

CIVIL SOCIETY  
RECOMMENDATIONS  
FOR THE THIRD US  
NATIONAL ACTION  
PLAN

*Model National  
Action Plan*

Version 1.0

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## Introduction

As part of engagement in the Open Government Partnership, the US government is required to develop an [OGP country plan](#) with concrete commitments on open government. The government makes public commitments to both domestic and international audiences and accountability for those commitments is built into the OGP process.

To set high standards for the US government's third plan, civil society groups created a model National Action Plan. OpenTheGovernment.org invited civil society groups and members of the public to submit their own model commitments through a [Google site](#), and break down the big goals of openness into concrete steps that could be reasonably taken over a year's time. Several issues included in civil society's first [model National Action Plan](#) were incorporated in the [government's second NAP](#).

The following plan includes all of the recommended commitments OpenTheGovernment.org received as of June 8<sup>th</sup>, 2015. The US government's consultation process kicked into high gear this summer and civil society will undoubtedly make additional recommendations over the coming months.

## Contributing Organizations

Brennan Center for Justice  
Center for Democracy and Technology  
Constitution Project  
Council for a Livable World  
Center for Arms Control and Non-Proliferation  
Demand Progress  
Electronic Privacy Information Center  
Electronic Frontier Foundation  
Government Accountability Project  
InterAction  
National Security Archive  
OpenTheGovernment.org  
Project On Government Oversight  
Publish What You Fund  
World Privacy Forum

## Agency Decision Making

**Goal: Make US government decision making more inclusive, open and transparent.**

### **Issue Statement:**

Transparency, participation and collaboration are the key principles underlying the Administration's Open Government Directive. To date, many agencies have focused their attention on transparency, or initiatives to increase the availability of information. More limited progress has been made on participation and collaboration. While some agencies have consistently demonstrated a willingness to engage external stakeholders in decision making, this practice needs to be strengthened and institutionalized in all agencies. At a minimum, agencies should engage with those likely to be affected by government rulemaking. This would be in keeping with Executive Order 13563 and previous U.S. National Action Plan commitments to expand public participation in the development of regulations. Currently – and arbitrarily – notice and comment procedures are only required for contracts. The rulemaking process provides the best assurance of transparency and will improve the quality of final rules.

### **Commitment:**

All federal agencies commit to using notice and comment procedures when developing regulations and requirements, including for assistance (i.e., grants and cooperative agreements). Agencies with such a requirement not already in place will develop policies mandating public participation in the development of regulations. These policies will require the publication of proposed rules and regulations in the Federal Register for public notice and comment before they are finalized, and should be reflected in agencies' Open Government Plans as these are updated.

### **Timeline and Benchmarks:**

Agencies will make rulemaking a requirement for all awards in the first quarter of 2016.

## Agency Open Government Plans

**Goal: Transparently implement agency open government plans.**

**Issue Statement:**

The Open Government Directive is one of the Administration’s signature open government policies. Among other things, it requires each agency to publish, at least every two years, a plan to make it more open, participatory, and collaborative. In the first National Action Plan, the Administration committed to monitoring implementation of agencies’ open government plans. Many agencies—with notable exceptions—have published the required updates of their plans, but the public does not always see the work being done by agencies to implement those plans.

**Commitment:**

We previously recommended that the Administration [create an open government dashboard](#) to monitor agencies’ progress. We recognize that resource constraints make this government-wide ask unreasonable. The [Department of Justice](#) and the [Social Security Administration](#) provide a model for agencies to transparently implement their plans with significantly less burden. These two agencies publish progress reports on each aspect of their Plans. Social Security went even further, and created a frequently-updated [page](#) outlining the progress made and expected completion dates for each open government commitment.

The White House should require agencies report on their progress and make those reports available to the public on their websites and centrally on the [WhiteHouse.gov/Open](#) page.

**Timeline and Benchmarks:**

3 months: Administration has met with agency personnel and outside stakeholders to discuss key indicators to include in reports.

3 – 6 months: Reporting requirements and guidance given to agencies. Agencies publish reports within 6 months of release of most recent plan.

12 months: Convene meetings with agency personnel and outside stakeholders to review key indicators, progress on reporting

15 months: All agencies required to publish plans have published progress reports.

## Classification Reform

### Goal 1: Make public recommendations for substantive reforms to reduce excessive secrecy.

#### Issue Statement:

In 2012, the Public Interest Declassification Board recommended that the President “appoint a White House-led Security Classification Reform Steering Committee to oversee implementation of the Board’s recommendations to modernize the current system of classification and declassification.” The White House has created a Classification Reform Committee (CRC), which holds periodic phone calls to discuss classification issues. But while the CRC exists, the public has limited if any opportunity for substantive engagement with its members. The CRC has no web presence, and its meetings are infrequent and closed to the public. The CRC also has taken no publicly perceptible actions on most of PIDB’s recommendations, other than those specifically included in the United States’ Second National Action Plan.

#### Commitment:

In order to ensure that the committee’s work is not lost after the start of a new administration, the CRC should publicly report on its work, and make recommendations for major, substantive reforms that would meaningfully reduce secrecy.

### Goal 2: Create a self-cancelling system of classification

#### Issue Statement:

Executive Order 13526 states that documents will be declassified on specified dates or after specified time periods, and that certain categories of documents will be declassified “automatically.” In fact, however, the practice of reviews by multiple “equity-holding” agencies, along with the need to engage in review for nuclear information under the Kyl-Lott amendment, result in routine, extensive delays. Unless these impediments are removed, declassification cannot possibly keep up with the massive volumes of classified information being created; there will be a perpetual and expanding backlog of information awaiting declassification.

#### Commitment:

The President will establish a category of “self-cancelling classification” by directing that all classified information that is operational or based on a specific date or event shall be automatically declassified without review when that operation, date, or event passes. In cases where circumstances change and information needs to remain classified for longer than originally specified, agency heads should be able to extend the deadline by showing in writing a specific need, but absent such a showing the default should be automatic declassification.

### **Goal 3: Provide for Expedited Declassification Review on Subjects of High Public Interest By the Interagency Security Classification Appeals Panel (ISCAP), and Remove Obstacles to the Mandatory Declassification Review (MDR) Process.**

#### **Issue Statement:**

Under the Freedom of Information Act (FOIA), expedited review is available for requests where there is a compelling need. There is no parallel provision for Mandatory Declassification Review (MDR).

#### **Commitment:**

The MDR process should **include an expedited review option**, and obstacles to MDR requests should be removed. In particular, MDR is not available for information: a) contained within an intelligence “operational file”; b) that is the subject of pending litigation; or c) required to be “submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement.” Often, these categories of information are precisely those where the public interest in disclosure is highest.

In cases where there is a particularly compelling interest for disclosure, the administration should **develop a process by which members of the public may nominate classified documents or topical areas for direct, expedited declassification review by the Interagency Security Classification Appeals Panel (ISCAP)**. ISCAP shall conduct such direct, expedited review if it determines that the document or topical area, if declassified, would contribute significantly to an ongoing, important policy debate. In cases of topical reviews, the ISCAP shall evaluate and amend, as appropriate, the relevant agency classification guidance.

### **Goal 4: Raise the National Declassification Center’s declassification rate by embracing established declassification best practices.**

#### **Commitment:**

The National Declassification Center should raise its declassification rate by conducting a line by line review and only redacting the specific information that needs to remain classified, as is done with standard Mandatory Declassification Review requests, instead of withholding entire documents on the basis of a few words’ classification. It should also **systematically utilize tools such as Executive Order 13526 3.1 (d)** which allows for the declassification of technically classified documents that may be declassified when the need for secrecy is “outweighed by the public interest.” Finally, the National Declassification Center should follow the instructions in Executive Order 13526’s [Implementing Memorandum](#) which states: “In order to promote the efficient and effective utilization of finite resources available for declassification, further referrals of these records are not required except for those containing [information about Weapons of Mass Destruction or confidential sources and methods].”



## Declassification and Targeted Killing

### Goal: Declassify Information About Lethal Strikes Overseas, and the Legal Authorities Governing the Overseas Use of Force

#### Issue Statement:

Thousands of people, including an unknown number of civilians and seven U.S. citizens, have been killed in covert airstrikes by the CIA and Joint Special Operations Command in Pakistan, Yemen, and Somalia. The program has been common knowledge for years, and President Obama has periodically released information about individual strikes and acknowledged the need for transparency—but these disclosures have been slow and inconsistent. For example, in 2015 President Obama acknowledged the accidental killing of two hostages in drone strikes because their families “deserve to know the truth.” But the United States has never acknowledged other civilian deaths from the program, either individually or in aggregate casualty estimates, nor has it revealed how it assesses whether deceased individuals are militants or civilians. In 2014 the Justice Department declined to appeal the court-ordered release of an Office of Legal Counsel memo that acknowledged the CIA’s operational role in the drone program—but the Executive Branch now maintains the CIA’s role is still secret. A number of related OLC memoranda, on both the drone program and the legal basis for the use of military force against the Islamic State, have been withheld from both the public and Congress. This ongoing secrecy leaves the American people and the legislature without access to basic facts about their country’s foreign policy, or the legal basis for the wars their country is fighting.

#### Commitment:

Declassify and release sufficient information about the drone program, and other uses of lethal force against suspected terrorists overseas, to allow meaningful democratic debate and oversight. More specifically, the following documents should be reviewed for declassification, and released with minimal redactions:

(1) The Office of Legal Counsel memoranda, or other authoritative statements of the Executive Branch’s view of the controlling law, on:

- a. the military’s and CIA’s legal authority to conduct targeted killing operations overseas (including “signature strikes”).
- b. the scope of the September 2001 Authorization for the Use of Military Force, and the legal authority for the United States’ use of military force against the Islamic State of Iraq and the Levant

(2) The revised Presidential Policy Guidance on the drone program, which President Obama publicly announced in a May 23, 2013 speech at the National Defense University.

(3) The text of the September 17, 2001 covert action Memorandum of Notification. The Memorandum of Notification, acknowledged and quoted in the Senate Select Committee on Intelligence’s Study of the

CIA's Detention and Interrogation, has been described by former CIA employees as providing legal authorization for the CIA's targeted killing program.

(4) Records of any "after-action" investigations or casualty assessments following individual strikes, with particular priority given to release of information about strikes in which independent reporting by journalists or human rights organizations found credible evidence of civilian casualties

(5) Information on the number and identities of individuals killed or injured; their legal status as civilians or combatants; and the methodology for determining civilian or combatant

## Detainee Treatment

### Goal: Declassify and Release Evidence of the CIA's Torture and Rendition Programs, and Current Detainee Treatment Policies

#### Issue Statement:

President Obama ended the CIA's rendition, detention and torture program shortly after he took office, but for many years allowed the CIA to classify crucial evidence about its treatment of prisoners after September 11. The administration not only maintained classification of government documents about torture, but forbade former CIA detainees and their lawyers from disclosing their own memories of what happened in the black sites. The December 2014 release of the Executive Summary of the Senate Select Committee on Intelligence's report on the torture program broke through this wall of secrecy, but it should be thoroughly dismantled.

#### Commitment:

Declassify and publicly release crucial evidence regarding the rendition, detention, and interrogation of prisoners, and current policies towards detainee treatment. In particular, the administration should:

- (1) Release the full, 6700 page SSCI report.
- (2) Release the Panetta Review
- (3) End all attempts to classify detainees' memories of their own treatment
- (4) Declassify the names and information concerning the treatment of the detainees whom the United States "rendered" to foreign custody
- (5) Declassify the CIA's treatment of prisoners in military custody in Iraq and Afghanistan
- (6) Declassify the foreign countries that housed black sites or participated in the rendition program, particularly if those countries have acknowledged their own role.
- (7) Declassify the full titles and pseudonyms, and (if acknowledged by the individuals in question, or in supervisory positions) names of individuals involved the CIA rendition, detention and interrogation program
- (8) Declassify and release all CIA Inspector General's reports, investigations and reviews into the CIA's detention and interrogation program, and fully release all versions of the Office of Medical Services Guidelines on Medical and Psychological Support of the program.
- (9) Release documentation from John Durham's investigations into the CIA torture program, including records of FBI interviews and the reasons that prosecution was declined
- (10) Release the report of the Special Task Force on Interrogations and Transfers

(11) Release statistics regarding hunger strikes and force feeding at Guantanamo Bay, and the current Standard Operating Procedures for management of hunger strikes, enteral feeding, and the use of restraints (including restraint chairs).

(12) Release, with appropriate redactions for individual privacy, videotapes of force feeding at Guantanamo Bay and photographs of detainee abuse in Iraq and Afghanistan

## Ethics Disclosure

We understand that each of the following recommendations require unique steps to implement. At the same time, these recommendations are inter-related and interdependent. For example, one recommendation proposes lowering the threshold for coverage under the Lobbying Disclosure Act. This should be done in conjunction with the clarification of lobbyist employment restrictions in President Obama's Executive Order on Ethics so that the restrictions do not create a perverse incentive to de-register or evade the LDA's requirements.

### Goal 1: Strengthening Lobbyist Employment Restrictions in Executive Order 13490 (Ethics EO)

Build on and expand the Obama Administration's groundbreaking efforts to address the problem of the "revolving door" and "special interest" influence in government by significantly expanding the scope of those persons subject to the President's Executive Order 13490 (Ethics EO) so that it covers all persons with pecuniary conflicts of interest whether or not they are "registered lobbyists."

#### Issue Statement:

President Obama is the first President in history to seek formal restrictions on the Executive Branch employment of individuals representing "special interests". The initial form of these restrictions adopted in the President's first term was based on a person's status as a "registered lobbyist" under the Lobbying Disclosure Act (LDA). This innovative effort sent a strong message that the Administration intended to reduce the clout of influence peddlers in Washington and it has had many significant consequences.

President Obama should now go further by implementing what might be called Ethics Reform 2.0, which would cover all persons with "special interests" in federal decisions as judged by whether or not they would have "pecuniary conflicts of interest" in their new positions. This standard would apply to individuals regardless of whether they are registered lobbyists, corporate executives or high-priced public relations advisors who seek to influence public decisions for private gain. No person could be employed in a job in which their pecuniary conflicts of interest would interfere with their ability to impartially pursue the public interest.

There is a precedent for making just such an adjustment to certain ethics and lobbying restrictions. Having initially applied certain restrictions to "registered lobbyists" seeking stimulus funds, the Administration recognized that the logic of those requirements applied to all persons seeking financial benefits under the stimulus legislation and expanded the restrictions accordingly to cover all persons lobbying to receive stimulus funds whether or not they were "registered" lobbyists under the LDA.<sup>1</sup> This adjustment was met with widespread approval.

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<sup>1</sup> On March 20, 2009, President Obama issued a memorandum for the heads of executive departments and agencies outlining restrictions on certain Recovery Act communications with lobbyists. (See [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09/).) On April 7, 2009, the Director of the Office of Management and Budget issued additional

In order to implement these expanded provisions in a manner that avoids unintended consequences, the Administration should also return to using the waiver authority built in to EO 13490. It should do so, however, based on clear policies about how waivers will be issued and based on publicly available information about those receiving waivers. The Administration also should articulate clear policies for recusals required for discrete conflicts of interest. Building on current efforts, the Administration should enhance the release and the accessibility of information about its appointees.

#### **Commitment:**

The Administration should commit to issuing a revised version of EO 13490 using the expanded pecuniary conflict of interest approach rather than LDA registration status, announce clear procedures for considering and issuing waivers and recusals, and implement new procedures to enhance the disclosure and accessibility of information concerning waivers, recusals and the handling of potential conflicts of interest of its appointees.

#### **Timeline and Benchmarks:**

Because these steps involve very slight amendments to EO 13490, it should be possible to implement them in a relatively short timeframe after consultation within the Administration on the details of implementing the revised EO. Therefore the Administration should announce its intention to implement these steps at the time it announces the new National Action Plan (Fall 2015) and should plan to publish the new EO **three months** from that date. **Within one year**, the Administration should publish any guidance that is needed for implementation of the revised EO.

## **Goal 2: Implement Executive Branch Procurement Lobbying Disclosure**

The Lobbying Disclosure Act (2 U.S.C. § 1601) requires the provision of information about lobbyist activities targeting Congress and certain high-level executive branch officials: but the statute does not cover most executive branch influence-peddling. The Byrd Amendment (31 U.S.C. § 1352) requires disclosure of executive branch lobbying by government contractors, but compliance and disclosure of this information is inconsistent. In general, collection of information about influence-peddling to obtain funding from the executive branch, such as lobbying by contractors, is limited. Such information should be systematically collected and disclosed.

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guidance for department and agency heads regarding these communications. (See [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m-09-16.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-16.pdf).) These were criticized because of unequal application to those who are and are not registered under the LDA. On May 29, 2009, Norm Eisen, Counsel to the President for Ethics and Government Reform, announced changes to President Obama's March 20 memorandum to address the controversy. (See <http://www.whitehouse.gov/blog/Update-on-Recovery-Act-Lobbying-Rules-New-Limits-on-Special-Interest-Influence/>.) Eisen wrote, "For the first time, we will reach contacts not only by registered lobbyists but also by unregistered ones, as well as anyone else exerting influence on the process." On July 24, 2009, OMB revised the guidance to agency heads to reflect the changes identified by Eisen. (See [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-24.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-24.pdf).)

### Issue Statement:

Current laws governing lobbying disclosure are not effectively capturing major influence peddling within the executive branch. The objective of this commitment is to shine a light on communications from individuals outside of government attempting to influence spending on federal programs, including contracts, grants, cooperative agreements, loans, insurance awards, tax expenditures, or any other financial arrangements. This commitment also implements Section 4(c)(4) of Executive Order 13490 (Ethics EO), which called for steps to improve executive branch procurement lobbying disclosure.

The Byrd Amendment currently prohibits using “appropriated funds” to lobby for federal awards, and requires federal grantees and contractors to disclose their lobbying activities and certify that they are not using federal funds to lobby for a grant, contract or other award.<sup>2</sup> Additionally, the Byrd Amendment requires grantees and contractors to file the Standard Form LLL (SF-LLL) to certify any use of non-federal funds to influence federal awards, and to disclose the names of any paid lobbyists or consultants hired to do so. An SF-LLL form must be filed: (1) with each submission of request for an award of a federal contract, grant, loan, or cooperative agreement; (2) upon the receipt of a federal contract, grant, loan, or cooperative agreement; and (3) at the end of each calendar quarter in which lobbying occurred.

However, each agency treats the SF-LLL differently, making enforcement of disclosure inconsistent. For example, in some agencies that provide grants, the grant award letters require certification that no federal funds have been used to influence the award. In other agencies, it is not clear if the SF-LLL is collected at all or if reporting is updated regularly.

Even if the SF-LLL has been collected, it is extremely difficult for the public to obtain the information. These inconsistencies are a result of three problems: (a) no central agency collects the SF-LLL; (b) there exists no guidance for agencies governing disclosure of the information; and (c) there is no vehicle for online access to the information. Many agencies require the public to submit a Freedom of Information Request to review SF-LLL forms – and even this, often lengthy process, does not necessarily result in public disclosure.

In addition to compliance and access concerns, the SF-LLL does not require the breadth of information that leads to meaningful disclosure.

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<sup>2</sup> Title 31, USC Section 1352 entitled, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions." This is commonly called the Byrd amendment and was signed into law on Oct. 23, 1989 as part of the Department of the Interior and Related Agencies Appropriations Act for FY 1990. OMB published interim final regulations and guidance to implement the Byrd Amendment on Dec. 20, 1989 (54 Fed. Reg. 52306, see Appendix B1), with supplementary guidance in June 1990 (Appendix B2) (55 Fed. Reg. 24540 (June 15, 1990)), Jan. 1992 (57 Fed. Reg. 1772 (Jan. 15, 1992)), and Jan. 1996 (61 Fed. Reg. 1412 (Jan. 19, 1996)). OMB has since mandated a common Byrd rule for all the major federal granting agencies. (See [http://www.whitehouse.gov/omb/grants\\_chart/](http://www.whitehouse.gov/omb/grants_chart/) for the OMB Byrd amendment common rule and cites for agency implementation of the rule.)

## **Commitment:**

The Obama administration should make a commitment to develop a disclosure framework that:

- Captures influence peddling by organizations and individuals representing organizations that are seeking to win or influence any federal award or spending on federal programs above a specified threshold such as \$250,000.
- Includes influence peddling on tax expenditures, non-monetary transfers, and subsequent awards (e.g., sub-contracts or sub-grants) in addition to contracts, grants, and other forms of financial assistance.
- Expands the type of information collected to support meaningful disclosure. This information should provide a full understanding of who is trying to influence government spending, the programs and agencies being influenced, and the amount of money involved (both in terms of influencing the agency and possible awards).
- Establishes electronic reporting of attempts to influence government spending, expanding on SF-LLL.
- Creates a searchable website with information from SF-LLL disclosures that are provided in a timely manner. The website should utilize common identifiers for organizations, federal awards, lobbyists, and other categories of information. The website should adhere to best practices for public access including ability to download data in aggregate, search in multiple formats, and provide web services for various feeds.
- Allows data on the searchable website to be linked to other government information on previously disclosed lobbying and ethics.
- Provides enforcement mechanisms for both governmental and non-governmental entities to ensure compliance. These mechanisms range from remedial actions to penalties.

## **Timeline and Benchmarks:**

There should be two phases: the first requires improved compliance and disclosure of the SF-LLL; the second requires expansion of SF-LLL coverage.

### **Phase I: Compliance and Disclosure of SF-LLL**

#### **1. Revise the data collected on SF-LLL.**

- |                    |   |
|--------------------|---|
| <b>Months 1-2:</b> | Review data elements currently collected through the SF-LLL and invite input on appropriate information that should be collected. |
| <b>Months 3-4:</b> | Propose a revised SF-LLL and invite input on the revised form.  |
| <b>Month 5:</b>    | Submit revised information collection request to OMB under the Paperwork Reduction Act.   |



**Month 7:** Announce revised SF-LLL to agencies (see OMB memo below).

## 2. Make SF-LLL available online in a searchable format.

**Months 5-7:** Develop an online interface to complete the SF-LLL obviating the need for a paper version.

**Months 5-9:** Create a searchable website with SF-LLL data.

**Month 7:** OMB issues memorandum to agencies on compliance and disclosure of SF-LLL. The memo includes: (a) description of SF-LLL; (b) who must complete the form; (c) how often the form must be completed; (d) disclosure requirements; (e) enforcement requirements; and (e) plans for future upgrades to the searchable website and compliance requirements.

**Month 11:** Searchable website becomes operational.

## 3. Enforce the existing SF-LLL rules.

**Month 10:** Agencies inform recipients of federal awards of plans for the revised SF-LLL changes and penalties for noncompliance.

**Months 11-23:** Provide warnings to federal awardees about non-compliance.

**Month 24:** Begin applying penalties for non-compliance.

## Phase II: Expand Who Reports SF-LLL

**Months 5-11:** Explore options for expanding SF-LLL reporting requirements to all organizations and those representing organizations seeking to win or influence any federal award or spending on federal programs above a specified threshold, such as \$250,000.

Two options that should be considered: (1) Integrate the agency visitor logs into the SF-LLL process, whereupon entering an agency location, visitors would be required to list with whom they will be meeting and the purpose of the meeting; (2) Require government employees to file a brief online report immediately when they are involved in communications with those outside of government who are trying to influence federal spending, which would trigger a notice to the non-governmental participants to complete a more detailed SF-LLL about the communication.

The options should also consider what types of communications – for example, policy, program, legal, technical or background communications knowingly prepared to seek a Federal award – are covered under these requirements.

**Months 12-14:** Propose a plan for expanded reporting requirements and invite comments

**Month 15:** Finalize plan

**Months 16-24:** Implement plan

### **Goal 3: Disclose Campaign Contributions and Independent Expenditures of Federal Contractors**

To ensure the integrity of the federal contracting system in order to foster decisions that provide economical and efficient results for the American people.

#### **Issue Statement:**

In the wake of *Citizens United*, there is unlimited spending on elections with far too little disclosure. That secret spending is eroding the quality of our democracy and potentially warping merit-based contracting decisions.

Federal contract spending totaled \$517 billion in fiscal year 2012. Although that amount has declined from a peak of \$541 billion in FY 2008, this is still a considerable amount of money, accounting for 15.5 percent of all outlays. In FY 2012, over \$245 billion in contracts was awarded without full and open competition, and about 70 percent of that amount, \$173 billion, was spent on sole source contracts, which have no competition at all. Moreover, of contracts that were competitively awarded, a full \$144 billion worth of contracts were awarded after the government received only a single bid.

While 2 U.S.C. § 441c prohibits contractors from making political contributions, the law allows contractors to create segregated funds to make such contributions. Furthermore, since *Citizens United* contractors can make independent expenditures from their general treasury. These loopholes allow contractors an opportunity to gain influence over senior government officials, elections, policies, programs, and projects through various kinds of political contributions.

According to the Center for Responsive Politics, House, Senate, and presidential candidates raised over \$3 billion, and outside entities (groups or individuals independent of, and not coordinated with, candidates' committees) spent an additional \$1 billion on independent expenditures and electioneering in the 2012 election cycle. The defense sector alone was credited with contributing over \$27 million in the 2012 election cycle.

Not surprisingly, small business owners believe that contracting procedures that do not provide for full and open competition fall prey to the influence big companies' campaign contributions and make it difficult for small businesses to compete. Fully 88 percent of small business owners recently surveyed

said they had a negative view on the role money plays in politics, with more than two-thirds saying they had a very negative view.<sup>3</sup>

In 2011, President Obama attempted to add transparency and accountability to the system with a draft Executive Order entitled “Disclosure of Political Spending by Government Contractors.” The draft Order stated that the “federal Government must ensure that its contracting decisions are merit-based in order to deliver the best value for the taxpayers,” and added that every stage of the contracting process must “be free from the undue influence of factors extraneous to the underlying merits of contracting decisions making, such as political activity or political favoritism.”

Employing a strategy used in many states, the draft Executive Order also included a provision that required federal agencies to “require all entities submitting offers for federal contracts to disclose certain political contributions and expenditures that they have made within two years prior to submission of their offer.” Although there was some support for President Obama’s draft Order, it was swiftly derailed by contracting industry lobbyists and their political allies.

Linking the disclosure to “submitting offers” ignited a firestorm of criticism from contractors and conservatives that such disclosure would increase political favoritism in the contracting process. House Oversight and Government Reform Committee Chairman Darrell Issa warned that if “the President’s proposed Executive Order is authorized, political donation information would be readily available to political appointees who are immediately involved in the contracting process.”

In fact, the draft Executive Order was intended to provide a much-needed dose of transparency, so contractors would not be able to influence the awards process via secret political spending. But asking the disclosure of political spending information *prior* to the bidding process was the fatal error that should have been corrected.

**Commitment:**

The Administration should commit to issuing a revised Executive Order that requires any individual or entity receiving federal contracting awards to file semi-annual disclosures of all<sup>4</sup>:

1. Contributions or expenditures to or on behalf of a federal candidate, parties, or party committee made by the bidding individual or entity, its directors or officers, or any affiliates or subsidiaries within its control; and

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<sup>3</sup> Lake Research Partners poll for Small Business Majority, Main Street Alliance, and American Sustainable Business Council conducted in 2012. See <http://www.smallbusinessmajority.org/small-business-research/money-in-politics/role-of-money-in-politics.php>.

<sup>4</sup> Basing disclosure on those receiving contract awards would not violate the “Consolidated Appropriations Act of 2012” (Pub. Law 112-74, Sect. 743), prohibiting political spending disclosure “as a condition of submitting the offer.”

2. Contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications.
3. This commitment would honor the Supreme Court’s ruling in *Citizens United* that was based on the theory that the “First Amendment protects political speech; and **disclosure** permits citizens and shareholders to react to the speech of corporate entities in a proper way. This **transparency** enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>5</sup> (Emphasis added.)

**Timeline and Benchmarks:**

President Obama should revise and sign the draft Executive Order, “Disclosure of Political Spending by Government Contractors. Within 30 days after its release, the Administration should issue guidance for the release of contractor political spending information on Data.gov and insert a clause into federal contracts requiring the political contribution and expenditure reporting.

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<sup>5</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 371 (2010).

## Goal 4: Require Publicly Held Companies Disclose Their Direct and Indirect Political Contributions

To provide investors the information they need to assess and respond to corporate political spending.

### Issue Statement:

In August, 2011, the Committee on Disclosure of Corporate Political Spending – comprised of 10 law professors – filed a petition with the Securities and Exchange Commission (SEC) asking the agency to initiate a rule requiring public companies to disclose to shareholders the use of corporate resources for political activities.<sup>6</sup> The petition has drawn more comments than any other in SEC’s history, with over 500,000 comments, the vast majority in support of the rulemaking petition.

In 2006, polls indicated that 85% of company shareholders believed there was a lack of transparency surrounding corporate political activity.<sup>7</sup> Nearly six in ten shareholders (57%) strongly agreed that there was too little transparency with respect to corporate spending on politics. Recognizing that these shareholder concerns have persisted, some of the largest companies have started voluntarily disclosing their direct and indirect political contributions. A recent report notes that the percentage of S&P 500 companies that have adopted disclosure policies has increased from a trivial level in 2003 to nearly 60% in 2012.<sup>8</sup>

Despite increasing disclosure to shareholders, nine in ten Americans say there is too much corporate money in politics.<sup>9</sup> Moreover, 81% agree that the “dark money” from corporate political spending is bad for democracy.<sup>10</sup> Three-quarters of business executives now say that the system of financing elections amounts to a “pay-to-play” system, where companies are expected to give money if they want to have influence over public policy.<sup>11</sup> These business executives, regardless of partisan preference, want more transparency: 95% of Democrats and 88% of Republicans support disclosure reforms.<sup>12</sup>

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<sup>6</sup> Committee on Disclosure of Corporate Political Spending, Petition for SEC Rulemaking, Aug. 3, 2011, <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

<sup>7</sup> Mason-Dixon Polling & Research, “Corporate Political Spending: A Survey of American Shareholders,” 2006, pg. 6, at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/918>.

<sup>8</sup> Center for Political Accountability and Zicklin Center For Business Ethics at the Wharton School of the University Of Pennsylvania, “The 2012 CPA - Zicklin Index of Corporate Political Accountability and Disclosure: How Leading Companies Navigate Political Spending in the Wake of Citizens United,” September 25, 2012, pg. 5, at <http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6903>.

<sup>9</sup> Corporate Reform Coalition, “Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms,” Oct., 2012, pg. 1, at [http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited\\_CorporatePoliticalSpending.pdf](http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf).

<sup>10</sup> Ibid, pg. 1.

<sup>11</sup> A bipartisan poll conducted by Hart Research Associates and American Viewpoint for the Committee for Economic Development, “American Business Leaders on Campaign Finance and Reform,” July 24, 2013, at <http://www.ced.org/reports/single/survey-american-business-leaders-on-campaign-finance>.

<sup>12</sup> Ibid.

More to the point, the same 2013 poll of business executives found widespread support (85%) for a SEC rule requiring all publicly traded companies to disclose all political expenditures to shareholders. That support was also bipartisan: 94% of Democrats and 79% of Republicans.

Notwithstanding broad support for the SEC rule – including among business executives – it is not clear what action the SEC will take on the rulemaking petition.

**Commitment:**

The administration will encourage the SEC to initiate a rule to require publicly traded companies to disclose all direct and indirect political expenditures.

**Timeline and Benchmarks:**

As soon as can be arranged, the president will communicate with the SEC commissioner about the priority of initiating a rulemaking on disclosure of corporate political expenditures.

## **Goal 5: Build Support for Reforming the Lobbying Disclosure Act**

To convene a bipartisan working group of diverse stakeholders to meet and draft model lobbying reform legislation that, if enacted, would make Lobbying Disclosure Act disclosure requirements more comprehensive and effective.

**Issue Statement:**

The US Supreme Court in [\*US v. Harriss\*](#) outlined the need for comprehensive lobbying disclosure, stating:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.

In order for elected representatives and citizens to be able to “properly evaluate the pressures” imposed by lobbying, the Lobbying Disclosure Act must be amended to provide for more comprehensive disclosure.

- **Expand Lobbying Disclosure Act Coverage.** The LDA should mandate that those who are paid to lobby register and report their actions. The threshold for disclosure should be lowered, some exemptions eliminated, and contingent fee arrangements should be reported to ensure comprehensive reporting.

- **Identify Targets of Lobbying.** Currently, LDA reports must only indicate which House of Congress or federal agency a lobbyist contacted during the reporting period. To be meaningful, lobbying disclosure reports should more specifically identify the targets of a lobbying effort which, for example, might include congressional committees and agency sub-entities contacted by the lobbying firm.
- **Disclose Grassroots Lobbying.** Lobbying and other organizations often make large expenditures to exhort groups or the general public to communicate with decision-makers in order to sway their opinions (e.g., communications that urge constituents to “write your congressman”). Public reporting of expenditures or receipts for grassroots lobbying efforts should be required.
- **Disclose Campaign-related Activities.** The LD-203 already requires disclosure of lobbyists’ campaign contributions and related contributions by each individual lobbyist. This should be extended to reporting of the lobbyist’s sponsorship/hosting of fundraising events, bundling, positions held in a campaign organization, participation on the board of a PAC or super-PAC, and solicitation of contributions by the lobbyist from persons outside her immediate family.
- **Publish Unique Identifiers.** To ensure the accuracy of reports and to enable better tracking of lobbyists’ activities, the unique identifier for each federally registered lobbyist should be publicly available in downloadable format.

**Commitment:**

The administration will advocate for improved lobbying disclosure to more accurately reflect the scope and influence of lobbying activities.

As a first step, the administration will convene a working group to develop recommendations for amendments to the Lobbying Disclosure Act that will provide for more timely, accurate, complete and robust disclosure.

The administration recognizes that any disclosure requirements will require congressional action to amend the LDA. Therefore, the administration will encourage Congress to pass legislation that will improve disclosure and close loopholes in the currently inadequate lobbyist reporting regime.

**Timeline and Benchmarks:**

- 3-6 months:** Name participants for Working Group, which would include people outside of government, to refine proposals to amend the LDA.
- 6-18 months:** Convene regular working group meetings to examine disclosure requirements with the goal of amending the current LDA in order to more fully disclose influence; engage representatives of Congress in this process.
- 18-24 months:** Release draft LDA amendments and begin to advocate for enactment of legislation that would strengthen lobbyist disclosures.

## Goal 6: Make Ethics Data Usable, Interoperable and More Accessible

### Issue Statement:

There are numerous types of information intended to shed light on special interest influence which are disclosed by various federal agencies. Disclosure is most effective when it makes information easy to access and use. However, many websites for accessing ethics disclosures are difficult to use and offer limited functionality.<sup>13</sup> In addition, data is not always available in open formats, which impedes research and hinders the development of new tools for accessing the information. Finally, the multitude of data sources are not always interoperable; without common identifiers and standardized data formats, making connections between datasets – such as between lobbying and campaign contributions – can be challenging and laborious.

### Commitment:

- A. Establish a working group to coordinate disclosure of ethics information.** The Administration will establish an inter-agency working group to coordinate technical issues related to access to ethics information. The working group will invite participation from all offices handling information about lobbying, political financing, and personal financial disclosures. The administration will also appoint representatives to the working group with expertise in usability, open data, and information policy. The working group will solicit feedback from stakeholders and the public. The working group will particularly address interoperability of data sources managed by the participating agencies and will seek to facilitate research and reuse across multiple datasets.
- B. Ensure compliance with federal data policy.** The Administration will direct agencies managing disclosure of ethics information to ensure that ethics data sources comply with the principles of openness and interoperability of Executive Order 13642, OMB Memorandum M-13-13, and the Digital Government Strategy.
- C. Review usability of ethics websites.** The Administration will direct agencies managing disclosure of ethics information to review the usability of their websites for members of the public seeking to access ethics information. The review will include usability analyses and seek feedback from frequent users of ethics information, including NGOs and journalists. The Administration will direct agencies managing disclosure of ethics information to adopt ongoing customer experience and usability measurement tools, such as those called for in the Digital Government Strategy, if they have not done so already.
- D. Implement lessons learned.** The Administration will direct agencies to implement lessons learned from these reviews into updates, revisions, and future planning for ethics information disclosure.

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<sup>13</sup> See OMB Watch, *Upholding the Public's Trust: Key Features for Effective State Accountability Websites*, March 2012, at <http://www.foreffectivegov.org/upholdingpublictrustreport>.



**Timeline and Benchmarks:**

- 2 months:** Administration issues guide to agencies on openness, usability, and interoperability of ethics information
- 3 months:** Issue charter for working group; appoint administration representatives and invite agency participation
- 4 months:** Working group identifies initial topics of interest and begins seeking public and stakeholder feedback
- 6 months:** Working group members begin conducting peer reviews of ethics data sources to offer suggestions to improve usability and interoperability

## Enhance Ethics.gov

### Goal: Enhance Ethics.gov with Increased Disclosure of Special Interest Attempts to Influence Government Decision-making

#### Issue Statement:

The Administration has taken several steps to increase disclosure of lobbying and special interest attempts to influence government decision-making, such as by posting ethics waivers filed by White House personnel and creating Ethics.gov. However, there remains a need to reduce the over-influence of moneyed interests in government by further disclosing information that would reveal special interest activities.

#### Commitment:

**Direct agencies to publish additional information on special interest influence.** The Administration will direct agencies to regularly and proactively disclose additional information that could shed light on special interest attempts to influence government decision-making.<sup>14</sup> Specifically, the Administration will direct agencies to post online in searchable, sortable, downloadable format on Ethics.gov, and link from agency websites to, the following information:

- *Communications with Congress*, including spending requests from members of Congress per E. O. 13457;
- *Calendars of Top Agency Officials*, including meeting topics and participating personnel;
- *Agency Visitor Logs*, for agencies which currently keep logs in an electronic format;
- *Contractor Lobbying Disclosures*, known as Form LLL, filed with federal agencies;<sup>15</sup>
- *Federal Advisory Committee Information*, including information about members (such as any conflict-of-interest waivers) and committee activities (such as meeting agendas, minutes, and transcripts).

**Oversee implementation of the new disclosure requirements.** The Administration will closely oversee and guide agency implementation of the new disclosure requirements, including requiring agencies to regularly report publicly on implementation and monitoring agency compliance with deadlines.

**Provide technical assistance to agencies.** The Administration will expand Ethics.gov to allow for postings by agencies under the new disclosure requirements. The Administration will direct agencies to create and disclose information on Ethics.gov in compliance with the format and interoperability requirements of the new data policy (E.O. 13642 and M-13-13).

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<sup>14</sup> For background, see <http://www.foreffectivegov.org/files/info/open-gov-min-standards-final.pdf>.

<sup>15</sup> Although required by law to be publicly available, members of the public have experienced difficulty accessing these filings. See Byron Tau, "Contracting lobbying info under wraps," *Politico*, July 7, 2013, <http://www.politico.com/story/2013/07/thank-you-for-contacting-nsa-we-do-not-have-anything-for-you-93752.html>.

### **Timeline and Benchmarks:**

**1 month:** Solicit stakeholder input on establishing disclosure requirements

**3 months:** Issue disclosure requirements; direct Administration to begin preparing implementation guidance and developing Ethics.gov for expanded disclosure

**3-6 months:** Issue implementation guidance on disclosure requirements; publicize implementation resources available to agencies

**6-12 months :** Agencies required to begin disclosure through Ethics.gov, with deadlines staggered by types of information (e.g. begin posting new Form LLL filings after 6 months; begin posting monthly visitor logs after 12 months; etc.)

**18 months:** Agencies are fully compliant with new reporting requirements  
**24 months –** Agencies phase out any paper visitor logs in lieu of electronic

## Freedom of Information Act (FOIA)

**Goal: Support enactment of meaningful FOIA reform in Congress.**

### **Issue Statement:**

In 2014, Freedom of Information Act requests, denials and redactions reached record highs, with the backlog for the U.S. federal government growing by 55%. While past plans have supported efforts to modernize administration of the act, compliance is failing across government. The FOIA reform bills before the 113th Congress closely matched the language that U.S. Attorney General Eric Holder directed the Department of Justice. They should become law.

### **Commitment:**

The Obama administration should honor the President's historic commitment to transparency by:

- 1) Publicly committing to support FOIA reform in Congress
- 2) Taking clear, public steps to ensure that federal agencies are not lobbying against passage nor watering down important aspects
- 3) Working with the Department of Justice to improve compliance and reduce the use of B5 exemptions
- 4) Increasing funding for FOIA officers
- 5) Tracking FOIA requests for data, including payments by industry, and proactively releasing datasets that are periodically requested under FOIA in machine-readable formats online.
- 6) Modernizing IT equipment used in FOIA offices across government, ensuring that no agency can claim that a broken fax machine, copier or backup tapes prevents response.

### **Timeline and Benchmarks:**

**For Step 1& 2:** End of 2015

**For Step 3:** FY 2016 budget

**For Step 4:** End of 2015

**For Step 5:** Progress every quarter

## Foreign Assistance

### Goal: Improve quality of foreign assistance data collected and published.

#### Issue Statement:

In 2011 the U.S. signed up to the International Aid Transparency Initiative (IATI) with a commitment to make their foreign assistance transparent. The previous two National Action Plans have called for all agencies administering foreign assistance to publish their aid information in line with the internationally agreed standard. Though some information has been published the quality of it is low, the information is incomplete and significant gaps in the data remain.

#### Commitment:

All U.S. agencies administering foreign assistance will improve the quality of the data they produce, collect and publish by 2018. The information published will be: disaggregated down to the project level, timely and comprehensive and in line with IATI.

To achieve this, all U.S. agencies will develop and publish costed management plans to accurately assess how information will be collected and published, what resources will be needed for this process and how it will be financed. The resulting plans will be fully implemented on time to deliver on the identified objectives.

#### Timeline and Benchmarks:

The agency specific plans should be developed by December 2016. This allows for one year for the implementation to begin. Not all activities will be completed during this time but the implementation must not be delayed and should remain on track as per the plans developed.

The quality of the information published should be the top priority for U.S. agencies and they should strive to continually improve this with every quarterly publication.

## Open Contracting

### Goal 1: Improve the FAPIIS Database

#### Issue Statement:

The public interface of the government's Federal Awardee Performance and Integrity Information System (FAPIIS) database has improved considerably since its debut in 2011. The site's overall design and search interface are cleaner and more user-friendly; at the same time, the reporting requirement for contractors and grantees has expanded.

However, there are still problems with the data posted on the site. A large portion of the government-entered and vendor-entered records in FAPIIS are duplicative and/or provide very little useful information. In addition, the public has been told very little about the creation and continued operation and maintenance of FAPIIS.

#### Commitment:

The agencies in charge of FAPIIS—the General Services Administration and the U.S. Navy's Naval Sea Systems Command—should be required to do regular spot checks of the data. Duplicate records should be eliminated, and vendors (contractors and grantees) should be required to provide clear and informative descriptions for all civil, criminal, and administrative misconduct proceedings.

The Government Accountability Office, the GSA, and/or the Naval Sea Systems Command should be required to provide Congress and the public an annual status report on the database's operation and maintenance.

#### Timeline and Benchmarks:

**3 months:** GAO, GSA, and/or the Naval Sea Systems Command produce the first of a regular series of annual reports on the status of FAPIIS: budget, costs, successes/failures in operation and maintenance.

**6 months:** GSA and/or the Naval Sea Systems Command formulate a plan for conducting a periodic review of data submitted to FAPIIS by contractors and grantees, as well as standards to which vendors must adhere when entering misconduct information.

### Goal 2: Make Contracts Publicly Available

#### Issue Statement:

Taxpayers have the right to know how the federal agencies spend their money acquiring goods and services. But with the details of federal contracts largely kept secret, it's difficult for the public to determine whether contractors are being held accountable and the government is getting quality goods and services at fair prices. The public should be able to see all contract-related documents.

This includes copies of the contract, delivery and task orders, modifications and amendments; as well as contract proposals, solicitations, award decisions, justifications (for contracts awarded with less than full and open competition and single-bid contract awards), contract audits and reviews, and contractor past performance reviews. Many states and countries make these documents publicly available.

**Commitment:**

The administration will decide on the best way to post contracts and related documents on USAspending.gov. Agencies can pursue this through several different pilot projects. After a set period of implementation, the administration will formulate a plan to phase in the best system.

**Timeline and Benchmarks:**

**3 months:** Administration issues memo on goals of posting contract documents and identifying the top three potential methods for accomplishing goal

**6 months:** Selected pilot agencies begin posting contract documents

**6-12 months:** Administration evaluates pilot programs, identifying technical barriers and other difficulties.

**12 months:** Administration issues a report on pilot projects detailing what worked and what problems were encountered. The report identifies the selected approach.

**18 months:** Agencies begin posting contract documents using the new system

### **Goal 3: Public Posting of Contractor Past Performance Reviews**

**Issue Statement:**

The government currently withholds contractor past performance reviews from public release. This is analogous to a school forbidding parents from seeing their children's report cards

Taxpayers have a right to see how the companies who are awarded hundreds of billions of dollars in contracts each year are performing on those contracts. Publicizing contractor past performance data will improve contractor performance and potentially reduce the number of bid protests, which consume considerable amounts of judicial time and resources.

The government's rationale is that publicly releasing contractor past performance reviews could harm the commercial interests of the government and the contractor and impede the efficiency of government operations. In the vast majority of situations, however, there is no such threat. Some past performance data is made publicly available, most notably in Government Accountability Office bid

protest decisions, which often contain past performance ratings, scores, report cards, and even anecdotal details about contractor performance. There is a big difference between past performance disclosures that legitimately threaten commercial interests and those that merely cause embarrassment or inconvenience to contractors or the government.

**Commitment:**

The administration should abandon its policy of automatically designating contractor past performance reviews "source selection sensitive" and therefore exempt from public release. Contracting officials should be given the authority to determine on a case-by-case basis whether releasing this information would legitimately pose a threat to commercial or other interest of the government or a contractor. If no such harm would occur, the information should be publicly posted on the Federal Awardee Performance and Integrity Information System (FAPIS).

**Timeline and Benchmarks:**

**6 months:** The administration will rescind its blanket non-disclosure policy and implement a system in which contracting officials publicly release contractor past performance reviews after determining whether posting this information will harm the commercial interests of the government or the contractor, or impede the efficiency of government operations.

**6-9 months:** Past performance reviews are posted on the public FAPIS portal

## **Goal 4: Public Release of DoD Revolving Door Database**

**Issue Statement:**

Large numbers of Department of Defense (DoD) officials retire from the federal government to work for companies that do business with the department. The expertise of these officials is coveted by companies that compete for federal contracts. This so-called "revolving door" between the public and private sectors erodes the public's trust in the government. Former DoD officials should be allowed to use their expertise to make a living in the private sector, but the public should be provided the information needed to determine whether an official is using their unique position to benefit a private company.

The National Defense Authorization Act for Fiscal Year 2008 requires senior DoD officials and senior acquisition officials who meet certain criteria to seek guidance from ethics officials before accepting compensation from a defense contractor. The law requires the DoD to keep ethics officials' opinions in a centralized database called the After Government Employment Advisory Repository (AGEAR).

The database is not made publicly available. Attempts to obtain the data through the Freedom of Information Act have been unsuccessful. In 2013, DoD released some of the data to the Citizens for Responsibility and Ethics in Washington (CREW) in response to a FOIA lawsuit. However, copies of the



ethics opinions were heavily redacted, with names, ranks, and other potentially identifying information omitted.

**Commitment:**

DoD should be required to publicly release the data in AGEAR, including the names of the officials who are the subjects of the ethics opinions.

**Timeline and Benchmarks:**

**6 months:** DoD establishes a public website on which AGEAR data is regularly posted.

## **Goal 5: Public Disclosure of Contractor Political Spending**

**Issue Statement:**

With so much money at stake -- \$460 billion last year -- companies seeking government contracts will try to court politicians who have power over contracting decisions. The opportunity for political corruption is high, as is the public's interest in transparency.

Contractors are already required to disclose their Political Action Committee (PAC) contributions and expenditures. Contractors should also be required to disclose the type of spending that was upheld by the Supreme Court in Citizens United -- so-called "dark money". With so much secrecy in federal election spending, it's difficult to expose and crack down on "pay-to-play" in contracting.

**Commitment:**

The President should issue an executive order requiring contractors and their employees, directors, officers, affiliates, and subsidiaries to disclose election spending exceeding \$5,000 in the aggregate. The data should be posted on Data.gov. Disclosure should be triggered every time a contract is renegotiated, renewed, or extended.

There must also be adequate enforcement, so that non-compliance or misrepresentation is subject to remedies, including cancellation of a contract and suspension or debarment. Contractors should also be required to certify that they are in compliance with 2 U.S.C. 441c's ban on direct or indirect political contributions.

In 2011, President Obama composed a draft executive order that would have required those seeking contracts to reveal their political spending as a condition of submitting bids. Congress has since passed riders on appropriations bills blocking the President from requiring political disclosure as a condition for contract negotiations.

DoD should be required to publicly release the data in AGEAR, including the names of the officials who are the subjects of the ethics opinions.

**Timeline and Benchmarks:**

With all deliberate speed: Finalize and issue the 2011 draft executive order.

## Goal 6: Publish an Annual Report on Defense Contracting Fraud

### Issue Statement:

In 2011, the Department of Defense (DoD) released its "Report to Congress on Contracting Fraud". The report provided invaluable statistics on DoD contractors who engaged in fraudulent conduct that led to criminal convictions, civil judgments, out-of-court settlements, and suspensions and debarments. For example, it found that hundreds of contractors that defrauded the military (including big players Lockheed Martin and Northrop Grumman) received more than \$1.1 trillion in DoD contracts over the previous decade. The report also identified planned and ongoing DoD initiatives to improve awareness and safeguards with regard to contracting fraud.

The report was prepared by the Under Secretary of Defense for Acquisition, Technology and Logistics at the request of Sen. Bernie Sanders (I-VT) through a provision Sanders inserted into the annual defense spending bill. The report cost approximately \$81,000 to prepare.

### Commitment:

The Department of Defense should be required to publish an annual report on defense contracting fraud. The report should contain the same elements that were in the 2011 report, to wit: an assessment (including tables) of the value of contracts entered into with contractors that have been indicted for, settled charges of, been by fined by any federal agency for, or been convicted of fraud in connection with a federal contract; recommendations for penalties for contractors who are repeatedly involved in contract fraud allegations; and an assessment of actions DoD has taken to strengthen its policies and safeguards against contractor fraud.

The report must be made available, without redactions, to the public.

### Timeline and Benchmarks:

**6 months:** The time it took DoD to prepare and release its initial 2011 report after the bill containing the Sanders provision passed. (DoD released an updated report about 9 months later.)

**Each year thereafter:** DoD releases a contract fraud report covering the previous year

## Goal 7: Disclosure of Executive Order 12600 Reviews

### Issue Statement:

President Ronald Reagan's Executive Order (EO) 12600 allows contractors to object to the release of information to the public under the Freedom of Information Act (FOIA). There is concern that the government often uncritically accepts the contractors' assertions—usually in regard to FOIA exemption (b)(4), which covers trade secrets and commercial or financial information—and redacts or withholds more information than is justified or necessary.

FOIA law requires agencies to indicate the amount of information withheld and the specific exemption that applies. There is no requirement for the government to inform FOIA requesters that specific information has been withheld or redacted pursuant to EO 12600.

**Commitment:**

The government should be required to inform FOIA requesters when a 12600 review was conducted and to denote with a special label or notation information that was withheld as a result of that review. These changes could be implemented by the Office of Information Policy (OIP) at the Department of Justice.

In addition, the OIP should conduct an annual audit of the 12600 process to determine whether the FOIA system is operating with a presumption of openness, or is instead being skewed in favor of those with a vested interest in secrecy.

**Timeline and Benchmarks:**

**3 months:** OIP drafts new FOIA rules regarding the 12600 process, requiring agencies to inform requesters when a 12600 review was conducted and to denote the information was withheld or redacted pursuant to that review

**9 months:** OIP publishes the results of its audit of the 12600 process; similar reports to be released every year thereafter.

## **Goal 8: Replace the DUNS Unique Identifier System**

**Issue Statement:**

The current method for tracking federal fund recipients is the Data Universal Numbering System (DUNS). Every year, the government pays the private financial services company Dun & Bradstreet (D&B) millions of dollars in licensing fees to use the DUNS numbering system.

Federal regulations and directives require all contractors, grantees, and other entities seeking federal funds to acquire a nine-digit DUNS number. This effectively gives D&B a monopoly. Furthermore, the licensing agreement gives D&B control over how the government uses DUNS data.

DUNS numbers are assigned to each physical location of the entity, often making searches of federal spending databases an arduous task. DUNS numbers are also not subject to transparency requirements such as the Freedom of Information Act, making it difficult to independently verify the accuracy or comprehensiveness of DUNS information. Reliance on this system creates logistical headaches for the government and hampers taxpayers' ability to track how their money is spent.

**Commitment:**

The DUNS should be replaced. The government should find an alternative system to uniquely identify federal fund recipients—preferably one that is not the exclusive property of a private company.

Efforts to replace DUNS have been underway for several years. In 2012, it was reported that the General Services Administration (GSA) was considering alternatives, such as switching to a new numbering system that is either government-created or a hybrid public/private system.

**Timeline and Benchmarks:**

**Ongoing:** GSA continues studying alternatives to the DUNS

**6 months:** GSA and/or the Government Accountability Office issues a report on progress and new developments in the effort to replace the DUNS.

## Open Data

### Goal: To increase the accessibility, understanding and use of open data by all stakeholders

#### Issue Statement:

There is a growing trend to open up data and unlock the potential of publicly available information. Opening up data is not enough. It must be used. And it should inform decision making and allow for better development outcomes. Initiatives like Open Contracting and the International Aid Transparency Initiatives have allowed providers to publish data in an open and comparable way. The potential of transparency and data will be maximized when the data is joined up and used to in order to access a more comprehensive picture of spending. External development flows should be aligned with partner country budgets. All development flows including information on budgets, aid, contracts and taxes should be made available to all users.

#### Commitment:

The U.S. government will encourage the use of all data by domestic and international stakeholders. It will develop capacity building programs so the data can be accessed and used for different purposes in real time and in a comparable manner.

#### Timeline and Benchmarks:

Capacity training programs should be developed in the first quarter of 2016 and should continue for the duration of the plan. USG should partner with infomediaries to ensure the information is reaching all users. Country missions and local partners should be included in the trainings.

## Pentagon and Nuclear Weapons Budgets

### Goal 1: To increase the accessibility, understanding and use of open data by all stakeholders

#### Commitment:

**Make public the total size and the annual and lifetime cost of the U.S. nuclear stockpile**—including the number of weapons (deployed and non-deployed), components, and fissile material (the U.S. inventory of Highly Enriched Uranium has not been made public since 2006). In addition, make public the number of weapons in the dismantlement queue, as well as the year, type, and number for each warhead type dismantled. This information is needed in order for the American people and their representatives in Congress to make better decisions about the role of nuclear weapons in our national security strategy and federal spending plans. Sharing information will also build trust with other nations and further nuclear non-proliferation efforts.

### Goal 2: Increase transparency and accountability in the Overseas Contingency Operations account

#### Issue Statement:

The Department of Defense and Congress have used the Overseas Contingency Operations (OCO) account to fund a myriad of programs, only some of which are directly tied to supporting our war efforts overseas. Notably, the OCO account is not subject to the cap on Pentagon spending put into place by the Budget Control Act of 2011 and it has increasingly been used as a way to evade the limits in law. Conservative accounting estimates \$71 billion has been spent on non-war programs. If it were a government agency, it would be the second largest. The Office of Management and Budget established some limitations on spending these funds in 2009, but it is impossible to determine how these funds are actually spent or reprogrammed under current DoD accounting.

#### Commitment:

DoD should include in their annual budget documents how OCO funds were spent in the previous year and make any requests for reprogramming these accounts public. There must be more responsible budgeting, and that can begin with more openness on how this account is being used.

### Goal 3: Coherence and accountability in DOD-funded security sector assistance

#### Issue Statement:

Starting with the “war on drugs” in the early 1990s and increasing yearly since 9/11, Congress has authorized DOD to establish multiple new channels for direct assistance to foreign forces. As a result, the Pentagon now funds more assistance to foreign police, military and other armed forces than the State Department.

Accountability and public oversight has not kept pace; while the State Department provides detailed country-by-country information on past, present and projected foreign aid as part of its annual budget submission, DOD is not required to do so.

**Commitment:**

DOD should produce an annual budget justification document for all DOD-funded military assistance that spells out country-by-country and DOD program-by-program what the DOD is proposing to do/provide in the coming fiscal year and why, as the State Department does for foreign assistance. This document would also report on DOD expenditures in the current FY, and report back actual expenditures for the preceding FY.

Regular reporting of this information would allow other parts of the USG, Congress and the public (here and abroad) to be better informed and to help gauge effectiveness of the aid against stated goals and help avoid redundancy, waste and fraud.



## Privacy

### Goal: Enhance Americans' privacy protections.

#### Issue statement:

The government has long been able to gather and access large quantities of private information about Americans, and the ongoing revelations from Edward Snowden have illuminated the scope of government access to sensitive data. At the same time, as a [recent Pew poll](#) highlighted, Americans place a high value on the privacy of their personal data and on their control over that data.

Unfortunately, the laws and processes in place to offer Americans accountability and transparency are in many cases under-enforced or complied with only in letter but not in spirit with respect to government activities that affect Americans' privacy. The recommendations below detail commitments that would help bolster transparency and accountability in several key areas.

#### Privacy Act and e-Government Act of 2002

Under the Privacy Act, agencies may exempt databases from provisions of the Act requiring transparency and an opportunity to challenge the accuracy of personal information.<sup>16</sup> In particular, agencies may exempt any database broadly related to law enforcement or national security, and those exemptions then remain in place for the life of the database.<sup>17</sup>

Agencies may also specify “routine uses” for the information in their databases. While these uses must be compatible with the purposes for which the data was originally collected, the uses are, in practice, often quite broad and vague. The “mission creep” of routine uses can lead to uses of data far afield from the original purpose for collection, and the citation of vague “routine uses” provides little transparency as to what these uses are.<sup>18</sup>

In addition, some agencies have developed “standard” routine uses that apply to multiple systems of records. Shortly before 9/11, for instance, the FBI set out “blanket routine uses” to apply to “every existing FBI Privacy Act system of records and to all FBI systems of records created or modified hereafter.”<sup>19</sup> The databases to which these blanket uses apply are often not identified or are identifiable only through diligent investigation, undermining the transparency goals of the Privacy Act.

At the same time, the Office of Management and Budget (OMB), which is tasked with overseeing and issuing guidance on the Privacy Act, has—at most—only a single staff member dedicated to overseeing

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<sup>16</sup> See 5 U.S.C. §§ 552a(j), (k).

<sup>17</sup> See 5 U.S.C. §§ 552a(j)(2), (k)(2).

<sup>18</sup> See *The Privacy Act of 1974*, EPIC, <https://epic.org/privacy/1974act/> (last visited June 3, 2015).

<sup>19</sup> See System of Records Notice, 66 Fed. Reg. 33,558 (June 22, 2001), available at <http://www.fbi.gov/foia/privacy-act/66-fr-33558>.

compliance with the Privacy Act, and the office has not been a robust voice on Privacy Act compliance.<sup>20</sup> The OMB has periodically been urged to provide additional guidance to agencies when it comes to Privacy Act compliance, suggesting that shoring up the Privacy Act function at the OMB would offer value to agencies endeavoring to comply with the Act.<sup>21</sup>

The e-Government Act of 2002 also aims to provide transparency about data in the hands of the federal government. Among other things, the e-Government Act requires that agencies conduct Privacy Impact Assessments (PIAs) when they “initiat[e] a new collection of information” that contains identifiable information. These PIAs are frequently supplemented by non-public Memorandums of Understanding (MOUs) that set out the details of how Americans’ information is shared with private entities, foreign governments, and/or other government agencies.

In addition, the Department of Justice has directed its components to conduct an Initial Privacy Assessment (IPA) to determine whether a PIA or a System of Records Notice (SORN) is required. According to the DOJ’s internal guidance, updated in May 2015, an IPA “is a tool used to facilitate the identification of potential privacy issues; assess whether additional privacy documentation is required; and ultimately, to ensure the Department’s compliance with applicable privacy laws and policies.”<sup>22</sup> An IPA is required when an information system is being developed, before any testing or piloting takes place, as well as when there is a significant change to an existing information system.<sup>23</sup> Similarly, the Department of Homeland Security conducts a Privacy Threshold Analysis (PTA) to determine whether a PIA is needed. Neither IPAs nor PTAs appear to be made public as a general matter.

Releasing the IPAs and PTAs that recommend that a PIA be conducted for a given system would contribute substantially to public oversight and transparency, as they would identify the systems of information that implicate privacy issues and would enable the public to ensure that the privacy impacts of sensitive information systems are formally assessed and made public.

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<sup>20</sup> See, e.g. JAY STANLEY, ENFORCING PRIVACY: BUILDING AMERICAN INSTITUTIONS TO PROTECT PRIVACY IN THE FACE OF NEW TECHNOLOGY AND GOVERNMENT POWERS 20 (Nov 2009), available at [https://www.aclu.org/files/assets/ACLU\\_Report\\_-\\_Enforcing\\_Privacy\\_2009.pdf](https://www.aclu.org/files/assets/ACLU_Report_-_Enforcing_Privacy_2009.pdf).

<sup>21</sup> See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO-03-304, PRIVACY ACT: OMB LEADERSHIP NEEDED TO IMPROVE AGENCY COMPLIANCE (2003), available at <http://www.gao.gov/new.items/d03304.pdf>; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-536, PRIVACY: ALTERNATIVES EXIST FOR ENHANCING PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION (2008), available at <http://www.gao.gov/new.items/d08536.pdf>; Dibya Sarkar, *Agencies Falling Short in Providing Accurate, Complete Federal Data*, GAO Says, FIERCEGOVERNMENTIT (Aug 3, 2014), <http://www.fiercegovernmentit.com/story/federal-agencies-falling-short-providing-accurate-complete-federal-award-da/2014-08-03>.

<sup>22</sup> OFFICE OF PRIVACY AND CIVIL LIBERTIES, U.S. DEP’T OF JUSTICE, INITIAL PRIVACY ASSESSMENT (IPA) INSTRUCTIONS & TEMPLATE 1 (May 2015), available at <http://www.justice.gov/file/dojipatemplatemay2015pdf-0/download>.

<sup>23</sup> *Id.*

### **Commitment 1:**

To facilitate strengthened compliance with the Privacy Act, OMB should establish a position at the Office of Information and Regulatory Affairs (OIRA) dedicated to overseeing federal agencies' conformity with Privacy Act requirements.

#### **Timeline and Benchmarks:**

**3 months:** OMB will have consulted with civil society regarding the priority issues for the position to address.

**6 months:** OMB will have established the position within OIRA.

**12 months:** OIRA will have staffed the position.

### **Commitment 2:**

To ensure compliance with both the spirit and the letter of the Privacy Act, OMB should require agencies to review and re-justify decisions to exempt databases related to law enforcement or national security from coverage of the transparency and accountability provisions of the Privacy Act. In the limited timeline available, OMB could identify agencies handling particularly sensitive information – for instance, the FBI, DEA, and components of DHS – and direct those agencies to reevaluate and re-justify (or rescind) exemptions of databases with significant impacts on privacy.

#### **Timeline and Benchmarks:**

**4 months:** OMB will have identified key databases that are exempted from the transparency and accuracy provisions of the Privacy Act on the grounds of law enforcement or national security, and directed the relevant agencies to reevaluate and re-justify the exemptions.

**9 months:** The agencies will have conducted the reevaluations.

**15 months:** The agencies will publish their reevaluations, and will initiate the process of conducting new SORNs for any databases that are no longer exempted.

### **Commitment 3:**

OMB should endeavor to reduce the use of “routine uses” in order to provide more transparency regarding agencies' uses of Americans' data. In light of the limited timeline available, OMB could identify agencies that have a high number of routine uses for information systems covered by the Privacy Act, and require those agencies to evaluate relevant systems in order to remove unnecessary routine uses and narrow any overly broad uses.

#### **Timeline and Benchmarks:**

**3 months:** OMB will have identified relevant agencies, in consultation with civil society groups, and will direct those agencies to report back within two months regarding the databases they intend to review.

**5 months:** OMB will review with civil society groups the list of databases scheduled for review and issue recommendations or directives regarding additional databases that should be covered.

**10 months:** OMB will receive the results of the agencies' reevaluation and their conclusions regarding routine uses that can be eliminated or narrowed.

**12 months:** OMB shall review these results with civil society.

**15 months:** Agencies will have implemented their conclusions or taken substantial steps towards doing so.

#### **Commitment 4:**

The White House should direct federal agencies to release Memorandums of Understanding (MOUs) relating to agencies' use, disclosure, and sharing of Americans' personal information. Where the MOUs contain information that would threaten national security or ongoing law enforcement investigations if released, the MOUs may be redacted, but the presumption should be in favor of disclosure wherever possible.

#### **Timeline and Benchmarks:**

**1 month:** The White House will issue a directive to federal law enforcement agencies to review existing MOUs in order to determine which MOUs can be disclosed in full or in part, with a presumption in favor of disclosure.

**5 months:** Agencies will report back to the White House with an accounting of all MOUs reviewed and their conclusions regarding disclosure of those MOUs.

**7 months:** The White House will meet with civil society organizations to share the information received from the agencies. The White House will take into account feedback received from the civil society organizations, and communicate it to the relevant agencies as necessary.

**12-15 months:** The agencies will release the identified MOUs, in full or in part.

#### **Commitment 5:**

The White House or OMB should require all agencies that conduct preliminary privacy assessments (including Preliminary Threshold Analyses or Initial Privacy Impact Assessments) to publish assessments concluding that a Privacy Impact Assessment is required for a program or system under the E-

Government Act of 2002. Preliminary assessments and Privacy Impact Assessments should be available from the same central webpage. Additionally, preliminary assessments that have a corresponding Privacy Impact Assessment should be grouped together.

**Timeline and Benchmarks:**

**3 months:** Identify all Agencies that use preliminary assessments that are not made public, and institute a requirement that preliminary assessments recommending PIAs be published going forward.

**9 months:** All existing agency preliminary assessments will be published.

### National Archives and Records Administration

**Issue Statement:**

The National Archives and Records Administration is responsible for issuing retention schedules for federal databases, and those schedules are generally available on NARA's website. The website is, however, difficult to navigate; there is no automated method for determining which retention schedule is the most current; and there is no way to accurately correlate the retention schedule and the Privacy Impact Assessment for a given database in order to obtain the most complete and up-to-date information.

**Commitment:**

As recommended in follow-up comments to the second NAP, the National Archives and Records Administration (NARA) should begin the process of updating its website to make it more user-friendly for the public. Specific goals should include (a) instituting a mechanism to determine which Records Retention Schedule for a given system is the most up to date and (b) connecting NARA retention schedules to the PIAs and SORNs for the same systems. Since this is a major undertaking, the proposed timeline below sets out the preliminary steps that would be needed to initiate an overhaul of the website.

**Timeline and Benchmarks:**

**1 month:** NARA will begin internal review of website. NARA will solicit input from civil society organizations and public regarding website usability issues as well as systems that should be priority for review.

**3 months:** NARA will identify key point people at relevant agencies who will partner with NARA to identify overlapping retention schedules, PIAs, and SORNs.

**9 months:** NARA will publicize steps taken regarding update of website and review of documents (retention schedules, PIAs, SORNs) governing systems.

**12 months:** NARA will publish anticipated timeline and process for project, and steps that will be taken to carry it out.

## Section 803 Reports

### Commitment:

As recommended in follow-up comments to the second NAP, the agencies covered by Section 803 of the Implementing Recommendations of the 9/11 Commission Act<sup>24</sup> should include reporting about civil liberties compliance in Section 803 reports, in addition to reporting regarding privacy compliance. By its terms, Section 803 requires both. In addition, the covered agencies should broaden the scope of the reports beyond counterterrorism-related issues; while the reports are provided to the PCLOB, whose mandate is focused on counterterrorism, Section 803 does not limit the reports to counterterrorism-related matters.<sup>25</sup> The covered agencies should be provided the resources necessary to enhance and improve their reporting in this manner.

### Timeline and Benchmarks:

**1 month:** The White House will issue a directive requiring all relevant agencies to expand Section 803 reporting to include reporting about civil liberties (beyond privacy) and reporting beyond counterterrorism-related issues.

**2 months:** Relevant agencies already in the process of expanding Section 803 reporting to include reporting about civil liberties (beyond privacy), and/or reporting beyond counterterrorism-related issues, will share their progress and process, as well as any obstacles, with civil society groups.

Any relevant agencies not already in the process of expanding their Section 803 reporting will identify any obstacles or objections to doing so and share those with civil society groups.

All relevant agencies will identify the resources necessary to expand their Section 803 reporting as described above.

**6 months:** All relevant agencies will at least be taking steps towards expanding their Section 803 reporting as described above, and will be provided resources to that end to the extent practicable.

**12 months:** All relevant federal agencies will be provided the full scope of resources necessary to expand their Section 803 reporting as described above.

**15 months:** All relevant federal agencies will have expanded their Section 803 reporting as described above.

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<sup>24</sup> 42 U.S.C. § 2000ee-1.

<sup>25</sup> See 42 U.S.C. § 2000ee-1(a), (f).

## Federal Government Surveillance Activities

### Issue Statement:

When it comes to surveillance activity, Americans are often in the dark regarding the ability of federal law enforcement agencies to gather, retain, share, and search information about individuals' identities and activities in public. For instance, federal law enforcement makes use of intrusive, real-time tracking technologies, but the details are often kept secret via non-disclosure agreements and other prohibitions on disclosure.<sup>26</sup> Similarly, the government is rolling out multiple initiatives to use biometric technologies, often in interoperable databases at both the federal and state level, but there is insufficient information about how and when biometric data will be shared both now and in the future.

Indeed, even where the federal government is obligated by statute to “minimize” Americans' information—that is, to limit its collection or retention of that data—it has on at least one significant occasion disregarded that obligation for years.<sup>27</sup> Accordingly, it is particularly important to ensure that there is transparency about the government's use of invasive surveillance technologies and the data that results.

### Commitment 1:

The White House should direct each federal agency using real-time tracking or location technologies – including the FBI, Drug Enforcement Administration, IRS, and U.S. Marshals, along with any others – to disclose information about the government's use of those technologies. Such disclosure should include information about the types of cases or investigations in which such technologies are used; the frequency with which they are used; the subsequent uses of the data collected; and the scope of data and technology sharing among federal, state, and local law enforcement entities.

### Timeline and Benchmarks:

**3 months:** Identify the agencies using real-time tracking and location technologies.

**8 months:** Complete review regarding types of technologies used, types of investigations in which they are used, and frequency with which they are used.

**12 months:** Complete review of subsequent uses of data collected and scope of inter-agency sharing.

**15 months:** Publish results of review and institute ongoing publication requirements.

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<sup>26</sup> See, e.g., Chris Velazco, *FBI Says Police Can Disclose Stingray Use, But Not What They Can Do*, ENGADGET (May 15, 2015), <http://www.engadget.com/2015/05/15/fbi-says-police-can-disclose-stingray-use/>.

<sup>27</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 81 (Mar 2008), available at <https://oig.justice.gov/special/s0803a/final.pdf>.

## **Commitment 2:**

The White House should require all agencies to publish their policies surrounding the collection, use, and retention of biometric data. Additionally, all MOUs regarding sharing of biometric data and/or the interoperability of databases containing biometric data should be made public. Those agencies that use biometric data but do not have stated policies should develop policies to be made public. Similarly, those agencies that share biometric data or have interoperable biometric databases that do not have corresponding MOUs should implement MOUs and make them public.

## **Timeline and Benchmarks:**

**3 months:** Identify all agencies that use biometric data.

**6 months:** Existing policies and MOUs should be published. Agencies without exist policies and MOUs should be in the process of creating them.

**15 months:** Newly created policies and MOUs should be published.

## **Privacy of Health Information**

### **Issue Statement:**

Executive Order 13181, To Protect the Privacy of Protected Health Information in Oversight Investigations, states in part:

- (d) On an annual basis, the Department of Justice, in consultation with the Department of Health and Human Services, shall provide to the President of the United States a report that includes the following information:
  - (i) the number of requests made to the Deputy Attorney General for authorization to use protected health information discovered during health oversight activities in a non-health oversight, unrelated investigation;
  - (ii) the number of requests that were granted as applied for, granted as modified, or denied;
  - (iii) the agencies that made the applications, and the number of requests made by each agency; and
  - (iv) the uses for which the protected health information was authorized.

To civil society's knowledge, the report required by EO 13181 has never been submitted. Regular FOIAs regarding the report have substantiated that this is the case.



In addition, U.S. health care providers are regulated under the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA). There is, however, a broad national security exemption under HIPAA, which permits the disclosure of health records by health care providers for national security and intelligence activities.

The exemption<sup>28</sup> states:

(2) *National security and intelligence activities.* A covered entity may disclose protected health information to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities authorized by the National Security Act (50 U.S.C. 401, *et seq.*) and implementing authority (*e.g.*, Executive Order 12333).

Because of the breadth of this exemption, it is lawful for covered entities to disclose health records without any procedural standards or any formal judicial request, and with no showing of relevance, importance, probable cause, or reasonable cause. The exemption does not require a written -- or indeed any -- request before a covered entity provides patient health files. Further, there are no procedures under which the keepers or the subjects of the records may challenge a request for the records as unlawful, inappropriate, or not in accordance with statutory procedures.

#### **Commitment 1:**

The White House should direct the Department of Justice and the Department of Health and Human Services to comply with Section 3 of Executive Order 13181. Even a report finding that no requests were made would contribute to greater transparency.

#### **Timeline and Benchmarks:**

**4 months:** The White House will have convened a meeting with the agencies to determine if any report has ever been filed.

**9 months:** The DOJ and HHS will submit a draft report.

**12 months:** The White House will submit the final report publicly.

#### **Commitment 2:**

The White House should request a GAO study regarding the acquisition of health records by U.S. security agencies from health care providers and other entities covered under HIPAA. Subsequent to that study, the White House should produce an executive order providing remedies where needed.

#### **Timeline and Benchmarks:**

**3 months:** The White House will have commissioned a GAO study to look at access by or disclosure of health records to U.S. national security agencies. The study should make inquiry into the following areas:

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<sup>28</sup> 45 CFR § 164.512(k)(2).

- a. How and when is health information released by providers: when there is a judicial warrant, with a formal process in place for executing the warrant, or otherwise?
- b. What procedures do health care providers have in place under which record keepers can challenge requests as unlawful or inappropriate or not within accepted statutory procedures?
- c. How could requests for health information meet high standards of relevancy, reasonable cause, or probable cause?
- d. How could formal requests be accompanied by accountability to a third party, such as a FISA court?
- e. What procedures would allow for written requests to establish the basis and legality of the request?

**6 months:** The GAO study should be underway.

**15 months:** The GAO study will have been completed. An Executive Order outlining procedures and protections will have been put in place if results of the GAO report warrant that outcome.

## Proactive Disclosure

**Goal: Advance proactive disclosure at government agencies.**

**Issue Statement:**

President Obama's open government memorandum [directed](#) agencies to "put information about their operations and decisions online." In addition, President Obama [stated](#) in his memo on the Freedom of Information Act (FOIA) that agencies "should not wait for specific requests from the public," but instead should post information proactively on their websites. Agencies still inconsistently post information frequently requested under the FOIA.

**Commitment:**

Direct agencies to proactively post accountability information on the web.

At a minimum, the White House should require agencies to proactively post online:

- [1. Communications with Congress](#)
- [2. FOIA Requests and Released Documents](#)
- [3. Agency Visitor Logs](#)
- [4. Employee Directories and Contact Information](#)
- [5. Calendars of Top Officials](#)
- [6. Federal Advisory Committees' Information](#)

Each above recommendation includes best practices from agencies already disclosing this information.

**Timeline and Benchmarks:**

**6 months:** Administration has met with agency personnel and outside stakeholders to discuss a draft directive.

**9 months:** Administration issues directive.

**12 months:** Convene meetings with agency personnel and outside stakeholders to discuss the progress of implementation.

## Secret Law

### Goal 1: Make Available Authoritative Legal Interpretations and Administrative Opinions

#### Issue Statement:

The public must have access to controlling executive and judicial interpretations of the legal rules under which our government operates in order to have an informed debate about the government's legal authorities and policies, and to build a shared understanding of the rule of law. As then-Senator Russ Feingold said at a hearing in 2008 (as quoted in Secrecy News), "Secret law excludes the public from the deliberative process, promotes arbitrary and deviant government behavior, and shields official malefactors from accountability."

#### Commitment:

The President will direct the Attorney General to make publicly available copies of documents setting forth the authoritative legal interpretations of the Executive Branch, including operative Office of Legal Counsel (OLC) memos, opinions, papers, etc., that show the extent of executive branch authorities and the rules governing executive branch actions. These documents will be made available with redactions for appropriately classified material as needed. If redacted versions of the documents cannot be made available, then unclassified summaries will be made available.

#### Timeline and Benchmarks:

**3 months** – The administration will make publicly available a list of complete list of documents setting forth the authoritative legal interpretations and administrative opinions of the Executive Branch. The list must clearly indicate the topics of the documents, and what they are in reference to.

**4 months** – The administration will have met with stakeholders, including civil society organizations, to prioritize the release of materials in the public interest. Using the input of stakeholders, the administration will develop a timeline for release of materials to reach the 15 month deadline.

**6 months**months: The administration will have completed the release of documents in priority categories. The government will also make publicly available all the documents detailing legal authorities and administrative opinions (with the proper limitations outlined above) created above within the last ten years.

**15 months**months: The administration will have completed the public dissemination of copies of documents setting forth the authoritative legal interpretations and administrative opinions of the Executive Branch, including operative Office of Legal Counsel (OLC) memos, opinions, papers, etc., that show the extent of executive branch authorities and the rules governing executive branch actions

## Goal 2: Make Available FISC and other Secret Judicial Decisions and Opinions

### Issue Statement:

The public must have access to controlling executive and judicial interpretations of the legal rules under which our government operates in order to have an informed debate about the government's legal authorities and policies, and to build a shared understanding of the rule of law. As then-Senator Russ Feingold said at a hearing in 2008 (as quoted in Secrecy News), "Secret law excludes the public from the deliberative process, promotes arbitrary and deviant government behavior, and shields official malefactors from accountability."

### Commitment:

The administration will make publicly available copies of existing Foreign Intelligence Surveillance Court (FISC) and other secret judicial decisions and opinions, with redactions for appropriately classified material as needed. If redacted versions of the opinions cannot be made available, the administration will urge the FISC to prepare and make available summaries of the opinions. Other judicial decisions or opinions that include or reflect significant interpretations of the law, such as Electronic Communications Privacy Act (ECPA), will also be unsealed and be made available with redactions as needed. If redacted versions of the documents cannot be made available, then unclassified summaries will be made available. The administration will also make unredacted versions of FISC and other secret judicial decisions opinions and pleadings available to all committees of jurisdiction in Congress. The administration will support legislation to require the Courts to prepare unclassified versions of their opinions on a going-forward basis.

### Timeline and Benchmarks:

**1 months:** The administration will make publicly available a list of FISC opinion titles and other now secret judicial decisions and opinions that include or reflect significant interpretations of the law.

**6 months:** The administration will complete the release of redacted opinions or unclassified summaries.

**12 months:** All opinions are made publicly available, with redactions for appropriately classified material as needed. If redacted versions of the opinions cannot be made available, unclassified summaries will be drafted and disseminated.

## Goal 3: Make Available Unclassified Presidential Policy Directives (PPDs)

### Issue Statement:

The interagency Open Government Working Group was established to share best practices and coordinate implementation efforts.

### Commitment:

The administration will make publicly available unclassified Presidential Policy Directives (PPDs). The Administration will also make publicly available redacted or summarized versions of classified PPDs that

set forth the operative rules and legal guidance for government programs. The administration also will promptly inform the public about, and make publicly available in unclassified or (where necessary) redacted/summarized form, any changes to previously published, PPDs. This should include any revocations or modifications, whether express or through practice, of an existing PPD.

**Timeline and Benchmarks:**

**1 month:** The administration will make publicly available a list, with sufficient titles indicating the topic and action, of operative PPDs, including any revocations or modifications.

**3 months:** The administration will make publicly available unclassified versions of PPDs.

**12 months:** The administration will make publicly available redacted or summarized versions of classified all remaining operative Presidential Policy Directives.

## Transparency and Participation in Trade Negotiations

### Goal: Increase Transparency and Participation in Trade Negotiations

#### Issue Statement:

Trade negotiations are conducted on behalf of the United States government by the United States Trade Representative (USTR). Current multilateral trade negotiations in progress include the Trans-Pacific Partnership (TPP), the Trans-Atlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TISA).

All of these negotiations are being conducted in secrecy. The texts under discussion are confidential, and there has been no public release of text, even in redacted form that eliminates references to specific countries' negotiating positions. In the case of the TTIP, the European Commission undertook in 2014 that it would release its own text proposals to the public, yet no corresponding commitment has been made by the USTR. Indeed, the only text made available to the public from TPP or TISA has been that leaked by Wikileaks.

The USTR does have Trade Advisory Committees, largely composed of industry representatives, with whom text is shared and who can make suggestions for text proposals. However, members of these committees must make an undertaking of confidentiality. As part of the primary mission of civil society organisations is to share information with the public, they have not been able to accept these confidentiality conditions, and most have therefore refused to take up membership.

Furthermore, trade negotiations are conducted behind closed doors without any mechanism for public participation or observation. Although some public consultation meetings have been held covering the general subject matter of the agreements, and at some of these members of the public were permitted to make presentations to negotiators, in the case of the TPP the last of these was held in 2013, even while negotiations are continuing to the present day.

The argument made by the USTR in favor of such secrecy and lack of public participation is that trade agreements have always been negotiated in secret. This may have been a valid argument when trade agreements were confined to the negotiation of mutual reductions in rates of tariffs and subsidies. But today, trade agreements look very different to this, extending to include a wide range of “behind the border” issues, including those that have an impact on the Internet.

In the case of the TPP, these include rules on intellectual property, e-commerce (“free flow of information”), telecommunications services, and “regulatory coherence”, amongst other measures. The negotiations thus bring up a range of other areas of law and policy outside of trade law, including Internet governance, competition law, data protection and human rights law.

In some of these areas, notably Internet governance, there are actually process-norms, notionally supported by the United States government, that demand a much higher level of transparency and

participation.<sup>29</sup>

The only extent to which this participation or transparency in trade negotiations are addressed at all in the existing OGP commitments is in the commitment to “Publish Best Practices and Metrics for Public Participation”. In the previous independent implementation report it was reported that this commitment has been postponed, though it appears that it since may have been implemented in part by way of the publication of a U.S. Public Participation Playbook, currently in a pilot phase.

The U.S. Trade Representative was not a participating agency in the development of the Playbook, yet ironically its processes are highlighted as a positive case study, through a reference to:

"The U.S. Trade Representative’s traveling roadshow that gathers feedback on trade agreement negotiations from stakeholders: industry, small business, academia, labor unions, environmental groups, and consumer advocacy organizations."

As explained above, this overstates the depth of the USTR's public consultations, and the metrics established in the Playbook are inadequate to expose the gap between this and norms of participation in the global venues where Internet governance and IP policies are developed. The Playbook also fails to provide concrete enough guidance to the USTR in addressing this gap. We suggest that this commitment has therefore only been partially addressed, and that the Playbook needs to be enhanced in this regard.

But additionally, we perceive the need for an additional and more specific commitment on trade transparency in the third National Action Plan, that mandates the release of text to the public by the USTR prior to the conclusion of trade negotiations.

**Commitment:**

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<sup>29</sup> For example, the NETmundial Multistakeholder Statement, concluded in April 2014 and since incorporated by reference into a number of multilateral resolutions and recommendations, provides:

"The development of international Internet-related public policies and Internet governance arrangements should enable the full and balanced participation of all stakeholders from around the globe, and made by consensus, to the extent possible. ... Decisions made must be easy to understand, processes must be clearly documented and follow agreed procedures, and procedures must be developed and agreed upon through multistakeholder processes."

Other agencies of the U.S. government (such as the NTIA and the Department of State) play much lip service to these multi-stakeholder ideals in other contexts such as in ICANN, the Internet Governance Forum and the Freedom Online Coalition. Yet there is an utter disconnect between these high standards and the manner in which Internet-related global public policies are actually developed by the USTR.

Even in traditional multilateral fora for developing intellectual property rules, much higher standards of transparency and participation apply than those followed by the USTR. For example, at the World Intellectual Property Organization (WIPO), both official documents and negotiating texts are distributed to the public, and non-governmental organizations are readily accredited to attend and speak at negotiating sessions.



Adopt enforceable standards for improved transparency and public participation in any trade negotiations that include Internet-related issues (including intellectual property, e-commerce and data protection).

**Timeline and Benchmarks:**

1. By the end of 2015, hold public hearings on East and West coasts and online, to establish minimum benchmarks for transparency and public participation in trade negotiations that cover Internet-related issues, in accord with U.S. government policy that Internet-related public policy issues should be developed in a multi-stakeholder fashion (ref: Bill HR 1580).
2. By the first quarter of 2016, develop a policy for the USTR that meets these benchmarks, including timetables for the release of text to the public, and methodologies for the participation of all stakeholders in trade text negotiations.
3. By the second quarter of 2016, issue an independent review of all pending trade negotiations against the standards of the new policy, with recommendations for the implementation of the policy in those negotiations.

## Whistleblowers

### Goal: Demonstrate that President Obama strongly and uniformly supports all whistleblowers.

#### Issue Statement:

While some solid progress for strengthening whistleblower protections was made under the last U.S. National Action Plan for the Open Government Partnership, these advances have been overshadowed and undermined by other anti-whistleblower actions by the Obama Administration.

Over the past six years, the whistleblower community has been whipsawed by executive actions that signal both support for and opposition to the rights of whistleblowers and the role they play in ensuring that government operates as openly as possible.

Whistleblowers are in the trenches, and best equipped to sound the alarm about government waste, fraud and abuse and suppression of information. It is crucial that they be protected. Such protections save taxpayer dollars, advance public health and safety, and make the government more open and accountable.

The President has personally supported whistleblower protections, including supporting the passage of the landmark Whistleblower Protection Enhancement Act and issuing new protections for national security and intelligence community whistleblowers. But the Obama Administration also has aggressively investigated and prosecuted national security whistleblowers.

The Department of Defense (DoD) and the Office of Personnel Management (OPM) both have challenged whistleblower protections. Both DOD and OPM would permit agencies to designate workers in “sensitive” positions, and have interpreted this designation to leave such employees, if terminated or demoted, no lawful process for appealing this personnel action, even if employees are, indeed, whistleblowers.

At the same time, other Executive Branch agencies, such as the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB), have been using their very limited resources to assist whistleblowers and to help with the implementation of the new whistleblower laws. In the NAP 2.0 the Office of Special Counsel received a laudable mandate to ensure that all federal agencies become certified with its 2302(c) Certification Program. We applaud this requirement, which will help to increase awareness of prohibited personnel practices and employee rights and remedies within the federal workplace. We caution, however, that it is an ambitious unfunded directive that may not realize its full potential due to limited resources.

Further, there are increasing concerns that agencies may be classifying information to deprive whistleblowers of the right to publicly challenge government misconduct and to retaliate against them, a practice illegal under Executive Order 12598.

In light of such contradictory signals, it is vitally important that the Administration speak with one voice on the importance of whistleblowers. The Administration must ensure that the new whistleblower protection policies it helped to usher in actually take root and fulfill the promise of more open, accountable, and efficient government.

The following commitments would go a long way to protect national security and intelligence community whistleblowers; prevent national security loopholes from undermining whistleblower protections and government accountability; increase accountability for federal spending by adequately protecting contractor and grantee whistleblowers; and take additional measures to protect our women and men in the military who blow the whistle on sexual assault, waste, fraud, abuse, and other misconduct, and to ensure that whistleblowers within the Department of Veterans Affairs are adequately protected.

**Commitments:**

- Immediately request that OPM and ODNI withdrawal any rulemakings or regulations pertaining to sensitive jobs classifications in the federal workforce. Support legislation and administrative action to ensure that employees already in national security sensitive positions are not stripped of their anti-retaliation and due process rights under the Whistleblower Protection Act and the merit system as a result of *Kaplan v. Conyers*, rulemaking, or any other action. As a prerequisite for any future action to remove preexisting rights under Title 5, first complete the necessary research and structure for a responsible transition. This includes a study to determine the full extent of any problem necessitating change, as well as the costs and process to implement. It also includes consistent executive branch Administrative Procedures Act due process procedures to appeal sensitive job designations, and associated personnel actions.
- Ensure the timely, public, and proper implementation of the Presidential Policy Directive Protecting Whistleblowers with Access to Classified Information (PPD-19), including strong, independent due process procedures and enforcement, and coverage of contractors and grantees by agencies. Protections should cover disclosures by intelligence community whistleblowers to the Office of Special Counsel.
- Actively support legislation to remove the loophole denying intelligence community contractors whistleblower protections available to all other contractor employees pursuant to 10 USC 2409 and 41 USC 4712. Similarly, support access to the Office of Special Counsel to file whistleblowing disclosures evidencing fraud, waste or abuse for all contractor employees, not just non-intelligence contractor whistleblowers. The intelligence community is where the greatest levels of secrecy occur, associated with the most intensive, high-stakes misconduct. The Office of Special Counsel already accepts whistleblowing disclosures from intelligence community government employees. There is no basis to exempt intelligence community contractors from accountability.
- End the criminal investigation and prosecution of government employees and contractors who exercise free speech rights to disclosure government waste, fraud, abuse, threats to public health and safety, censorship of federal information, or other illegality or wrongdoing. Limit

Espionage Act prosecutions only to cases when the disclosure of information is specifically intended to harm the U.S. national defense or aid a foreign nation.

- Actively support legislation and administrative action strengthening the FBI whistleblower protections, including allowing non-intelligence employees to have rights under the Whistleblower Protection Act.
- Actively support the strongest provisions of the legislation to upgrade whistleblower protections for members of our military who face much higher hurdles than other federal worker and contractors in proving retaliation.
- Actively support legislation to improve protections for employees of the Department of Veterans Affairs who disclose mismanagement, threats to public health and safety, and other forms of misconduct.
- Fill the remaining Office of Inspector General vacancies with Presidential appointments as a top priority, since the pattern of Acting IG's has facilitated political conflicts of interest, lack of independence, and lack of stability in pursuit of their mission.
- Invest more resources in the whistleblower protection functions of the Office of Special Counsel and the Inspectors General.
- Issue an order that encourages, honors, and protects whistleblowing, enforcing existing protections and making it clear that the President has a zero-tolerance policy for suppression and retaliation against whistleblowers, which specifically:
  - Orders officials to hold violators of that anti-retaliation policy accountable to the fullest extent allowable. This includes initiating long dormant criminal accountability for retaliation, pursuant to authority such as found in 18 USC 1513 (e).
  - Continues to require each agency to undergo the OSC 2302(c) Certification Program, and monitor compliance with the Whistleblower Protection Enhancement Act. This includes issuance of annual progress reports on disclosing each agency's compliance track record, and accountability for agencies not completing certification.
  - Mandates ongoing, timely, public reporting on a central online Whistleblower Reporting Portal/Dashboard site of metrics on agency performance under the order and agency-specific statistics on OSC certifications and disclosures and retaliation claims made under the Whistleblower Protection Enhancement Act, PPD-19, the National Defense Authorization Act of Fiscal Year 2013 (Sections 827 and 828), the Intelligence Authorization Act of Fiscal Year 2014 (Title VI) —including the number, details, and resolutions of whistleblowing disclosures and claims of retaliation; training and certifications; and other compliance information. The ODNI and implementing agencies must participate in the Whistleblower Portal/Dashboard and ensure the maximum information is made public, while protecting classified disclosures.
  - Requires training for federal, contractor, and grantee managers and employees on the rights and remedies available.
  - Establishes biannual Presidential awards for federal, contractor, and grantee employees who identify waste, fraud, abuse, threats to public health and safety, or other illegality

or wrongdoing by the government or a federal fund recipient. Encourages agencies to establish similar awards.

- Establishes an award for the highest performing agencies for encouraging, honoring, and protecting whistleblowing.
- Directs the government to preserve the rights of federal workers while protecting legitimate secrets to prevent harm to our national defense.
- Establishes that whistleblowers have direct access to Interagency Secure Classification Appeals Panel (ISCAP) for expedited, confidential review of challenges to the classification status.
- Directs agencies to institute procedures that consistently include the negative impacts on whistleblowing a factor when weighing investigation, prosecution, and litigation decisions.

### **Timeline and Benchmarks:**

#### **3 months:**

- White House requests that OPM and ODNI withdrawal any proposed rules or regulations pertaining to sensitive jobs classifications in the federal workforce.
- White House asks all agencies to halt any plans to expand the sensitive jobs designation to include additional agency employees.
- GAO begins a study on the implications of providing federal employees with sensitive jobs classifications.
- Assign team leads in the White House and relevant agencies and begin meeting with civil society groups and other stakeholders to develop the order and its policies.
- White House assigns a legislative liaison(s) to work with Congress and civil society on whistleblower legislation and begins actively lobbying for the best military whistleblower reforms as the NDAA FY16 moves through Congress.
- Seek to adequately fund OSC and IG expanded whistleblower responsibilities in any appropriations for Fiscal Year 2016, and include adequate funding in the President's Budget for Fiscal Year 2016.
- Issue a policy to ensure anti-retaliation procedures are incorporated into all investigations, prosecutors, and litigation.
- ODNI and agencies implementing PPD-19 begin ongoing dialogue and sharing of agency certifications with civil society groups and other stakeholders.
- ODNI ensures agency certifications include coverage of contractor and grantee employees.
- DOJ issues proposed rule implementing strengthened protections for FBI whistleblowers.

#### **6 months:**

- Share a first draft of the President's order with civil society groups and other stakeholders.
- Aggressive investigations and prosecutions of whistleblowing cease.
- Bill(s) to restore independent due process rights for employees with sensitive job classifications are introduced.

- Bill(s) for FBI and intelligence community contractor whistleblower protections are introduced.

**6-12 months:**

- Issue the President's order and begin implementation.
- White House continues to work with Congress on adequate funding for OSC and IG whistleblower responsibilities.
- Development of the Whistleblower Reporting Portal/Dashboard begins in consultation with ODNI, OSC, and OMB.
- Congressional hearings on strengthening legislation take place.

**12 months:**

- Continue the ongoing dialogue on the progress of the implementation of the President's order and other whistleblower protections with civil society groups and other stakeholders.
- Legislation has been reported by relevant committees.
- White House continues to ask Congress for adequate funding for OSC and IG whistleblower responsibilities.

**18 months:**

- GAO study on the implications of designating federal employees with sensitive job designations is completed.
- Make the first whistleblower award and launch the Whistleblower Reporting Portal/Dashboard.
- ISCAP review is in place.
- Make second whistleblower award and at least the first agency award.
- New laws enacted.