) Carry firearms (18 U.S.C. § 3052).
6. (U) Administer oaths to witnesses attending to testify or depose in the course of investigations of frauds on or attempts to defraud the United States or irregularities or misconduct of employees or agents of the United States (5 U.S.C. § 303).
7. (U) Seize property subject to seizure under the criminal and civil forfeiture laws of the United States (e.g., 18 U.S.C. §§ 981 and 982).
8. (U) Perform other duties imposed by law.

2.5. (U) Status as Internal Guidance

(U) The AGG-Dom and this DIOG are set forth solely for the purpose of internal DOJ and FBI guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the DOJ and the FBI. (AGG-Dom, Part I.D.2.)

2.6. (U) Departures from the AGG-Dom

- A. (U//FOUO) **Departure from the AGG-Dom in Advance of an Operation:** A Departure from the AGG-Dom must be approved by the Director of the FBI, by the Deputy Director of the FBI, or by an Executive Assistant Director (EAD) designated by the Director. The Director of the FBI has designated the EAD National Security Branch or the EAD Criminal Cyber Response and Services Branch to grant departures from the AGG-Dom. Notice of the departure must be provided to the General Counsel (GC).
- B. (U//FOUO) **Emergency Exception for a Departure from the AGG-Dom:** If a departure from the AGG-Dom is necessary without such prior approval because of the immediacy or gravity of a threat to the safety of persons or property or to the national security, the Director, the Deputy Director, or a designated EAD, and the GC must be notified by the official granting the emergency departure as soon thereafter as practicable. The FBI must provide timely written notice of departures from the AGG-Dom to the DOJ Criminal Division or

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National Security Division (NSD), as appropriate, and the Criminal Division or NSD must notify the Attorney General and the Deputy Attorney General. Notwithstanding this paragraph, all activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States. (AGG-Dom, Part I.D.3.)

- C. (U//FOUO) **Records of Departures from the AGG-Dom:** The Office of the General Counsel (OGC) is responsible for maintaining records of all requests and approvals or denials of departures from the AGG-Dom.

2.7. (U) Departures from the DIOG

- A. (U//FOUO) **Departure from the DIOG in Advance of an Operation:** A request for a "departure from" any provision of the DIOG must be submitted to the appropriate substantive program Assistant Director (AD) and to the GC for approval prior to exercising a departure from the DIOG. The AD may designate the Deputy Assistant Director (DAD), and the GC may designate the Deputy General Counsel for the National Security Law Branch (NSLB) or the Deputy General Counsel for the Investigative Law Branch (ILB) to approve departures. Notwithstanding this paragraph, all activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States.
- B. (U//FOUO) **Emergency Exception for a Departure from the DIOG:** If a departure is necessary because of the immediacy or gravity of a threat to the safety of persons or property or to the national security, the approving authority may, at his/her discretion, authorize an emergency departure from the DIOG. As soon as practicable thereafter, the Special Agent in Charge (SAC) or FBIHQ Section Chief must provide, in writing, notice to the appropriate AD and GC describing the circumstances and necessity for the departure. Notwithstanding this paragraph, all activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States.
- C. (U//FOUO) **Records of Departures from the DIOG:** The OGC is responsible for maintaining records of all requests and approvals or denials of departures from the DIOG.

2.8. (U) Other FBI Activities Not Limited by AGG-Dom

(U) The AGG-Dom apply to FBI investigative activities as provided herein and do not limit other authorized activities of the FBI, such as the FBI's responsibilities to conduct background checks and inquiries concerning applicants and employees under federal personnel security programs (e.g., background investigations), the FBI's maintenance and operation of national criminal records systems and preparation of national crime statistics, and the forensic assistance and administration functions of the FBI Laboratory. (AGG-Dom, Part I.D.4.)

(U) FBI employees may incidentally obtain information relating to matters outside of the FBI's primary investigative responsibility. For example, information relating to violations of state or local law or foreign law may be incidentally obtained in the course of investigating federal crimes or threats to the national security or in collecting foreign intelligence. The AGG-Dom does not bar the acquisition of such information in the course of authorized investigative activities, the retention of such information, or its dissemination as appropriate to the responsible authorities in other jurisdictions. (AGG-Dom, Part II)

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2.9. (U) Use of Classified Investigative Technologies

(U) Inappropriate use of classified investigative technologies may risk the compromise of such technologies. Hence, in an investigation relating to activities in violation of federal criminal law, that does not concern a threat to the national security or foreign intelligence, the use of such technologies must be in conformity with the Procedures for the Use of Classified Investigative Technologies in Criminal Cases. (AGG-Dom, Part V.B.2)

2.10. (U) Application of AGG-Dom and DIOG

(U//FOUO) The AGG-Dom and DIOG apply to all FBI domestic investigations and operations conducted by "FBI employees" such as, but not limited to, applicable support personnel, intelligence analysts, special agents, task force officers, detailees, FBI contractors, and confidential human sources (CHS). All of these "FBI employees" are bound by the AGG-Dom and DIOG. In the DIOG, the use of "FBI employee" implies the use of all personnel descriptions, if not otherwise prohibited by law or policy. For example, if the DIOG states the "FBI employee" is responsible for a particular investigative activity, the supervisor has the flexibility to assign that responsibility to any person bound by the AGG-Dom and DIOG (i.e., agent, intelligence analyst, task force officer), if not otherwise prohibited by law or policy.

(U//FOUO) FBIHQ Division Policy Implementation Guides cannot be less restrictive than the DIOG. Additionally, FBIHQ Division Policy Implementation Guides must comply with the policy contained in the DIOG, unless approval for deviation from the DIOG is reviewed by the General Counsel and approved by the FBI Deputy Director.

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3. (U) Core Values, Roles, and Responsibilities

3.1. (U) The FBI's Core Values

(U) The FBI's values do not exhaust the many goals we wish to achieve, but they capsule them as well as can be done in a few words. The FBI's core values must be fully understood, practiced, shared, vigorously defended, and preserved. The values are:

- (U) Rigorous obedience to the Constitution of the United States
- (U) Respect for the dignity of all those we protect
- (U) Compassion
- (U) Fairness
- (U) Uncompromising personal integrity and institutional integrity
- (U) Accountability by accepting responsibility for our actions and decisions and their consequences
- (U) Leadership, by example, both personal and professional

(U) By observing these core values, we achieve a high level of excellence in performing the FBI's national security and criminal investigative functions as well as the trust of the American people. Rigorous obedience to constitutional principles ensures that individually and institutionally our adherence to constitutional guarantees is more important than the outcome of any single interview, search for evidence, or investigation. Respect for the dignity of all reminds us to wield law enforcement powers with restraint. Fairness and compassion ensure that we treat everyone with the highest regard for constitutional, civil, and human rights. Personal and institutional integrity reinforce each other and are owed to our Nation in exchange for the sacred trust and great authority conferred upon us.

(U) We who enforce the law must not merely obey it. We have an obligation to set a moral example that those whom we protect can follow. Because the FBI's success in accomplishing its mission is directly related to the support and cooperation of those we protect, these core values are the fiber that holds together the vitality of our institution.

(U) Compliance

(U) All FBI personnel must fully comply with all laws, rules, and regulations governing FBI investigations, operations, programs and activities, including those set forth in the AGG-Dom. We cannot and do not countenance disregard for the law for the sake of expediency in anything we do. The FBI expects its personnel to ascertain the laws and regulations that govern the activities in which they engage, to acquire sufficient knowledge of those laws, rules, and regulations to understand their requirements and to conform their professional and personal conduct accordingly. Under no circumstances will expediency justify disregard for the law. Further, the FBI requires its employees to report to proper authority any known or suspected failures to adhere to the law, rules or regulations by themselves or others. Information for reporting such violations is available from the Office of Integrity and Compliance (OIC).

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FBI policy must be consistent with Constitutional, legal and regulatory requirements. Additionally, the FBI must provide sufficient training to affected personnel and ensure that appropriate oversight monitoring mechanisms are in place.

3.2. (U) Deputy Director Roles and Responsibilities

(U//FOUO) The Deputy Director is the proponent of the DIOG, and he has oversight regarding compliance with the DIOG and subordinate implementing procedural directives and divisional specific policy implementation guides (PG). The Deputy Director is also responsible for the development and the delivery of necessary training and the execution of the monitoring and auditing processes. The Deputy Director works through the Corporate Policy Office (CPO) to ensure that the DIOG is updated, as necessary, to comply with changes in the law, rules, or regulations, but not later than one year from the effective date of this DIOG, and every three years thereafter.

3.3. (U) Special Agent/Intelligence Analyst/Task Force Officer/FBI Contractor/Others Roles and Responsibilities

(U//FOUO) Agents, analysts, task force officers (TFO), FBI contractors and others bound by the AGG-Dom and DIOG must:

- A. (U//FOUO) Ensure compliance with the DIOG standards for initiating, conducting, and closing an investigative activity; collection activity; or use of an investigative method, as provided in the DIOG;
- B. (U//FOUO) Obtain training on the DIOG standards relevant to his/her position and perform activities consistent with those standards;
- C. (U//FOUO) Ensure all investigative activity complies with the Constitution, federal law, executive orders, Presidential Directives, AGG-Dom, other Attorney General Guidelines, Treaties, Memoranda of Agreement/Understanding, this policy document, and any other applicable legal and policy requirements (if an agent, analyst, TFO, or other individual is unsure of the legality of any action, he/she must consult with his/her supervisor and Chief Division Counsel [CDC] or OGC);
- D. (U//FOUO) Ensure that civil liberties and privacy are protected throughout the assessment or investigative process;
- E. (U//FOUO) Conduct no investigative activity solely on the basis of activities that are protected by the First Amendment or solely on the basis of the race, ethnicity, national origin or religion of the subject;
- F. (U//FOUO) Comply with the law, rules, or regulations, and report any non-compliance concern to the proper authority, as stated in the DIOG Section 3.1; and
- G. (U//FOUO) Identify victims who have suffered direct physical, emotional, or financial harm as result of the commission of federal crimes, offer the FBI's assistance to victims of these crimes and provide victims' contact information to the responsible FBI Victim Specialist, and keep them updated on the status of the investigation. The FBI's responsibility for assisting victims is continuous as long as there is an open investigation.

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3.4. (U) Supervisor Roles and Responsibilities

- A. (U) **Supervisor Defined:** Supervisors include, but are not limited to, Field Office and FBIHQ personnel including: Supervisory Intelligence Analyst (SIA), Supervisory Special Agent (SSA), Supervisory Senior Resident Agent (SSRA), Unit Chief (UC), Assistant Special Agent in Charge (ASAC), Assistant Section Chief (ASC), Section Chief (SC), Special Agent in Charge (SAC), Deputy Assistant Director (DAD), Assistant Director (AD), Assistant Director in Charge (ADIC), and Executive Assistant Director (EAD).
- B. (U) **Supervisor Responsibilities:**
1. (U//FOUO) Anyone in a supervisory role that approves/reviews investigative or collection activity must determine whether the standards for initiating, approving, conducting, and closing an investigative activity, collection activity or investigative method, as provided in the DIOG, are satisfied.
 2. (U//FOUO) Supervisors must monitor to ensure that all investigative activity, collection activity and the use of investigative methods comply with the Constitution, federal law, Executive Orders, Presidential Directives, AGG-Dom, other Attorney General Guidelines, Treaties, Memoranda of Agreement/Understanding, this policy document, and any other applicable legal and policy requirements.
 3. (U//FOUO) Supervisors must obtain training on the DIOG standards relevant to their position and conform their decisions to those standards. Supervisors must also ensure that all subordinates have received the required training on the DIOG standards and requirements relevant to their positions.
 4. (U//FOUO) All supervisors must ensure that civil liberties and privacy are protected throughout the investigative process.
 5. (U//FOUO) If encountering a practice that does not comply with the law, rules, or regulations, the supervisor must report that compliance concern to the proper authority and, when necessary, take action to maintain compliance.
 6. (U//FOUO) Supervisors must not retaliate or take adverse action against persons who raise compliance concerns. (See OIC non-retaliation policy in the CPO policy and guidance library)
- C. (U//FOUO) **Supervisory Delegation:** Throughout the DIOG, any requirement imposed on a supervisor may be performed by a designated Acting, Primary or Secondary Relief Supervisor, unless specified otherwise by federal statute, Executive Order, Presidential Directive, Attorney General Guidelines, FBI policy, or any other applicable regulation. All delegations must be made in writing and retained appropriately.
- (U//FOUO) A supervisor may delegate authority to a supervisor one level junior to himself or herself, unless specified otherwise (e.g., the SAC may delegate authority to the ASAC). This delegation must: (i) identify the task delegated; (ii) identify the supervisory position given approval authority; (iii) be in writing; and (iv) be retained appropriately. This delegation authority is not further delegable. Except as provided in the preceding paragraph, an SSA or SIA may not delegate authority.
- (U//FOUO) Any supervisor can request that a supervisor at a higher level approve a particular activity, so long as the higher-level supervisor is in the original approval

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supervisor's "chain-of-command" (e.g., SSA approval is required to open a preliminary investigation, but the SSA requests that his/her ASAC or SAC approve the preliminary investigation because he/she will be on TDY). Unlike delegations of authority which require written documentation, higher supervisory approval than required by the AGG-Dom or DIOG does not require written authorization.

- D. (U//FOUO) **File Reviews:** Full-time supervisors or primary relief supervisors (relief supervisors require SAC approval) must conduct investigative file reviews with their subordinates, as discussed below. Investigative file reviews must be conducted with all agents, Resident Agents, TFOs, analysts, detailees, and FBI contractors as appropriate. Investigative file reviews for probationary agents are recommended every 30 days but must be conducted at least every 60 days.
1. (U//FOUO) **Assessment Justification/File Reviews:** Supervisors must conduct 30-day justification reviews for types 1 and 2 assessments and 90-day file reviews for types 3, 4 and 6 assessments, as required in Section 5 of the DIOG. These justification/file reviews must: (i) evaluate the progress made toward the achievement of the authorized purpose and objective; (ii) ensure activities that occurred in the prior 30/90 days were appropriate; (iii) determine whether it is reasonably likely that information may be obtained that is relevant to the authorized objective, thereby warranting an extension for another 30/90 days; (iv) determine whether adequate predication has been developed to open and/or continues to justify a predicated investigation; and (v) determine whether the assessment should be terminated.
 - a. (U//FOUO) **Type 1 and 2 Assessments:** Supervisory justification reviews must be conducted for each 30 day period. Following the end of the 30-day period, the agent, analyst, TFO, detailee or FBI contractor and the supervisor have up to 10 calendar days to complete all aspects of the review and to appropriately document the review, as specified in this section of the DIOG.
 - b. (U//FOUO) **Type 3, 4 and 6 Assessments:** Supervisory justification/file reviews must be conducted for each 90 day period. Following the end of each 90 day period, the agent, analyst, TFO, detailee or FBI contractor and the supervisor have up to 30 days to complete all aspects of the review and to appropriately document the review, as specified in this section of the DIOG. Investigative file reviews for probationary FBI employees are recommended every 30 days but must be conducted at least every 60 days.
 2. (U//FOUO) **Predicated Investigations:** Supervisory investigative file reviews must be conducted for each 90 day period. Following the end of each 90 day period, the agent, analyst, TFO, detailee or FBI contractor and the supervisor have up to 30 days to complete all aspects of the review and to appropriately document the review, as specified in this section of the DIOG. Investigative file reviews for probationary FBI employees are recommended every 30 days but must be conducted at least every 60 days.
 3. (U//FOUO) **General Policy for Justification/File Reviews:** A justification/file review must be: (i) in person or by telephone when necessary (e.g., FBI employee is TDY); (ii) conducted in private; and (iii) noted in the Automated Case Support (ACS) Investigative Case Management Case Review or on the FD-71 or Guardian. Justification/file review documentation must be executed in duplicate, with the subordinate being permitted to

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retain a copy, and the originals retained by the supervisor in each subordinate's administrative folder until the next inspection. If the subordinate only has applicant cases assigned and is in compliance with FBI deadlines and regulations, the in-person conference may be waived. If the conference is waived, the supervisor will make suitable comments concerning the subordinate's caseload, performance, compliance with FBI deadlines and regulations, and record the fact that no conference was held. The results of the justification/file reviews must be considered when preparing mid-year progress reviews, annual appraisals, and developmental worksheets, except this provision does not apply to TFOs, other agency detailees, or FBI Contractors.

E. (U//FOUO) Unaddressed Work for Assessments and Full Investigations

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(U//FOUO) [Redacted]

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(U//FOUO) The FD-71 provides a mechanism to assign an Assessment to an appropriate Unaddressed Work File, if appropriate. In the FD-71, the Supervisor must select a reason for assigning the matter to the Unaddressed Work File, and choose the appropriate classification. Upon submitting the FD-71, a new Unaddressed Work File will be opened.

3.5. (U) Chief Division Counsel Roles and Responsibilities

(U//FOUO) The Chief Division Counsel (CDC) must review all assessments and predicated investigations involving sensitive investigative matters as discussed in DIOG Section 10 as well as review the use of particular investigative methods as discussed in Sections 5 and 11 of the DIOG. The primary purpose of the CDC's review is to ensure the legality of the actions proposed. Review, in this context, includes a determination that the investigative activity is: (i) not legally objectionable (i.e., that it is not based solely on the exercise of First Amendment rights or on the race, ethnicity, national origin or religion of the subject; and (ii) founded upon an authorized purpose and/or adequate factual predication and meets the standard specified in the DIOG. The CDC should also include in his or her review and recommendation, if appropriate, a determination of the wisdom of the proposed action (e.g., the CDC may have no legal objection but may recommend denial because the value of the proposal is outweighed by the intrusion into legitimate privacy interests). The CDC's determination that an investigative activity is: (i) not legally objectionable; and (ii) warranted from a mission standpoint is based on facts known at the time of the review and recommendation. Often these facts are not verified or otherwise corroborated until the investigative activity commences. As a result, the CDC may require additional CDC reviews or provide guidance to supervisory personnel with regard to monitoring the results of the investigative activity to ensure that the authorized purpose and/or factual predication remains in tact after the facts are developed.

(U//FOUO) For investigative activities involving a sensitive investigative matter, the CDC must also independently consider the factors articulated in the DIOG and provide the approving authority with a recommendation as to whether, in the CDC's judgment, the investigative activity should be approved. Activities found to be legally objectionable by the CDC may not be approved unless and until the CDC's determination is countermanded by the FBI General Counsel or a delegated designee.

(U//FOUO) Throughout the DIOG, any requirement imposed on the CDC may be performed by an Associate Division Counsel (ADC), Legal Advisor, or designated Acting CDC. All CDC delegations must be made in writing and retained appropriately.

3.6. (U) Office of the General Counsel Roles and Responsibilities

(U//FOUO) In coordination with the DOJ NSD, the OGC is responsible for conducting regular reviews of all aspects of FBI national security and foreign intelligence activities. The primary purpose of the OGC's review is to ensure the legality of the actions proposed. These reviews, conducted at FBI Field Offices and Headquarters' Units, broadly examine such activities for compliance with the AGG-Dom and other applicable requirements. Review, in this context, includes a determination that the investigative activity is: (i) not legally objectionable (i.e., that it is not based solely on the exercise of First Amendment rights or on the race, ethnicity, national origin or religion of the subject; and (ii) founded upon an authorized purpose and/or adequate factual predication and meets the standard specified in the DIOG. The OGC should also include in its review and recommendation, if appropriate, a determination of the wisdom of the proposed

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action (e.g., the OGC may have no legal objection but may recommend denial because the value of the proposal is outweighed by the intrusion into legitimate privacy interests). The OGC's determination that an investigative activity is: (i) not legally objectionable; and (ii) warranted from a mission standpoint is based on facts known at the time of the review and recommendation. Often these facts are not verified or otherwise corroborated until the investigative activity commences. As a result, the OGC may require additional OGC reviews or provide guidance to supervisory personnel with regard to monitoring the results of the investigative activity to ensure that the authorized purpose and/or factual predication remains in tact after the facts are developed.

(U//FOUO) For those investigative activities involving a sensitive investigative matter requiring OGC review, the OGC must independently consider the factors articulated in the DIOG and provide the approving authority with a recommendation as to whether, in the OGC's judgment, the investigative activity should be approved.

(U//FOUO) Throughout the DIOG, any requirement imposed on the General Counsel may be delegated and performed by a designated OGC attorney. All delegations must be made in writing and retained appropriately.

3.7. (U) Corporate Policy Office Roles and Responsibilities

(U//FOUO) Subject to the guidance of the Deputy Director, the CPO has oversight of the implementation of the DIOG. In the process of implementing and analyzing the DIOG, the CPO should report any apparent compliance risk areas directly to the OIC. Additionally, the CPO will work directly with the OIC to ensure that the policies, training and monitoring are adequate to meet compliance monitoring procedures.

3.8. (U) Office of Integrity and Compliance Roles and Responsibilities

(U//FOUO) OIC is responsible for reviewing the DIOG, and working with each FBI Division and the CPO, to identify compliance risk areas and ensure the adequacy of policy statements, training and monitoring. When compliance risk areas are identified, the OIC works with the Divisions, Field Offices, and/or programs affected by the risk and develops programs to review the adequacy of policy statements, training, and monitoring and mitigates those concerns appropriately.

3.9. (U) Operational Program Manager Roles and Responsibilities

(U//FOUO) FBIHQ Operation Program Managers must review notices and actions received from FBI Field Offices pursuant to procedures contained in the applicable FBIHQ substantive Division's policy implementation guide. This responsibility includes notifying the appropriate DOJ entity of FBI Field Office and FBIHQ investigative activities, within the time period specified by the AGG-Dom, when required.

(U//FOUO) FBIHQ Operational Program Managers are responsible for identifying, prioritizing, and analyzing potential compliance risks within their programs regarding implementation of the DIOG, and developing mitigation plans where warranted.

(U//FOUO) Operational Program Managers must proactively identify and take appropriate action to resolve potential compliance concerns. In identifying possible compliance concerns, Program Managers should consider the following indicators of possible compliance issues:

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- A. (U//FOUO) Similar activities being handled differently from Squad-to-Squad / Unit-to-Unit / Field Office-to-Field Office;
- B. (U//FOUO) Unusually high need for contact with Headquarters' Division for basic information on how to conduct an activity;
- C. (U//FOUO) Apparent confusion over how to conduct a certain activity;
- D. (U//FOUO) Conflicting policy;
- E. (U//FOUO) Non-existent/inaccurate/wrongly targeted training;
- F. (U//FOUO) Monitoring mechanisms that do not exist or do not test the right information (e.g. file reviews/program management); and
- G. (U//FOUO) Inadequate audit for compliance.

(U//FOUO) Operational Program Managers may not retaliate or take adverse action against persons who raise compliance concerns.

3.10. (U) Division Compliance Officer Roles and Responsibilities

(U//FOUO) Each FBIHQ Division and Field Office must have a Division Compliance Officer (DCO) who will proactively identify potential non-compliance risk areas concerning the implementation of the DIOG and report them to the proper authority and the OIC. The DCO must always be aware that the focus of a compliance program is the identification and resolution of a compliance problem and the process must not be punitive or retaliatory.

3.11. (U) FBI Headquarters Approval Levels

(U//FOUO) If a DIOG provision does not specifically provide, or prohibit, FBIHQ approval authority for conducting certain investigative activities or investigative methods, the below Field Office approval authorities equate to the following FBIHQ personnel and approving officials when FBIHQ initiates, conducts, or closes an investigative activity or utilizes an investigative method:

- (U//FOUO) Field Office Analyst or Special Agent (SA) = FBIHQ Analyst, SA, or Supervisory Special Agent (SSA);
- (U//FOUO) Field Office Supervisory Intelligence Analysts (SIA) = FBIHQ SIA;
- (U//FOUO) Chief Division Counsel (CDC) = FBIHQ Office of the General Counsel (OGC);
- (U//FOUO) Field Office SSA = FBIHQ Unit Chief (UC); and
- (U//FOUO) Special Agent in Charge (SAC) = FBIHQ Section Chief (SC).

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4. (U) Privacy and Civil Liberties, and Least Intrusive Methods

4.1. (U) Civil Liberties and Privacy

A. (U) Overview

(U) The FBI is responsible for protecting the American public, not only from crime and terrorism, but also from incursions into their constitutional rights. Accordingly, all AGG-Dom investigative activities must be carried out with full adherence to the Constitution, federal laws and the principles of civil liberty and privacy.

(U) The FBI has a long-established commitment to protecting the civil liberties of Americans as it investigates threats to national security and public safety. As discussed below, compliance with the FBI's comprehensive infrastructure of legal limitations, oversight and self-regulation effectively ensures that this commitment is honored. Because our ability to achieve our mission requires that we have the trust and confidence of the American public, and because that trust and confidence can be significantly shaken by our failure to respect the limits of our power, special care must be taken by all employees to comply with these limitations.

B. (U) Purpose of Investigative Activity

(U) One of the most important safeguards in the AGG-Dom—one that is intended to ensure that FBI employees respect the constitutional rights of Americans—is the threshold requirement that all investigative activity be conducted for an authorized purpose. Under the AGG-Dom that authorized purpose must be an authorized national security, criminal, or foreign intelligence collection purpose.

(U) Simply stating such a purpose is not sufficient, however, to ensure compliance with this safeguard. It is critical that the authorized purpose not be, or appear to be, arbitrary or contrived; that it be well-founded and well-documented; and that the information sought and the investigative method used to obtain it be focused in scope, time, and manner to achieve the underlying purpose. Furthermore, there are constitutional provisions that set limits on what that purpose may be. It may not be solely to monitor the exercise of rights that are protected by the Constitution, and, equally important, the authorized purpose may not be based solely on race, ethnicity, national origin or religion.

(U) It is important to understand how the "authorized purpose" requirement and these constitutional limitations relate to one another. For example, individuals or groups who communicate with each other or with members of the public in any form in pursuit of social or political causes—such as opposing war or foreign policy, protesting government actions, promoting certain religious beliefs—have a fundamental constitutional right to do so. No investigative activity may be conducted for the sole purpose of monitoring the exercise of these rights. If, however, there exists a well-founded basis to conduct investigative activity for one of the authorized purposes listed above—and that basis is not solely the race, ethnicity, national origin or religion of the participants—FBI employees may assess or investigate these activities, subject to other limitations in the AGG-Dom and the DIOG. In this situation, the investigative activity would not be based solely on Constitutionally-protected conduct or on race, ethnicity, nationality or religion. Finally, although investigative activity would be authorized in this situation, it is important that it be conducted in a manner

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that does not materially interfere with the ability of the individuals or groups to engage in the exercise of Constitutionally-protected rights.

C. (U) Oversight and Self-Regulation

(U) Provisions of the AGG-Dom, other AGG, and oversight from DOJ components are designed to ensure the activities of the FBI are lawful, appropriate and ethical as well as effective in protecting the civil liberties and privacy of individuals in the United States. DOJ and the FBI's Inspection Division, OIC, and OGC, along with every FBI employee, share responsibility for ensuring that the FBI meets these goals.

(U) In the criminal investigation arena, oversight of FBI activities has traditionally come from prosecutors and district courts. Because many national security investigations do not result in prosecutions, other oversight mechanisms are necessary. Various features of the AGG-Dom facilitate the DOJ NSD oversight functions in the national security and foreign intelligence collection areas. Relevant requirements and provisions include: (i) required notification by the FBI to the DOJ NSD concerning a full investigation that involves foreign intelligence collection, a full investigation of a United States person in relation to a threat to the national security; or a national security investigation involving a "sensitive investigative matter;" (ii) an annual report by the FBI to the DOJ NSD concerning the FBI's foreign intelligence collection program, including information reflecting the scope and nature of foreign intelligence collection activities in each FBI Field Office; (iii) access by the DOJ NSD to information obtained by the FBI through national security or foreign intelligence activities; and (iv) general authority for the Assistant Attorney General for National Security to obtain reports from the FBI concerning these activities. (AGG-Dom, Intro.4.C)

(U) The DOJ NSD's Oversight Section and the FBI's OGC are responsible for conducting regular reviews of all aspects of FBI national security and foreign intelligence activities. These reviews, conducted at FBI Field Offices and FBIHQ Divisions, broadly examine such activities for compliance with the AGG-Dom and other applicable requirements.

(U) Further examples of oversight mechanisms include the involvement of both FBI and prosecutorial personnel in the review of undercover operations involving sensitive circumstances; notice requirements for investigations involving sensitive investigative matters; and notice and oversight provisions for enterprise investigations, which involve a broad examination of groups implicated in criminal and national security threats. These requirements and procedures help to ensure that the rule of law is respected in the FBI's activities and that public confidence is maintained in these activities. (AGG-Dom, Intro.4.C)

(U) In addition to the above-mentioned oversight entities DOJ has in place, the FBI is subject to a regime of oversight, legal limitations, and self-regulation designed to ensure strict adherence to civil liberties. This regime is comprehensive and has many facets, including the following:

1. (U) The Foreign Intelligence Surveillance Act of 1978, as amended, and Title III of the Omnibus and Streets Act of 1968. These laws establish the processes for obtaining judicial approval of: electronic surveillance and physical searches for the purposes of collecting foreign intelligence and electronic surveillance for the purpose of collecting evidence of crimes.

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2. (U) The Whistleblower Protection Acts of 1989 and 1998: These laws protect whistleblowers from retaliation.
3. (U) The Freedom of Information Act of 1966: The law provides the public with access to FBI documents not covered by a specific statutory exemption.
4. (U) The Privacy Act of 1974: The purpose of the Privacy Act is to balance the government's need to maintain information about United States citizens and legal permanent resident aliens with the rights of those individuals to be protected against unwarranted invasions of their privacy stemming from the government's collection, use, maintenance, and dissemination of that information. The Privacy Act forbids the FBI and other federal agencies from collecting information about how individuals exercise their First Amendment rights, unless that collection is expressly authorized by statute or by the individual, or is pertinent to and within the scope of an authorized law enforcement activity (5 U.S.C. § 552a[e][7]). Except for collection of foreign intelligence, activities authorized by the AGG-Dom are authorized law enforcement activities or activities for which there is otherwise statutory authority for purposes of the Privacy Act. Foreign intelligence collection is not an authorized law enforcement activity.

(U) Congressional Oversight is conducted by various committees of the United States Congress, but primarily by the Judiciary and Intelligence Committees. These committees exercise regular, vigorous oversight into all aspects of the FBI's operations. To this end, the National Security Act of 1947 requires the FBI to keep the intelligence committees (for the Senate and House of Representatives) fully and currently informed of substantial intelligence activities. This oversight has significantly increased in breadth and intensity since the 1970's, and it provides important additional assurance that the FBI conducts its investigations according to the law and the Constitution.

(U) The FBI's counterintelligence and counterterrorism operations are subject to significant self-regulation and oversight beyond that conducted by Congress. The Intelligence Oversight Board (IOB), comprised of members from the President's Intelligence Advisory Board (PIAB), also conducts oversight of the FBI. Among its other responsibilities, the IOB reviews violations of The Constitution, national security law, E.O. or Presidential Decision Directive (PDD) by the FBI and the other intelligence agencies, and issues reports thereon to the President and the Attorney General.

(U) Internal FBI safeguards include: (i) the OGC's Privacy and Civil Liberties Unit (PCLU), which reviews plans of any record system proposed within the FBI for compliance with the Privacy Act and related privacy protection requirements and policies; (ii) the criminal and national security undercover operations review committees, comprised of senior DOJ and FBI officials, which review all proposed undercover operations that involve sensitive circumstances; (iii) the Sensitive Operations Review Committee (SORC), comprised of

[REDACTED]

[REDACTED]; (iv) all FBI employees have an obligation to report violations of the DIOG to their supervisor, other management officials, or appropriate authorities; and (v) the FBI requirement for training of new FBI employees and periodic training for all FBI employees

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to maintain currency on the latest guidelines, changes to laws and regulations, and judicial decisions related to constitutional rights and liberties.

(U) The AGG-Dom and DIOG set forth the standards and requirements under which an investigative activity may be initiated and are designed to provide FBI employees with a framework that maintains the proper balance between the public's need for effective law enforcement and protection of the national security and the protection of civil liberties and privacy. Among the provisions that specifically serve to protect civil liberties and privacy are the following: (i) the prohibition against initiating investigations based solely on the exercise of First Amendment rights or other constitutionally protected activity; (ii) the requirement that FBI employees use the least intrusive method reasonable under the circumstances to achieve their investigative goals; and (iii) the prohibition against engaging in ethnic and racial profiling. Further, in the context of collecting foreign intelligence, the FBI is further required to operate openly and consensually with United States persons, to the extent practicable.

4.2. (U) Protection of First Amendment Rights

(U) A fundamental principle of the Attorney General's guidelines for FBI investigations and operations since the first guidelines were issued in 1976 has been that investigative activity may not be based solely on the exercise of rights guaranteed by the First Amendment to the United States Constitution. This principle carries through to the present day in the AGG-Dom. There is a corollary to this principle in the Privacy Act of 1974, 5 U.S.C. § 552a, which prohibits the retention of information describing how a person exercises rights under the First Amendment, unless there is a valid law enforcement purpose.

(U) The First Amendment states:

(U) Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for redress of grievances.

(U) Although the amendment appears literally to apply only to Congress, the Supreme Court made it clear long ago that it also applies to activities of the Executive Branch, including law enforcement agencies. Therefore, for FBI purposes, it would be helpful to read the introduction to the first sentence as: "The FBI shall take no action respecting . . ." In addition, the word "abridging" must be understood. "Abridging," as used here, means "diminishing." Thus, it is not necessary for a law enforcement action to destroy or totally undermine the exercise of First Amendment rights for it to be unconstitutional; significantly diminishing or lessening the ability of individuals to exercise these rights without an authorized investigative purpose is sufficient.

(U) This is not to say that any diminishment of First Amendment rights is unconstitutional. The Supreme Court has never held that the exercise of these rights is absolute. In fact, the Court has set forth realistic interpretations of what level and kind of government activity actually violates a First Amendment right. For example, taken to an extreme, one could argue that the mere possibility of an FBI agent being present at an open forum (or an on-line presence) would diminish the right of free speech by, for example, an anti-war protestor because he/she would be afraid to speak freely. The Supreme Court, however, has never found an "abridgement" of First Amendment rights based on such a subjective fear. Rather, it requires an action that, from an

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objective perspective, truly diminishes the speaker's message or his/her ability to deliver it (e.g., pulling the plug on the sound system). For another example, requiring protestors to use a certain parade route may diminish, in a practical sense, delivery of their message. The Court has made it clear, however, that for legitimate reasons (e.g., public safety), the government may impose reasonable limitations in terms of time, place and manner to the exercise of such rights—as long as the ability to deliver the message remains.

(U) While the language of the First Amendment prohibits action that would abridge the enumerated rights, the implementation of that prohibition in the AGG-Dom reflects the Supreme Court's opinions on the constitutionality of law enforcement action that may impact the exercise of First Amendment rights. As stated above, the AGG-Dom prohibits investigative activity for the sole purpose of monitoring the exercise of First Amendment rights. The import of the distinction between this language and the actual text of the First Amendment language is two-fold: (i) the line drawn by the AGG-Dom prohibits even "monitoring" the exercise of First Amendment rights (far short of abridging those rights) as the sole purpose of FBI activity; and (ii) the requirement of an authorized purpose for all investigative activity provides additional protection for the exercise of Constitutionally protected rights.

(U) The AGG-Dom classifies investigative activity that involves a religious or political organization (or an individual prominent in such an organization) or a member of the news media as a "sensitive investigative matter." That designation recognizes the sensitivity of conduct that traditionally involves the exercise of First Amendment rights—i.e., groups who associate for political or religious purposes, and the press. The requirements for opening and pursuing a "sensitive investigative matter" are set forth in Section 10 of this policy document. It should be clear, however, from the discussion below just how pervasive the exercise of First Amendment rights is in American life and that not all protected First Amendment activity will fall within the definition of a "sensitive investigative matter." Therefore, it is essential that FBI employees recognize when investigative activity may have an impact on the exercise of these fundamental rights and be especially sure that any such investigative activity has a valid law enforcement or national security purpose, even if it is not a "sensitive investigative matter" as defined in the AGG-Dom and the DIOG.

(U) Finally, it is important to note that United States persons (and organizations comprised of United States persons) do not forfeit their First Amendment rights simply because they also engage in criminal activity or in conduct that threatens national security. For example, an organization suspected of engaging in acts of domestic terrorism may also pursue legitimate political goals and may also engage in lawful means to achieve those goals. The pursuit of these goals through constitutionally-protected conduct does not insulate them from legitimate investigative focus for unlawful activities—but the goals and the pursuit of their goals through lawful means remain protected from unconstitutional infringement.

(U) When allegations of First Amendment violations are brought to a court of law, it is usually in the form of a civil suit in which a plaintiff has to prove some actual or potential harm. Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989). In a criminal trial, a defendant may seek either or both of two remedies as part of a claim that his or her First Amendment rights were violated: suppression of evidence gathered in the alleged First Amendment violation, a claim typically analyzed under the "reasonableness" clause of the Fourth Amendment, and dismissal of the indictment on the basis of "outrageous government conduct" in violation of the Due Process Clause of the Fifth Amendment.

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(U) The scope of each of the primary First Amendment rights and their impact on FBI investigative activity are discussed below. The First Amendment's "establishment clause,"—the prohibition against the government establishing or sponsoring a specific religion—has little application to the FBI and, therefore, is not discussed here.

A. (U) Free Speech

(U) The exercise of free speech includes far more than simply speaking on a controversial topic in the town square. It includes such activities as carrying placards in a parade, sending letters to a newspaper editor, posting a web site on the Internet, wearing a tee shirt with a political message, placing a bumper sticker critical of the President on one's car, and publishing books or articles. The common thread in these examples is conveying a public message or an idea through words or deeds. Law enforcement activity that diminishes a person's ability to communicate in any of these ways may interfere with his or her freedom of speech—and thus may not be undertaken by the FBI solely for that purpose.

(U) The line between constitutionally protected speech and advocacy of violence or of conduct that may lead to violence or other unlawful activity must be understood. In Brandenburg v. Ohio, 395 U.S. 444 (1969), the Supreme Court established a two-part test to determine whether such speech is constitutionally protected: the government may not prohibit advocacy of force or violence except when such advocacy (i) is intended to incite imminent lawless action, and (ii) is likely to do so. Therefore, even heated rhetoric or offensive provocation that could conceivably lead to a violent response in the future is usually protected. Suppose, for example, a politically active group advocates on its web site taking unspecified "action" against persons or entities it views as the enemy, who thereafter suffer property damage and/or personal injury. Under the Brandenburg two-part test, the missing specificity and imminence in the message may provide it constitutional protection. For that reason, law enforcement may take no action that, in effect, blocks the message or punishes its sponsors.

(U) Despite the high standard for prohibiting free speech or punishing those who engage in it, the law does not preclude FBI employees from observing and collecting any of the forms of protected speech and considering its content—as long as those activities are done for a valid law enforcement or national security purpose and conducted in a manner that does not unduly infringe upon the ability of the speaker to deliver his or her message. To be an authorized purpose, it must be one that is authorized by the AGG-Dom—i.e., to further an FBI assessment, predicated investigation, or other authorized function such as providing assistance to other agencies. Furthermore, by following the "Standards for Initiating or Approving an Assessment or Predicated Investigation" as contained in the DIOG, the FBI will ensure that there is a rational relationship between that authorized purpose and the protected speech such that a reasonable person with knowledge of the circumstances could understand why the information is being collected.

(U) Returning to the example posed above, because the group's advocacy of action could be directly related by circumstance to property damage suffered by one of the group's known targets, collecting the speech—although lawfully protected—can lawfully occur. Similarly, listening to the public talks by a religious leader, who is suspected of raising funds for a terrorist organization, may yield clues as to his motivation, plan of action, and/or hidden messages to his followers. FBI employees should not, therefore, avoid collecting First

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Amendment protected speech if it is relevant to an authorized AGG-Dom purpose—as long as they do so in a manner that does not inhibit the delivery of the message or the ability of the audience to hear it, and so long as the method of collection is the least intrusive means feasible to gather the relevant information.

(U) In summary, during the course of lawful investigative activities, the FBI may lawfully collect, retain, and consider the content of constitutionally protected speech, so long as: (i) the collection is logically related to an authorized investigative purpose; (ii) the collection does not actually infringe on the ability of the speaker to deliver his or her message; and (iii) the method of collection is the least intrusive alternative feasible.

B. (U) Exercise of Religion

(U) Like the other First Amendment freedoms, the “free exercise of religion” clause is broader than commonly believed. First, it covers any form of worship of a deity—even forms that are commonly understood to be cults or fringe sects, as well as the right not to worship any deity. Second, protected religious exercise also extends to dress or food that is required by religious edict, attendance at a facility used for religious practice (no matter how unlikely it appears to be intended for that purpose), observance of the Sabbath, raising money for evangelical or missionary purposes, and proselytizing. Even in controlled environments like prisons, religious exercise must be permitted—subject to reasonable restrictions as to time, place, and manner. Another feature of this First Amendment right is that it is a matter of heightened sensitivity to some Americans—especially to devout followers. For this reason, it is a matter that is more likely to provoke an adverse reaction if the right is violated—regardless of which religion is involved. Therefore, when essential investigative activity may impact this right, it must be conducted in a manner that avoids the actual—and the appearance of—interference with religious practice to the maximum extent possible.

(U) While there must be an authorized purpose for any investigative activity that could have an impact on religious practice, this does not mean religious practitioners or religious facilities are completely free from being examined as part of an assessment or predicated investigation. If such practitioners are involved in—or such facilities are used for—activities that are the proper subject of FBI-authorized investigative or intelligence collection activities, their religious affiliation does not “immunize” them to any degree from these efforts. It is paramount, however, that the authorized purpose of such efforts be properly documented. It is also important that investigative activity directed at religious leaders or at conduct occurring within religious facilities be focused in time and manner so as not to infringe on legitimate religious practice by any individual but especially by those who appear unconnected to the activities under investigation.

(U) Furthermore, FBI employees may take appropriate cognizance of the role religion may play in the membership or motivation of a criminal or terrorism enterprise. If, for example, affiliation with a certain religious institution or a specific religious sect is a known requirement for inclusion in a violent organization that is the subject of an investigation, then whether a person of interest is a member of that institution or sect is a rational and permissible consideration. Similarly, if investigative experience and reliable intelligence reveal that members of a terrorist or criminal organization are known to commonly possess or exhibit a combination of religion-based characteristics or practices (e.g., group leaders state that acts of terrorism are based in religious doctrine), it is rational and lawful to consider

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such a combination in gathering intelligence about the group—even if any one of these, by itself, would constitute an impermissible consideration. By contrast, solely because prior subjects of an investigation of a particular group were members of a certain religion and they claimed a religious motivation for their acts of crime or terrorism, other members' mere affiliation with that religion, by itself, is not a basis to assess or investigate—absent a known and direct connection to the threat under assessment or investigation. Finally, the absence of a particular religious affiliation can be used by analysts and investigators to eliminate certain individuals from further investigative consideration in those scenarios where religious affiliation is relevant.

C. (U) Freedom of the Press

(U) Contrary to what many believe, this well-known First Amendment right is not owned by the news media; it is a right of the American people. The drafters of the Constitution believed that a free press was essential to preserving democracy. Although the news media typically seeks to enforce this right, freedom of the press should not be viewed as a contest between law enforcement or national security, on the one hand, and the interests of news media, on the other.

(U) Freedom of the press includes such matters as reasonable access to news-making events, the making of documentaries, and the posting of “blogs.” The news gathering function is the aspect of freedom of the press most likely to intersect with law enforcement and national security investigative activities. Within that category, the interest of the news media in protecting confidential sources and the interest of agencies like the FBI in gaining access to these sources who may have evidence of a crime or national security intelligence often clash. The seminal case in this area is Branzburg v. Hayes, 408 U.S. 665 (1977), in which the Supreme Court held that freedom of the press does not entitle a news reporter to refuse to divulge the identity of his source to a federal grand jury. The Court reasoned that, as long as the purpose of law enforcement is not harassment or vindictiveness against the press, any harm to the news gathering function of the press (by revealing source identity) is outweighed by the need of the grand jury to gather evidence of crime.

(U) Partially in response to Branzburg, the Attorney General has issued regulations that govern the issuance of subpoenas for reporter's testimony and telephone toll records, the arrest of a reporter for a crime related to news gathering, and the interview of a reporter as a suspect in a crime arising from the news gathering process. In addition, an investigation of a member of the news media in his official capacity, the use of a reporter as a source, and posing as a member of the news media are all sensitive circumstances in the AGG-Dom and other applicable AG guidelines.

(U) These regulations are not intended to insulate reporters and other news media from FBI assessments or predicated investigations. They are intended to ensure that investigative activity that seeks information from or otherwise involves members of the news media: is appropriately authorized; is necessary for an important law enforcement or national security objective; is the least intrusive means to obtain the information or achieve the goals; and does not unduly infringe upon the news gathering aspect of the constitutional right to freedom of the press.

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D. (U) Freedom of Peaceful Assembly and to Petition the Government for Redress of Grievances

(U) Freedom of peaceful assembly, often called the right to freedom of association, present unique issues for law enforcement agencies, including the FBI. Individuals who gather with others to protest government action, or to rally or demonstrate in favor of, or in opposition to, a social cause sometimes present a threat to public safety either by their numbers, by their actions, by the anticipated response to their message, or by creating an opportunity for individuals or other groups with an unlawful purpose to infiltrate and compromise the legitimacy of the group for their own ends. The right to peaceful assembly includes more than just public demonstrations—it includes, as well, the posting of group web sites on the Internet, recruiting others to a cause, marketing a message, and fund raising. All are protected First Amendment activities if they are conducted in support of the organization or political, religious or social cause.

(U) The right to petition the government for redress of grievances is so linked to peaceful assembly and association that it is included in this discussion. A distinction between the two is that an individual may exercise the right to petition the government by himself whereas assembly necessarily involves others. The right to petition the government includes writing letters to Congress, carrying a placard outside city hall that delivers a political message, recruiting others to one's cause, and lobbying Congress or an executive agency for a particular result.

(U) For the FBI, covert presence or action within associations, also called “undisclosed participation,” has the greatest potential to impact this Constitutional right. The Supreme Court addressed this issue as a result of civil litigation arising from one of the many protests against the Vietnam War. In Laird v. Tatum, 408 U.S. 1 (1972), the Court found that the mere existence of an investigative program—consisting of covert physical surveillance in public areas, infiltration of public assemblies by government operatives or sources, and the collection of news articles and other publicly available information—for the purpose of determining the existence and scope of a domestic threat to national security does not, by itself, violate the First Amendment rights of the members of the assemblies. The subjective “chill” to the right to assembly, based on the suspected presence of government operatives, did not by itself give rise to legal “standing” to argue that their constitutional rights had been abridged. Instead, the Court required a showing that the complained-of government action would reasonably deter the exercise of that right.

(U) Since Laird v. Tatum was decided, the lower courts have examined government activity on many occasions to determine whether it gave rise to a “subjective chill” or an “objective deterrent.” The basic standing requirement established by Laird remains unchanged today. The lower courts, however, have often imposed a very low threshold of objective harm to survive dismissal of the case. For example, plaintiffs who have shown a loss of membership in an organization, loss of financial support, loss to reputation and status in the community, and loss of employment by members have been granted standing to sue.

(U) More significant for the FBI than the standing issue has been the lower courts' evaluation of investigative activity into First Amendment protected associations since Laird. The courts have held the following investigative activities to be constitutionally permissible under First Amendment analysis: undercover participation in group activities; physical and video

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surveillance in public areas; properly authorized electronic surveillance; recruitment and operation of sources; collection of information from government, public, and private sources (with consent); and the dissemination of information for a valid law enforcement purpose. However, these decisions were not reached in the abstract. In every case in which the courts have found government action to be proper, the government proved that it was conducted for an authorized law enforcement or national security purpose and that it was conducted in substantial compliance with controlling regulations. In addition, in approving these techniques, the courts have often considered whether a less intrusive technique was available to the agency, and the courts have balanced the degree of intrusion or impact against the importance of the law enforcement or national security objective.

(U) By contrast, since Laird, the courts have found these techniques to be legally objectionable: initiating an investigation solely on the basis of the groups' social or political agenda (even if the agenda made the group susceptible to subversive infiltration); sabotaging or neutralizing the group's legitimate social or political agenda; disparaging the group's reputation or standing; leading the group into criminal activity that otherwise probably would not have occurred; and undermining legitimate recruiting or funding efforts. In every such case, the court found the government's purpose either was not persuasive, was too remote, or was too speculative to justify the intrusion and the potential harm to the exercise of First Amendment rights.

(U) Once again, the message is clear that investigative activity that involves assemblies or associations of United States persons exercising their First Amendment rights must have an authorized purpose under the AGG-Dom—and one to which the information sought and the technique to be employed are rationally related. Less intrusive techniques should always be explored first and those authorizing such activity (which, as discussed above, will almost always constitute a sensitive investigative matter) should ensure that the investigative activity is focused as narrowly as feasible and that the purpose is thoroughly documented.

4.3. (U) Equal Protection under the Law

A. (U) Introduction

(U) The Equal Protection Clause of the United States Constitution provides in part that: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court and the lower courts have made it clear that it applies as well to the official acts of United States government law enforcement agents.¹ Specifically, government employees are prohibited from engaging in invidious discrimination against individuals on the basis of race, ethnicity, national origin, or religious affiliation. This principle is further reflected and implemented for federal law enforcement in the United States Department of Justice's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (hereinafter "DOJ Guidance").

(U) The DOJ Guidance states that investigative and intelligence collection activities must not be based solely on race, ethnicity, national origin, or religious affiliation. Any such activities that are based solely on such considerations are invidious by definition, therefore,

¹ See, e.g., Whren v. United States, 517 U.S. 806 (1996); see also Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001).

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unconstitutional. This standard applies to all investigative and collection activity, including collecting and retaining information, opening cases, disseminating information, and indicting and prosecuting defendants. It is particularly applicable to the retention and dissemination of personally identifying information about an individual—as further illustrated in the examples enumerated below.

(U) The constitutional prohibition against invidious discrimination based on race, ethnicity, national origin or religion is relevant to both the national security and criminal investigative programs of the FBI. National security investigations often have ethnic aspects; members of a foreign terrorist organization may be primarily or exclusively from a particular country or area of the world. Similarly, ethnic heritage is frequently the common thread running through violent gangs or other criminal organizations. It should be noted that this is neither a new nor isolated phenomenon. Ethnic commonality among criminal and terrorist groups has been relatively constant and widespread across many ethnicities throughout the history of the FBI.

B. (U) Policy Principles

(U) To ensure that assessment and investigative activities and strategies consider racial, ethnic, national origin and religious factors properly and effectively and to help assure the American public that the FBI does not engage in invidious discrimination, the following policy principles are established.

1. (U) The prohibition against investigative activity based solely on race or ethnicity is not avoided by considering it in combination with other prohibited factors. For example, a person of a certain race engaging in lawful public speech about his religious convictions is not a proper subject of investigative activity based solely on any one of these factors—or by the combination of all three. Before collecting and using this information, a well-founded and authorized investigative purpose must exist as to which any or all of these otherwise prohibited factors is relevant.
2. (U) When race or ethnicity is a relevant factor to consider, it should not be the dominant or primary factor. Adherence to this standard will not only ensure that it is never the sole factor—it will also preclude undue and unsound reliance on race or ethnicity in investigative analysis. It reflects the recognition that there are thousands and, in some cases, millions of law abiding people in American society of the same race or ethnicity as those who are the subjects of FBI investigative activity, and it guards against the risk of sweeping some of them into the net of suspicion without a sound investigative basis.
3. (U) The FBI will not collect or use behavior or characteristics common to particular racial or ethnic community as investigative factors unless they bear clear and specific relevance to a matter under assessment or investigation. This policy is intended to prevent the potential that collecting ethnic characteristics or behavior will inadvertently lead to individual identification based solely on such matters, as well as to avoid the appearance that the FBI is engaged in ethnic or racial profiling.

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C. (U) Guidance on the Use of Race and Ethnic Identity in Assessments and Predicated Investigations

(U) Considering the reality of common ethnicity or race among many criminal and terrorist groups, some question how the prohibition against racial or ethnic profiling is to be effectively applied—and not violated—in FBI assessments and predicated investigations. The question arises generally in two contexts: (i) with respect to an individual or a group of individuals; and (ii) with respect to ethnic or racial communities as a whole.

1. (U) Individual Race or Ethnicity as a Factor

(U) The DOJ Guidance permits the consideration of ethnic and racial identity information based on specific reporting—such as from an eyewitness. As a general rule, race or ethnicity as an identifying feature of a suspected perpetrator, subject, and in some cases, a victim, is relevant if it is based on reliable evidence or information—not conjecture or stereotyped assumptions. In addition, the DOJ Guidance permits consideration of race or ethnicity in other investigative or collection scenarios if it is relevant. These examples illustrate:

- a. (U) The race or ethnicity of suspected members, associates, or supporters of an ethnic-based gang or criminal enterprise may be collected and retained when gathering information about or investigating the organization.
- b. (U) Ethnicity may be considered in evaluating whether a subject is—or is not—a possible associate of a criminal or terrorist group that is known to be comprised of members of the same ethnic grouping—as long as it is not the dominant factor for focusing on a particular person. It is axiomatic that there are many members of the same ethnic group who are not members of the group; and for that reason, there must be other information beyond race or ethnicity that links the individual to the terrorist or criminal group or to the other members of the group. Otherwise, racial or ethnic identity would be the sole criterion, and that is impermissible.

2. (U) Community Race or Ethnicity as a Factor

- a. (U) **Collecting and analyzing demographics.** The DOJ guidance and FBI policy permit the FBI to identify locations of concentrated ethnic communities in the Field Office's domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purpose of performing intelligence analysis. If, for example, intelligence reporting reveals that members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity, the location of that community is clearly valuable—and properly collectible—data. Similarly, the locations of ethnic-oriented businesses and other facilities may be collected if their locations will reasonably contribute to an awareness of threats and vulnerabilities, and intelligence collection opportunities. Also, members of some communities may be potential victims of civil rights crimes and, for this reason, community location may aid

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enforcement of civil rights laws. Information about such communities should not be collected, however, unless the communities are sufficiently concentrated and established so as to provide a reasonable potential for intelligence collection that would support FBI mission programs (e.g., where identified terrorist subjects from certain countries may relocate to blend in and avoid detection).

(U) [redacted] ethnic/racial demographics. [redacted]

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- c. (U) **General ethnic/racial behavior.** The authority to collect ethnic community location information does not extend to the collection of cultural and behavioral information about an ethnic community that bears no rational relationship to a valid investigative or analytical need. Every ethnic community in the Nation that has been associated with a criminal or national security threat has a dominant majority of law-abiding citizens, resident aliens, and visitors who may share common ethnic behavior but who have no connection to crime or terrorism (as either subjects or victims). For this reason, a broad-brush collection of racial or ethnic characteristics or behavior is not helpful to achieve any authorized FBI purpose and may create the appearance of improper racial or ethnic profiling.

- d. (U) **Specific and relevant ethnic behavior.** On the other hand, knowing the behavioral and life style characteristics of known individuals who are criminals or who pose a threat to national security may logically aid in the detection and prevention of crime and threats to the national security within the community and beyond. Focused behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community (not with the community as a whole) may be collected and retained. For example, if it is known through intelligence analysis or otherwise that individuals associated with an ethnic-based terrorist or criminal group conduct their finances by certain methods, travel in a certain manner, work in certain jobs, or come from a certain part of their home country that has established links to terrorism, those are relevant factors to consider when investigating the group or assessing whether it may have a presence within a community. It is recognized that the "fit" between specific behavioral characteristics and a terrorist or criminal group is unlikely to be perfect—that is, there will be members of the group who do not exhibit the behavioral criteria as well as persons who exhibit the behaviors who are not members of the group. Nevertheless, in order to maximize FBI mission relevance and to minimize the appearance of racial or

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ethnic profiling, the criteria used to identify members of the group within the larger ethnic community to which they belong must be as focused and as narrow as intelligence reporting and other circumstances permit. If intelligence reporting is insufficiently exact so that it is reasonable to believe that the criteria will include an unreasonable number of people who are not involved, then it would be inappropriate to use the behaviors, standing alone, as the basis for FBI activity.

(U) **Exploitive ethnic behavior.** A related category of information that can be collected is behavioral and cultural information about ethnic or racial communities that is reasonably likely to be exploited by criminal or terrorist groups who hide within those communities in order to engage in illicit activities undetected. For example, the existence of a cultural tradition of collecting funds from members within the community to fund charitable causes in their homeland at a certain time of the year (and how that is accomplished) would be relevant if intelligence reporting revealed that, unknown to many donors, the charitable causes were fronts for terrorist organizations or that terrorist supporters within the community intended to exploit the unwitting donors for their own purposes.

4.4. (U) Least Intrusive Method

A. (U) Overview

(U) The AGG-Dom requires that the "least intrusive" means or method be considered and—if operationally sound and effective—used to obtain intelligence or evidence in lieu of a more intrusive method. This principle is also reflected in Executive Order 12333, which governs the activities of the United States intelligence community. The concept of least intrusive method applies to the collection of all intelligence and evidence. Regarding the collection of foreign intelligence that is not collected as part of the FBI's traditional national security or criminal missions, the AGG-Dom provides that open and overt collection activity must be used with United States persons if feasible.

(U) By emphasizing the use of the least intrusive means to obtain intelligence and evidence, FBI employees can effectively execute their duties while mitigating potential negative impacts on the privacy and civil liberties of all people encompassed within the investigation, including targets, witnesses, and victims. This principle is not intended to discourage FBI employees from seeking relevant and necessary intelligence, information, or evidence, but rather is intended to encourage investigators to choose the least intrusive—but still effective—means from the available options to obtain the material.

(U) This principle is embodied in statutes and DOJ policies on a variety of topics including electronic surveillance, the use of tracking devices, the temporary detention of suspects, and forfeiture. In addition, the concept of least intrusive method can be found in case law as a factor to be considered in assessing the reasonableness of an investigative method in the face of a First Amendment or due process violation claim. See Clark v. Library of Congress, 750 F.2d 89, 94 (D.C. Cir 1984); Alliance to End Repression v. City of Chicago, 627 F. Supp. 1044, 1055 (N.D. Ill. 1985), citing Elrod v. Burns, 427 U.S. 347, 362-3 (1976).

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B. (U) General Approach to Least Intrusive Method Concept

(U) Applying the concept of least intrusive method to an investigative or intelligence collection scenario is both a logical process and an exercise in judgment. It is logical in the sense that the FBI employee must first determine the relative intrusiveness of the method that would provide information:

1. (U) Relevant to the assessment or predicated investigation;
2. (U) Within the time frame required by the assessment or predicated investigation;
3. (U) Consistent with operational security and the protection of sensitive sources and methods; and
4. (U) In a manner that provides confidence in the accuracy of the information.

(U) Determining the least intrusive method also requires sound judgment because it is clear that the factors discussed above are not fixed points on a checklist. They require careful consideration based on a thorough understanding of investigative objectives and circumstances.

C. (U) Determining Intrusiveness

(U) In determining intrusiveness, the primary factor should be the degree of procedural protection that established law and the AGG-Dom provide for the use of the method. Using this factor, search warrants, wiretaps, and undercover operations are very intrusive. By contrast, investigative methods with limited procedural requirements, such as checks of government and commercial data bases and communication with established sources, are less intrusive.

(U) The following guidance is designed to assist FBI personnel in judging the relative intrusiveness of different methods:

1. (U) **Nature of the information sought:** Investigative objectives generally dictate the type of information required and from whom it should be collected. This subpart is not intended to address the situation where the type of information needed and its location are clear so that consideration of alternatives would be pointless. When the option exists, however, to seek information from any of a variety of places, it is less intrusive to seek information from less sensitive and less protected places. Similarly, obtaining information that is protected by a statutory scheme (e.g., financial records) or an evidentiary privilege (e.g., attorney/client communications) is more intrusive than obtaining information that is not so protected. In addition, if there exists a reasonable expectation of privacy under the Fourth Amendment (i.e., private communications), obtaining that information is more intrusive than obtaining information that is knowingly exposed to public view as to which there is no reasonable expectation of privacy.
2. (U) **Scope of the information sought:** Collecting information regarding an isolated event—such as a certain phone number called on a specific date or a single financial transaction—is less intrusive or invasive of an individual's privacy than collecting a complete communications or financial "profile." Similarly, a complete credit history is a more intrusive view into an individual's life than a few isolated credit charges. In some cases, a complete financial and credit profile is exactly what the investigation

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requires (for example, investigations of terrorist financing or money laundering). If so, FBI employees should not hesitate to use appropriate legal process to obtain such information if the predicate requirements are satisfied. It is also recognized that operational security—such as source protection—may dictate seeking a wider scope of information than is absolutely necessary for the purpose of protecting a specific target or source. When doing so, however, the concept of least intrusive alternative still applies. The FBI may obtain more data than strictly needed, but it should obtain no more data than is needed to accomplish the operational security goal.

3. (U) **Scope of the use of the method:** Using a method in a manner that captures a greater picture of an individual's or a group's activities is more intrusive than using the same method or a different one that is focused in time and location to a specific objective. For example, it is less intrusive to use a tracking device to verify point-to-point travel than it is to use the same device to track an individual's movements over a sustained period of time. Sustained tracking on public highways would be just as lawful but more intrusive because it captures a greater portion of an individual's daily movements. Similarly, surveillance by closed circuit television that checks a discrete location within a discrete time frame is less intrusive than 24/7 coverage of a wider area. For another example, a computer intrusion device that captures only host computer identification information is far less intrusive than one that captures file content.
 4. (U) **Source of the information sought:** It is less intrusive to obtain information from existing government sources (such as state, local, tribal, international, or federal partners) or from publicly-available data in commercial data bases, than to obtain the same information from a third party (usually through legal process) that has a confidential relationship with the subject—such as a financial or academic institution. Similarly, obtaining information from a reliable confidential source who is lawfully in possession of the information and lawfully entitled to disclose it (such as obtaining an address from an employee of a local utility company) is less intrusive than obtaining the information from an entity with a confidential relationship with the subject. It is recognized in this category that the accuracy and procedural reliability of the information sought is an important factor in choosing the source of the information. For example, even if the information is available from a confidential source, a grand jury subpoena, national security letter (NSL), ex parte order, or other process may be required in order to ensure informational integrity.
 5. (U) **The risk of public exposure:** Seeking information about an individual or group under circumstances that create a risk that the contact itself and the information sought will be exposed to the individual's or group's detriment and/or embarrassment—particularly if the method used carries no legal obligation to maintain silence—is more intrusive than information gathering that does not carry that risk. Interviews with employers, neighbors, and associates, for example, or the issuance of grand jury subpoenas at a time when the investigation has not yet been publicly exposed are more intrusive than methods that gather information covertly. Similarly, interviews of a subject in a discrete location would be less intrusive than an interview at, for example, a place of employment or other location where the subject is known.
- (U) There is a limit to the utility of this list of intrusiveness factors. Some factors may be inapplicable in a given investigation and, in many cases, the choice and scope of the

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method will be dictated wholly by investigative objectives and circumstances. The foregoing is not intended to provide a comprehensive checklist or even an overall continuum of intrusiveness. It is intended instead to identify the factors involved in a determination of intrusiveness and to attune FBI employees to select, within each applicable category, a less intrusive method if operational circumstances permit. In the end, selecting the least intrusive method that will accomplish the objective is a matter of sound judgment. In exercising such judgment, however, consideration of these factors should ensure that the decision to proceed is well founded.

D. (U) Standard for Balancing Intrusion and Investigative Requirements

(U) Once an appropriate method and its deployment have been determined, reviewing and approving authorities should balance the level of intrusion against investigative requirements. This balancing test is particularly important when the information sought involves clearly established constitutional, statutory, or evidentiary rights or sensitive circumstances (such as obtaining information from religious or academic institutions or public fora where First Amendment rights are being exercised), but should be applied in all circumstances to ensure that the least intrusive alternative feasible is being utilized.

(U) Balancing the factors discussed above with the considerations discussed below will help determine whether the method and the extent to which it intrudes into privacy or threatens civil liberties is proportionate to the significance of the case and the information sought.

(U) Considerations on the investigative side of the balancing scale include the:

1. (U) Seriousness of the crime or national security threat;
2. (U) Strength and significance of the intelligence/information to be gained;
3. (U) Amount of information already known about the subject or group under investigation; and
4. (U) Requirements of operational security, including protection of sources and methods.

(U) If, for example, the threat is remote, the individual's involvement is speculative, and the probability of obtaining probative information is low, intrusive methods may not be justified, i.e., they may do more harm than good. At the other end of the scale, if the threat is significant and possibly imminent (e.g., a bomb threat), aggressive measures would be appropriate regardless of intrusiveness.

(U) In addition, with respect to the investigation of a group, if the terrorist or criminal nature of the group and its membership is well established (e.g., al Qaeda, Ku Klux Klan, Colombo Family of La Cosa Nostra), there is less concern that pure First Amendment activity is at stake than there would be for a group whose true character is not yet known (e.g., an Islamic charity suspected of terrorist funding) or many of whose members appear to be solely exercising First Amendment rights (anti-war protestors suspected of being infiltrated by violent anarchists). This is not to suggest that investigators should be less aggressive in determining the true nature of an unknown group, which may be engaged in terrorism or other violent crime. Indeed, a more aggressive and timely approach may be in order to determine whether the group is violent or to eliminate it as a threat. Nevertheless, when First Amendment rights are at stake, the choice and use of investigative methods

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should be focused in a manner that minimizes potential infringement of those rights. Finally, as the investigation progresses and the subject's or group's involvement becomes clear, more intrusive methods may be justified. Conversely, if reliable information emerges refuting the individual's involvement or the group's criminal or terrorism connections, the use of any investigative methods must be carefully evaluated.

(U) Another consideration to be balanced is operational security. Is it likely that if a less intrusive but feasible method were selected, the subject would detect its use and alter his activities—including his means of communication—to thwart the success of the operation. Operational security—particularly in national security investigations—should not be undervalued and may, by itself, justify covert tactics which, under other circumstances, would not be the least intrusive.

E. (U) Conclusion

(U) The foregoing guidance is offered to assist FBI employees in navigating the often unclear course to select the least intrusive investigative method that effectively accomplishes the operational objective at hand. In the final analysis, the choice of method and balancing of the impact on privacy and civil liberties with operational needs is a matter of judgment, based on training and experience. Pursuant to the AGG-Dom, other applicable laws and policies, and this guidance, FBI employees may use any lawful method allowed, even if intrusive, where the intrusiveness is warranted by the threat to the national security or to potential victims of crime and/or the strength of the information indicating its existence.