

UNCLASSIFIED

EDP-3:FO:TSF:P LJ

Denise Sorasio  
The Director  
Directorate - General Justice Freedom and Security  
Directorate D: Internal Security and Criminal Justice  
Rue du Luxembourg 46 3/106, B-1049 Bruxelles  
Belgium

Dear Ms. Sorasio:

Thank you for your letter of December 20, 2006 regarding the issue of the push method of obtaining Passenger Name Record (PNR) data from air carriers. While we appreciate and take your concerns very seriously, we believe that they may be the result of miscommunications or misunderstandings between Customs and Border Protection (CBP) and our European counterparts.

As you may know, CBP has been actively working with the EU carriers' Global Distribution System (Amadeus) for over two years as these air carriers migrate to a push method. Much progress has been made, including the initial testing of PNR data between CBP and Amadeus. In September 2006, CBP was notified by Amadeus that all testing must cease per a request from their clients the air carriers. Since this notification, CBP has continually requested that Amadeus resume and complete testing. On December 12, 2006, the six air carriers represented by Amadeus agreed to resume testing by the end of 2006, and as a result, testing is currently in process.

The remaining outstanding issue with Amadeus is CBP's need to receive an ad-hoc (or non-scheduled) push upon request. Whether it is called "interactive query capability" or an "ad-hoc query" or a "non-scheduled push," to ensure proper enforcement action is taken when there is an indication of a threat to a flight, set of flights, route or other circumstances related to terrorism or serious transnational crimes, CBP must have the ability to receive the most up-to-date PNR information upon request. We have been consistently clear that any push method must be designed to accommodate CBP's needs for access to this data outside of the 72-hour mark, whether before or in between any regular scheduled pushes, when there is an indication that such data is needed.

I detailed this system requirement to Mr. Francisco Fonseca Morillo of the European Commission in a February 2006 letter, which I understand you have reviewed and in a September 2006 letter to Mr. Arnaud Camus of International Agreements. Air France (representative for EU Amadeus carriers). More recently, the European Union's

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delegation during the 2006 negotiations acknowledged that air carriers must meet all of CBP's functional requirements when developing a push method. It is also provided for in the old and new U.S. - EU PNR Arrangement.

Based on an apparent misunderstanding of the process, the air carriers and Amadeus also have resisted the "real-time push" option, which would provide CBP with PNR initially at the 72-hour mark and again whenever changes are made to that PNR prior to the flight's departure. PNR data that has not changed between the 72-hour mark and the flight's departure need not be transmitted again, absent a pressing need by CBP.

CBP believes it has provided air carriers with viable options that meet CBP's operational needs for providing PNR data utilizing the push method, including those situations where CBP requires information outside of the 72-hour mark. CBP is actively working with air carriers to move toward that goal. We believe this approach is fully consistent with our representations in the Undertakings and under the new Agreement.

Thank you for your interest in this matter. If you have any questions please feel free to contact me at (202) 344-1220.

Sincerely,

Robert M. Jacksta  
Executive Director  
Traveler Security and Facilitation

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Hans Tischler Response:


Thank you for your email message of November 30, 2006 regarding the European Union (EU) air carriers' migration from the pull to a push system. Currently, there are no issues that impede U.S. Customs and Border Protection (CBP) from supporting this migration.

As you may know, CBP has been actively working with the EU carrier's Global Distribution System (Amadeus) for over two years as these air carriers migrate to a push system. Much progress has been made, including the initial testing of PNR data between CBP and Amadeus. In September 2006, CBP was notified by Amadeus that all testing must cease per their clients, that is, the air carriers. Since this notification, CBP has continually requested that Amadeus continue and complete testing. On December 12, 2006, the six air carriers represented by Amadeus have agreed to resume testing by the end of 2006.

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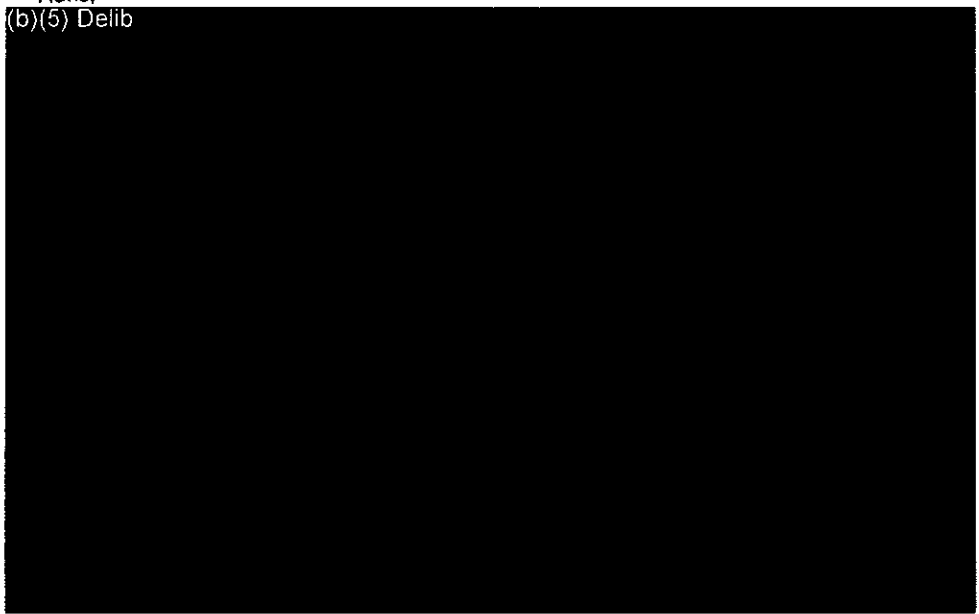
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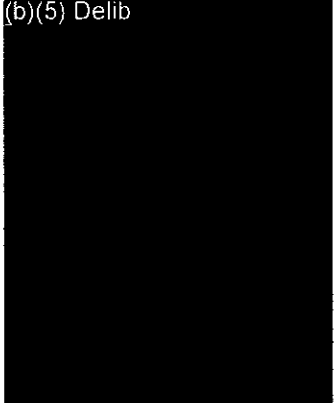
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Hans,

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Best Regards,

Bob

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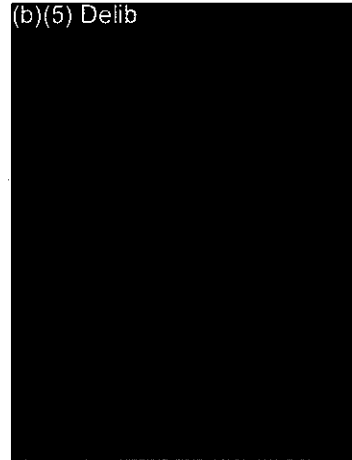
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Best Regards,

Bob

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U.S. Department of  
Homeland Security  
Washington, DC 20535



Homeland  
Security

September 6, 2001

MEMORANDUM FOR: Stewart Baker  
Assistant Secretary for Policy

FROM: Nathan A. Sales  
Deputy Assistant Secretary for Policy Development

SUBJECT: b5 (c)

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~~W. J. ...~~



# Homeland Security

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INFORMATION

MEMORANDUM FOR: Stewart Baker  
THROUGH: Marisa Lino  
FROM: Michael Scardaville  
SUBJECT: Critique of the EU's proposed PNR Undertakings  
Overview

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cc: Paul Rosenzweig

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U.S. Department of Homeland Security  
Washington, DC 20528



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INFORMATION

MEMORANDUM FOR: Stewart Baker  
THROUGH: Marisa Lino  
FROM: Michael Scardaville  
SUBJECT: Critique of the EU's proposed PNR Undertakings

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U.S. Department of Homeland Security  
Washington, DC 20528



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INFORMATION

**MEMORANDUM FOR:** Stewart Baker  
**THROUGH:** Marisa Lino, Senior Advisor, PLCY/OIA  
**FROM:** Michael Scardaville, Deputy Director for European Affairs  
**SUBJECT:** Key Issues for the May 3, 2007 PNR VTC

Overview:

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Background

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Strategic Issues:

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ANNEX 15 DOCUMENT  
Ann. Assessment of the [ b5 ] 2004 Undertakings  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

[ b2 ]

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Pursuant to the conclusions of the Sept 12-13, 2004 EU-US negotiating session on a replacement PNR agreement, the United States offers the following [ b5 ]

b5 b2(High) b7E

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2 [ b5 ] The Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight, unless CBP obtains advance information that persons of concern may be traveling. [ b5 ]

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3 [ b5 ] The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed and then only in a "deleted items" folder). [ b5 ]

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] Under records retention schedules

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approved by U.S. federal courts or authorities, longer periods are generally applicable for data with national security implications. For example, FBI national security case records are held for 20 years after the case is closed, Treasury Enforcement Communications System data (ECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 70 years.

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*DISCUSSION DOCUMENT*

U.S. Assessment of the [ b5 ] 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

[ b2 ]

Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session  
on a replacement PNR agreement, the United States offers the following <

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- [ b5 ] the Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight. <

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- [ b5 ] The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed due to the identification of a high risk individual and then only in a "deleted items" folder). <

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Revised Scenario MGE  
12/22/2022

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[ b5 b2 High b7E ] Under records retention schedules approved by U.S. federal records authorities, longer periods are used for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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[ b5 b2(High) b7E ]

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DISCUSSION DOCUMENT  
U.S. Assessment of the [ b5 ] 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

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1 [ b2 ]  
(u) Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session on a replacement PNR agreement, the United States offers the following [ b5 b2(H)(4) b7E ]

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2. [ b5 ] The Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight, unless CBP obtains advance information that persons of concern may be traveling. [ b5 b2(H)(4) b7E ]

3. [ b5 ] The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed and then only in a "deleted items" folder). [ b5 b2(H)(4) b7E ]  
Under records retention schedules

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approved by U.S. federal records authorities, longer periods are generally applied for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT

U.S. Assessment of the [ b5 ] 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

[ b2 ]

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Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session on a replacement PNR agreement, the United States offers the following [

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- [ b5 ] The Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight, unless CBP obtains advance information that persons of concern may be traveling. [

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- [ b5 ] The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed and then only in a "deleted items" folder). [

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Under records retention schedules approved by U.S. federal records authorities, longer periods are generally applied for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT  
U.S. Assessment of the [ b5 ] 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

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1 [ b2 ]  
(U) Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session on a replacement PNR agreement, the United States offers the following [ b5 b2(H) b7E ]

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(U) • [ b5 ] the Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight. [

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(U) • [ b5 ] The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed due to the identification of a high risk individual and then only in a "deleted items" folder). [

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C b5 b2(High) b7E Under records retention schedules approved by U.S. federal records authorities, longer periods are used for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT  
U.S. Assessment of the [ b5 ] 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

Deleted: September 19, 2006

[ b2 ]

(U) Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session on a replacement PNR agreement, the United States offers the following:

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[ b5 ] the Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight. [

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[ b5 ] The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed). [

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[ b5 b2(High) b7E ] Under records retention schedules approved by U.S. federal records authorities, longer periods are generally applied for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed. Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT

U.S. Assessment of the ~~C~~ b5 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

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(u) Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session on a replacement PNR agreement, the United States offers the following:

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2. ~~C~~ b5 The Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight, unless CBP obtains advance information that persons of concern may be traveling.

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3. ~~C~~ b5 The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed and then only in a "deleted items" folder).

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approved by U.S. federal records authorities, longer periods are generally applied for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT

U.S. Assessment of the [ b5 ] 2004 "Undertakings"  
adopted by U.S. Customs and Border Protection  
U.S. Department of Homeland Security

Deleted: September 19, 2006

1 [ b2 ]

(u) Pursuant to the conclusions of the September 18, 2006 EU-U.S. negotiating session on a replacement PNR agreement, the United States offers the following [ b7E b5 b2/Hqn ]

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2. [ b5 ] : The Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limit the number of pulls to four for any given flight, unless CBP obtains advance information that persons of concern may be traveling. [

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3. [ b5 ] : The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed and then only in a "deleted items" folder) [

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approved by U.S. federal records authorities, longer periods are generally applied for data with national security applications. For example, FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT  
DHS Objectives and Critical Factors in Renegotiating the US-EU PNR Arrangement  
Department of Homeland Security

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1. Issue: To explain DHS objectives and establish a negotiating position for the United States government in discussions with the European Union on a potential replacement PNR arrangement

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3. FBI national security case records are held for 30 years after the case is closed, Advance Passenger Information System records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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DISCUSSION DOCUMENT  
DHS Objectives and Critical Factors in Renegotiating the US-EU PNR Arrangement  
Department of Homeland Security

October 3, 2006 ~~September 1, 2006~~

1. *Issue:* To explain DHS objectives and establish a negotiating position for the United States government in discussions with the European Union on a potential replacement PNR arrangement

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- *The Data Retention Period:* The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed due to the identification of a high risk individual and then only in a "deleted items" folder).<sup>2</sup> [

[ b5 b2high b7E ]

<sup>1</sup> Paragraphs 3 (through the narrow use definition), 17, 28 and 31.  
<sup>2</sup> Paragraph 15.

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[ b5 b2 (high) b7c ]

> FBI national security case records are held for 30 years after the case is closed, Treasury Enforcement Communications System data (TECS) records are retained for 40, and Terrorist Screening Center and FBI fingerprint cards are held for 99 years.

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# Homeland Security

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Deleted: June 9, 2006

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INFORMATION

(u) MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Councilor to the Assistant Secretary for Policy

FROM: Michael Scardaville, Special Assistant/International Policy Advisor

SUBJECT: Summary of potential changes to seek in the PNR Undertakings

Purpose

(u) Per your request, below is a preliminary summary of areas of the Undertakings DHS may want to consider changing. I intend to work with CBP, OGC, TSA and Privacy to address these issues in more detail next week. My goal is provide you with a prioritized and justified list of changes to guide an eventual dialogue with the Europeans.

Background

(u) In addition, some requirements, such as the audit standards, actually improved the overall operation of the program and others reflect existing policy (i.e., redress opportunities).

Discussion

Likely Top Priorities:

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b2 (4/20/04)  
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# Homeland Security

June 8, 2006

## INFORMATION

(u) MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Counselor to the Assistant Secretary for Policy

FROM: Michael Scardaville, Special Assistant/International Policy Advisor

SUBJECT: Summary of potential changes to seek in the PNR Undertakings

### Purpose

(u) Per your request, below is a preliminary summary of areas of the Undertakings DHS may want to consider changing. I intend to work with CBP, OGC, TSA and Privacy to address these issues in more detail next week. My goal is provide you with a prioritized and justified list of changes to guide an eventual dialogue with the Europeans.

### Background

(u) In addition, some requirements, such as the audit standards, actually improved the overall operation of the program and others reflect existing policy (i.e., redress opportunities).

### Discussion

#### Likely Top Priorities:

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# Homeland Security

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## INFORMATION

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Deleted: June 9, 2006

MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy (u)

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Councilor to the Assistant Secretary for Policy (u)

FROM: Michael Scardaville, Special Assistant/International Policy Advisor (u)

SUBJECT: Summary of potential changes to seek in the PNR Undertakings (u)

### Purpose

(u) Per your request, below is a preliminary summary of areas of the Undertakings DHS may want to consider changing. I intend to work with CBP, OGC, TSA and Privacy to address these issues in more detail next week. My goal is provide you with a prioritized and justified list of changes to guide an eventual dialogue with the Europeans.

### Background

(u) C b5  
 In addition, some requirements, such as the audit standards, actually improved the overall operation of the program and others reflect existing policy (i.e., redress opportunities).

### Discussion

#### Likely Top Priorities

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# Homeland Security

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INFORMATION

~~CONFIDENTIAL~~

Deleted: June 11, 2006

Deleted: June 9, 2006

MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy (u)

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Councilor to the Assistant Secretary for Policy (u)

FROM: Michael Scardaville, Special Assistant/International Policy Advisor (u)

SUBJECT: Summary of potential changes to seek in the PNR Undertakings (u)

### Purpose

(u) Per your request, below is a preliminary summary of areas of the Undertakings DHS may want to consider changing. I intend to work with CBP, OGC, TSA and Privacy to address these issues in more detail next week. My goal is provide you with a prioritized and justified list of changes to guide an eventual dialogue with the Europeans. (u)

### Background

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In addition, some requirements, such as the audit standards, actually improved the overall operation of the program and others reflect existing policy (i.e. redress opportunities).

### Discussion

#### Likely Top Priorities

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# Homeland Security

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## INFORMATION

Deleted: June 2, 2006

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(u) MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy

THROUGH: Paul Rosenzweig, Acting Assistant Secretary (PDEV) and Counselor to the Assistant Secretary for Policy

FROM: PNR Working Group

SUBJECT: Summary of potential changes to seek in the PNR Undertakings

Deleted: Michael Scardaville, Special Assistant International Policy Advisor

### Purpose

(u) Per your request, below is an assessment of areas of the Undertakings DHS should seek to change in the Sub-EU PNR arrangement. [

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Background:

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Priority concerns are

addressed individually below

*Likely Top Priorities:*

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DEPUTIES MEETING ON PNR

DATE: Tuesday, July 25, 2006  
TIME: 12:00 - TBD  
LOCATION: Facility, Building, Office (e.g., NAC, C 6 2 3  
FROM: Stewart Baker, Assistant Secretary for Policy

OBJECTIVES/DESIRED OUTCOME OF MEETING:

- Establish an interagency negotiating position [

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BACKGROUND:

- On May 30, 2006 the European Court of Justice (ECJ) ruled that the legal instruments the European Union utilized in striking a 2004 agreement with DHS on CBP's access to PNR were inappropriate and required the EU to terminate the agreement by September 30, 2006. The EU has since provided notice that it is terminating the agreement effective that date.
- In issuing this ruling the ECJ indirectly commented on the substance of the issue by emphasizing that the EU's 1995 directive on data protection in first pillar does not apply to the transfer of PNR data which is a law enforcement (third pillar issue). Concern that CBP regulations conflicted with this directive was the principal reason the agreement was struck in the first place. However, the ECJ did not comment on the sufficiency of DHS's efforts to protect privacy.
- However, the current arrangement does have significant impacts on DHS operations. In particular, the limitations on sharing and retention enshrined in the Undertakings has prohibited broader use of PNR data within DHS to combat terrorism and crime. Most affected by this change has been ICE, [

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**PARTICIPANTS:**

*Non-DHS*

*DHS*

Deputy Secretary Jackson

**PRESS PLAN:** "Closed"

**ATTACHMENTS:**

- A. Discussion Document: Analysis of United States Interests in the U.S.-EU PNR dialogue (7/13/06)
- B. Memo: Summary of Potential Changes to the Undertakings *PENDING*
- C. Member State Positions known as of 7/20/06
- D. Background on EU views of consent as a solution
- E. DHS' Response Options to European Court of Justice Decision (February 2006)

Prepared by: Michael Scardaville, PDEV, C b2

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002777

DEPUTIES MEETING ON PNR

DATE: Tuesday, July 25, 2006  
TIME: 12:00 - TBD  
LOCATION: Facility, Building, Office (e.g., VAC) [ b2 ]  
FROM: Stewart Baker, Assistant Secretary for Policy

OBJECTIVES/DESIRED OUTCOME OF MEETING:

- Establish an interagency negotiating position [ b5 ]

BACKGROUND:

- On May 30, 2006 the European Court of Justice (ECJ) ruled that the legal instrument the European Union utilized as a basis for entering into a 2004 agreement with DHS on CBP's access to PNR was inapplicable and required the EU to terminate the agreement by September 30, 2006. The EU has since provided notice that it is terminating the agreement effective that date.
- In issuing this ruling the ECJ held that the EU's 1995 directive on data protection in the first pillar does not apply to the transfer of PNR data which is a law enforcement (third pillar issue). Concern that U.S. law and CBP's implementing PNR regulations conflicted with this directive was the basis for entering into the agreement in the first place. However, the ECJ did not comment on the sufficiency of DHS's efforts to protect privacy.
- However, the current arrangement does significantly impact DHS operations. In particular, the limitations on sharing and retention enshrined in the Undertakings have prohibited broader use of PNR within DHS to combat terrorism and crime. Most affected by this change has been ICE, [ b5 ]

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**PARTICIPANTS:**

*Non-DHS*

*DHS*

Deputy Secretary Jackson

**PRESS PLAN:** "Closed"

**ATTACHMENTS:**

- A. Discussion Document: Analysis of United States Interests in the U.S.-EU PNR dialogue (7/13/06)
- B. Memo: Summary of Potential Changes to the Undertakings (*PENDING*)
- C. Member State Positions known as of 7/20/06
- D. Background on EU views of consent as a solution
- E. DHS' Response Options to European Court of Justice Decision (February 2006)

Prepared by: Michael Scardaville, PDEV, E b2

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*Michael Scardaville*





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PARTICIPANTS:

~~Non-DHS~~

DHS

Deputy Secretary Jackson

PRESS PLAN: "Closed"

ATTACHMENTS:

- A. Discussion Document: Analysis of United States Interests in the U.S.-EU PNR dialogue (7/13/06)
- B. Memo: Summary of Potential Changes to the Undertakings (*PENDING*)
- C. Member State Positions known as of 7/20/06
- D. Background on EU views of consent as a solution
- E. DHS' Response Options to European Court of Justice Decision (February 2006)

Prepared by: Michael Scardaville. PDEV L b2 J

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DEPUTIES MEETING ON PNR

DATE: Tuesday, July 25, 2006  
TIME: 12:00 - TBD  
LOCATION: Facility, Building, Office (e.g., NAC, C 6 2)  
FROM: Stewart Baker, Assistant Secretary for Policy

OBJECTIVES/DESIRED OUTCOME OF MEETING:

- Establish an interagency negotiating position C

b5

BACKGROUND:

- On May 30, 2006 the European Court of Justice (ECJ) ruled that the legal instruments the European Union utilized in striking a 2004 agreement with DHS on CBP's access to PNR were in appropriate and required the EU to terminate the agreement by September 30, 2006. The EU has since provided notice that it is terminating the agreement effective that date.
- In issuing this ruling the ECJ indirectly commented on the substance of the issue by emphasizing that the EU's 1995 directive on data protection in first pillar does not apply to the transfer of PNR data which is a law enforcement (third pillar issue). Concern that CBP regulations conflicted with this directive where the reason the agreement was struck in the first place. However, the ECJ did not comment on the sufficiency of DHS's efforts to protect privacy.
- However, the current arrangement does have significant impacts on DHS operations. In particular, the limitations on sharing and retention enshrined in the Undertakings has prohibited broader use within DHS to combat terrorism and crime. Most affected by this change has been ICE, C

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**PARTICIPANTS:**

*Non-DHS*

*DHS*

Deputy Secretary Jackson

**PRESS PLAN:** "Closed"

**ATTACHMENTS:**

- A. Discussion Document: Analysis of United States Interests in the U.S.-EU PNR dialogue (7/13/06)
- B. Memo: Summary of Potential Changes to the Undertakings (*PENDING*)
- C. Member State Positions known as of 7/20/06
- D. Background on EU views of consent as a solution
- E. DHS' Response Options to European Court of Justice Decision (February 2006)

Prepared by: Michael Scardaville, PDEV, E b2

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CBP CCC comments (document with all of [b6] comments, so these supplement the set

P. 1. [b5]

10 of P. 1 [b5]

P. 5: [b5]

Second paragraph in that section, 3<sup>rd</sup> sentence, should read, [b5]

Last 2 paragraphs re DHS views:

After the 4<sup>th</sup> sentence add: [b5]

Second paragraph: [b5]

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Background: (u)

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Information exchange with entities inside the European Union territory occur through both government-to-government channels (as in the case of law enforcement information sharing - say between ICE and Scotland Yard) and directly with European air carriers (as in the case of CBP's receipt of Passenger Name Record (PNR) data from carriers offering international flights originating from the United States). A number of converging events in Europe, in particular the European Court of Justice decision on the legality of the EC-US PNR Agreement, announced July 30, and a proposed EU Framework Decision on exchange of law enforcement data, have major implications for both kinds of information sharing.

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**The PNR Case.** Shortly after the 2004 signing of the European Union agreement on CBP access to Passenger Name Record data, the European Parliament (EP), disturbed over what it viewed as an attack on personal privacy and its own authority, filed two suits in the European Court of Justice (ECJ) against the actions of the European Commission (EC) and the European Council for entering into the information sharing arrangement. The first suit challenged the authority of the EC and the European Council to enter into the International Agreement without the assent of the Parliament; the second challenged the merits of the arrangement itself—whether the undertakings were adequate to meet the information privacy protections afforded under EU law specifically their Data Protection Directive to all individuals.

(u)

On May 30, 2004 the European Court of Justice (ECJ) annulled the decision of adequacy made by the European Commission, as well as the European Council's decision to enter into an international agreement with DHS on the ~~access to and~~ use of Passenger Name Records. In issuing this finding, the Court did not rule against CBP's ability to access PNR data, it did not determine that privacy was violated, nor did it take a view on the content of the arrangement. Rather, consistent with the Advocate General's November 2003 opinion, the court found that the decisions of the Commission and Council were premised upon an inapplicable legal basis under European law. Instead of concluding the agreement under the data protection provisions of Article 95, the court deemed that the processing of PNR data is a law enforcement and public security issue, and as a result, is a shared competency between the European Union and Member States under the so called "third pillar."

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The effective date of the ruling is delayed until September 30, 2006 for the date the agreement is terminated, whichever is sooner). We have an open dialogue with the Commission on this issue and a commitment to, within the confines of the court's ruling, continue to make data available as we attempt to resolve the impact of the ECJ's decision. DHS is expecting a proposal from the European Commission later this month on how to respond to the ECJ decision.

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Prepared by: Michael Scarsville PLIC/PDEV: [ 102 (low) ]

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... limited international commitments ...

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**Relationship to Existing Agreements and Impact on DHS Law Enforcement Operations.**  
 The United States has previously entered into a number of binding and non-binding information sharing arrangements at both the European Union and Member State level. For example, with respect to the former, we have signed a 2003 Mutual Legal Assistance Agreement (MLAA) with the European Union and a 2001 information sharing agreement with Europol (the EU-level police agency); with respect to Member States, we signed a 2003 MLAA with Germany, which builds on numerous other MLAs already in force with other EU member states. The United States also has many executive agreements and memoranda of understanding with Member States under which critical information is currently being shared. In recent meetings, officials have articulated that information exchanges under these agreements may be "grandfathered" and allowed to continue upon institution of the framework.

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Related Issues.

Recently a number of U.S. airlines were notified by one French Police state General of Civil Aviation (DGAC) that they would be required to assist for authorities and ... of the French ...

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Prepared by: [ b2 (100) ]





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US-EU AGREEMENT ON PNR

Un (line)

Talking Points:

- (u) • Thank the EU for presenting us with their proposed replacement text. Emphasize that much as they had to coordinate extensively between their various institutions that the USG must now do the same
- (u) • Emphasize that the USG looks forward to beginning negotiations soon and is committed to working with the EU to find a mutually acceptable solution by September 30, 2006.

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Watch Out For/If Asked:

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Drafted by: Michael Scardaville, Special Assistant/International Policy Advisor. PDEV

Contact: L b2 J

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Page 2

**Background:**

(u) Consistent with the Aviation and Transportation Security Act of 2001, each air carrier operating passenger flights in foreign air transportation to or from the United States must provide the Department of Homeland Security (DHS) Bureau of Customs and Border Protection (CBP) with electronic access to passenger name record (PNR) data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems ("reservation systems"). In 2002, the EU raised concerns that the statutory requirement conflicted with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("European Data Protection Directive"). Most significantly, the European Data Protection Directive places burdens on private sector data controllers that limits their ability to share personal data cross-border with non-EU countries absent a demonstration that the receiving entity in a third country has adequate data protection standards.

(u) After more than a year and half of negotiations, the DHS-led, interagency team reached an arrangement with the European Commission (EC) which permits airlines to legally provide access to passenger name record (PNR) data emanating from within the European Union (EU) to CBP. This access is subject to carefully negotiated limitations as set forth in a set of Undertakings issued by CBP offering detailed assurances on how the DHS component would collect, process, handle, protect and share PNR data received in connection with flights between the U.S. and EU. Compliance with the Undertakings required significant system, policy and operational modifications by CBP and was accomplished on May 13, 2005.

(u) It is important to note that the "PNR Arrangement" is comprised of three linked actions – the unilateral CBP Undertakings, an executive-level international agreement signed on May 28, 2004, and the a finding by the European Commission that the CBP commitments outlined in the Undertakings adequately protect privacy.

(u) **The Joint Review.** On September 20-21, 2005, in a cooperative effort with the DHS Privacy Office, CBP hosted the first U.S.-EU Joint Review with members of the EU. On day one, CBP provided a presentation during the site visit at the National Targeting Center and during the site visit at Dulles International Airport. CBP gave an overview of the operations at each site, as well as demonstrated how CBP operationally uses and protects PNR data derived between the EU and the United States.

(u) On day two, CBP provided a presentation on the efforts taken to fulfill the obligations of the "Undertakings" and the international agreement that was signed on May 28, 2005. The presentation included existing and added policies, training, and the enhancements of our automated system. CBP also addressed questions and concerns during the visit. The Joint Review went well, and has been referenced by both sides as a valuable effort for improving understanding on both sides. The EU team from the Joint Review recently issued its report,

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Drafted by: Michael Scardaville, Special Assistant/International Policy Advisor, PDEV

Contact: c 82

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which was generally favorable despite criticizing the length of time it took CBP to implement the Undertaking, concerns over the protection of information disclosed during the meetings and detailing specific questions and recommendations for further action.

(u) **The PNR Case.** Shortly after the 2004 signing of the European Union agreement on CBP access to Passenger Name Record data, the European Parliament (EP), disturbed over what it viewed as an attack on personal privacy and its own authority, filed two suits in the European Court of Justice (ECJ) against the actions of the European Commission (EC) and the European Council for entering into the information sharing arrangement. The first suit challenged the authority of the EC and the European Council to enter into the International Agreement without the assent of the Parliament; the second challenged the merits of the arrangement itself—whether the Undertakings were adequate to meet the information privacy protections afforded under EU law to all individuals.

(u) On May 30, 2006 the European Court of Justice (ECJ) annulled the decision of adequacy made by the European Commission, as well as the European Council's decision to enter into an international agreement with DHS on the use of Passenger Name Records. In issuing this finding, the Court did not rule against the availability of PNR data, it did not determine that privacy was violated, nor did it take a view on the content of the agreement. Rather, consistent with the Advocate General's November 2005 opinion, the court found that the decisions of the Commission and Council were premised upon an inapplicable legal basis under European law. Instead of concluding the agreement under the data protection provisions of Article 95, the court deemed that the processing of PNR data is a law enforcement and public security issue, and as a result, is a shared competency between the European Union and Member States under the so called "third pillar."

(u) The Court's ruling gave the European Commission until September 30, 2006 to establish a new community-wide arrangement to govern PNR access for flights to the United States. However, since the ECJ's decision removes the threat of fines and criminal penalties based on EU law, the immediate consequences for not striking a new arrangement are significantly diminished. Nonetheless, the European Commission will push for an EU-wide solution.

The EU provided notice to the United States of the termination of the agreement effective September 30, 2006 on July 3<sup>rd</sup>. A proposed alternative text was provided by the Finnish Presidency on Wednesday July 19<sup>th</sup>, but subsequent conversations with Commission officials have indicated that this draft is not the final proposal. This proposal is currently being reviewed, but at a minimum a variety of legal questions will have to be explored with the EU to determine both the impact of certain language and whether the legal basis can withstand a new challenge. In addition, the proposal relies on the 2004 Undertakings of CBP. Further, the USG is pending direction from a Deputy's Committee meeting currently scheduled for 7/25.

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**Drafted by:** Michael Scardaville, Special Assistant/International Policy Advisor, PDEV

**Contact:** [initials] 52 [initials]

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(U) 95 Directive  
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Derived: Schneider MPN  
Revised: 11/2022

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(v) Specific Issues:

- (v) • *Retention:*
- (v) • *Onward Transfer:*
- (v) • *Data Elements:*
- (v) • *Oversight/Joint Review:*
- (v) • *Push vs. Pull:*
- (v) • *Redress:*

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DRAFT Framework for International Arrangement Regarding EL PNR Access  
May 31, 2006

Note: [Bracketed] text is to be held in reserve as needed for negotiating purposes. It is not the preferred language, but is nonetheless acceptable, if needed, subject to certain conditions in some instances.

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[Add additional preambular language, as needed]

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John A. Schmitt  
Director

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DRAFT Framework for International Arrangement Regarding EU PNR Access  
May 31, 2006

Note: [Bracketed] text is to be held in reserve as needed for negotiating purposes. It is not the preferred language, but is nonetheless acceptable if needed (subject to certain conditions in some instances).

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[Add additional preamble in language, as needed]

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Dredas 31 May 2006

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ELEMENTS OF A COOPERATIVE SYSTEM FOR COLLECTING AND USING  
PNR DATA

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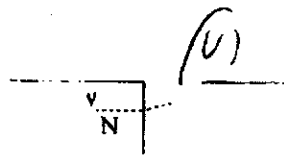
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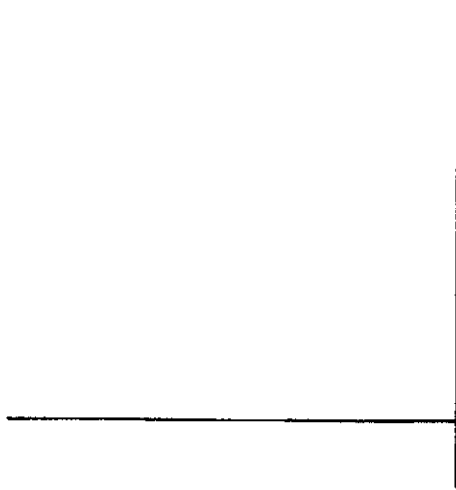
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10. Amendment

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11. Remedies

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12. Exemptions

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ELEMENTS OF A COOPERATIVE SYSTEM FOR COLLECTING AND USING PNB DATA

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Comment [b5 b6]

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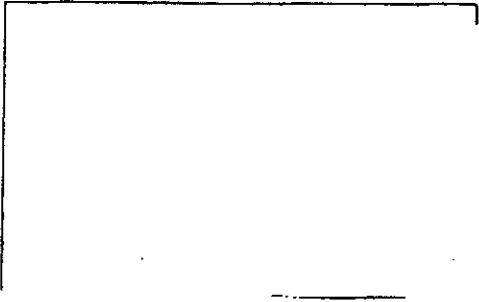
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ELEMENTS OF A COOPERATIVE SYSTEM FOR COLLECTING AND USING PNR DATA

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ELEMENTS OF A COOPERATIVE SYSTEM FOR COLLECTING AND USING  
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