OFFICE OF INSPECTOR GENERAL

DHS Non-disclosure Forms and Settlement Agreements Do Not Always Include the Required Statement from the Whistleblower Protection Enhancement Act of 2012

Homeland Security

August 10, 2018

OIG-18-73

DHS OIG Highlights

DHS' Non-disclosure Forms and Settlement Agreements Do Not Always Include the Required Statement from the *Whistleblower Protection Enhancement Act of 2012*

August 10, 2018

Why We Did This Review

We conducted this review to determine whether DHS includes the *Whistleblower Protection Enhancement Act of 2012* (WPEA) statement in non-disclosure forms, which seek to protect certain information, and personnel settlement agreements, which identify the terms and conditions of a settlement between an agency or organization and an employee on a certain issue.

What We Recommend

We are making three recommendations to ensure compliance with the WPEA and to better track settlement agreements.

For Further Information:
Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

The WPEA requires that Federal agencies' non-disclosure policies, forms, and agreements include a specific statement on individuals' obligations and rights concerning disclosure of evidence of fraud, waste, or abuse to permissible recipients, such as Offices of Inspectors General (OIG). To assess compliance with the WPEA, we reviewed forms the Department of Homeland Security and its components use to create non-disclosure agreements, as well as personnel settlement agreement templates, and a sample of DHS and component settlement agreements. Our review revealed that not all of DHS' non-disclosure agreement forms include the required WPEA statement. Further, many of the settlement agreement templates and settlement agreements we reviewed included provisions that might constrain an individual from reporting fraud, waste, or abuse to permissible recipients, including DHS OIG; yet, most did not contain the WPEA statement. Omitting the WPEA statement from settlement agreements could lead to confusion about what information may be disclosed, which could deter reporting of fraud, waste, or abuse and impede the work of the DHS OIG. In addition, omitting the WPEA statement runs counter to fostering an open and transparent environment that welcomes disclosures and protects whistleblowers. The Department also has not developed a policy or practice to track settlement agreements comprehensively, which hampers the ability to promptly gather complete and accurate information about the number and type of such agreements.

DHS Response

DHS concurred with recommendations 1 and 3 and described corrective actions to address these issues. DHS non-concurred with recommendation 2 but identified corrective actions it will take in response to it. We consider the recommendations to be resolved and open.

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov
August 10, 2018

MEMORANDUM FOR: The Honorable Kirstjen M. Nielsen
Secretary
Department of Homeland Security

FROM: John V. Kelly
Senior Official Performing the Duties of
the Inspector General

SUBJECT: *DHS' Non-disclosure Forms and Settlement Agreements Do Not Always Include the Required Statement from the Whistleblower Protection Enhancement Act of 2012*

For your action is our final report, *DHS' Non-disclosure Forms and Settlement Agreements Do Not Always Include the Required Statement from the Whistleblower Protection Enhancement Act of 2012* (WPEA). We incorporated the formal comments provided by the Department.

The report contains three recommendations aimed at improving non-disclosure agreements, including personnel settlement agreements. The Department concurred with recommendations 1 and 3 and non-concurred with recommendation 2. Based on information provided in the Department's response to the draft report, we consider the recommendations to be resolved and open. Once the Department has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendations. The memorandum should be accompanied by evidence showing completion of the agreed-upon corrective actions. Please send your response or closure request to OIGInspectionsFollowup@oig.dhs.gov. For recommendation 2, please submit drafts of the guidance documents the Department will prepare on satisfying the WPEA's notice requirement and including language in settlement agreements on whistleblower rights.

Consistent with our responsibility under the *Inspector General Act of 1978*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Jennifer L. Costello, Chief Operating Officer or John D. Shiffer, Chief Inspector, at (202) 981-6000.

Background

The *Whistleblower Protection Enhancement Act of 2012* (WPEA) strengthened protections for Federal employees who disclose evidence of Government fraud, waste, or abuse. The WPEA requires that any non-disclosure policy, form, or agreement contain the following statement to ensure signees are appropriately advised of their obligations and rights concerning disclosure of information:

> These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.[1,2]

The WPEA-required statement affects two types of non-disclosure documents used by the Department of Homeland Security — non-disclosure agreements (NDA) and personnel settlement agreements.

Typically, DHS uses NDAs to ensure confidentiality of classified information or sensitive but unclassified information. DHS employees, detailees from other Federal agencies, contractors, and consultants must sign NDAs as a condition of accessing DHS systems and information.

Personnel settlement agreements identify the terms and conditions of a settlement between an agency or organization (e.g., DHS or one of its components) and an employment applicant, employee, or former employee on a certain issue, such as employment separation or an employee complaint. Settlement agreements may include non-disclosure provisions, such as confidentiality clauses that restrict or prevent a person who benefits from the settlement from disclosing information about it, at the risk of losing the agreement's benefits. DHS and its components may use settlement agreement

[1] *Whistleblower Protection Enhancement Act of 2012*, Pub. L. No. 112-199, § 115(a)(1), 126 Stat. 1465, 1473; *see also* 5 United States Code (U.S.C.) § 2302(b)(13)
[2] Congress regularly includes in its appropriations a requirement that agencies can only implement or enforce NDAs if they contain a statement similar to the one in the WPEA. *See, e.g., Consolidated Appropriations Act, 2018*, Pub. L. No. 115-141, div. E, tit. VII, § 744(a)

templates containing standardized language to begin drafting settlement agreements.

The U.S. Office of Special Counsel (OSC) is charged with protecting Federal employment applicants, employees, and former employees from prohibited personnel practices and has enforcement jurisdiction over many claims brought under the WPEA. In this role, OSC has released information related to the WPEA requirement. In March 2013, OSC issued a memorandum to all Executive Branch departments and agencies stating that, among other actions, they "must update existing NDAs to conform to the new notification statement required by the WPEA." In a footnote in this memorandum, OSC explained how this requirement applies to confidentiality clauses in settlement agreements. Specifically, according to the footnote:

> Agencies may distinguish between a non-disclosure policy, form, or agreement and a confidentiality clause in a settlement agreement. A confidentiality clause in a settlement agreement is generally not covered by the WPEA's notice requirements. A confidentiality clause only restricts disclosure of the terms and conditions of the settlement, and does not otherwise restrict disclosure of any other information. If a confidentiality clause in a settlement agreement extends beyond the terms and conditions of the agreement, agencies must incorporate the WPEA's statement.

In January 2017, OSC issued a press release reiterating its guidance on including the WPEA statement and highlighting certain instances of noncompliance and corrective actions it obtained to address that noncompliance. In February 2018, OSC released a memorandum again reminding agencies of the WPEA statement requirement and reiterating its March 2013 guidance about when the statement applies to confidentiality clauses in settlement agreements.

Results of Review

Not all forms DHS and its components use to create NDAs include the required WPEA statement. Further, although many of the settlement agreement templates and settlement agreements in the sample we reviewed included provisions that might restrict or prevent disclosure of information, nearly three-fourths of these documents did not contain the WPEA statement. Omitting the statement in NDAs and personnel settlement agreements could lead to confusion about what information may be disclosed to permissible recipients, which could deter reporting of fraud, waste, or abuse and impede DHS Office of Inspector General (OIG) activities. In addition, omitting this statement

runs counter to fostering an environment that welcomes disclosures and protects whistleblowers. The Department also does not centrally track settlement agreements, which hampers its ability to promptly gather accurate and complete information about the number and type of such agreements.

Not All NDA Forms Include the Required WPEA Statement

To prevent disclosure of classified and sensitive but unclassified information, DHS requires its employees, detailees, contractors, consultants, and others with access to such information to sign an applicable NDA. The Department commonly uses its own form (Form 11000-6, *Department of Homeland Security Non-disclosure Agreement*) and two standard government forms (Form 4414, *Sensitive Compartmented Information Non-disclosure Agreement*, and SF-312, *Classified Information Non-disclosure Agreement*) for this purpose.

The WPEA requires that all NDA forms include the statement advising signees of their obligations and rights concerning disclosure of information. Our review of these forms showed that the two standard government forms (Form 4414 and SF-312) include the WPEA statement, as required by statute. However, DHS has not updated its NDA form (Form 11000-6) since August 2004, and the form does not contain the WPEA statement.[3]

In addition to these three common NDA forms, some components have applicants, interns, employees, contractors, and consultants sign program-specific NDAs. For example, the U.S. Secret Service and the Transportation Security Administration use NDA forms related to handling certain information, such as sensitive security information, job applicant assessments, and information from interviews conducted as part of an investigation. Eight of the 17 program-specific NDA forms we reviewed did not contain the WPEA-required statement.

In November 2017, in response to the *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*,[4] the DHS Deputy Under Secretary for Management sent an email to all DHS employees with links to a new whistleblower website with

[3] Form 11000-6 states, "[s]igning this Agreement does not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law." This narrow language does not satisfy the WPEA requirement nor does it provide complete information about existing whistleblower protections.
[4] The *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*, Pub. L. No. 115–73, 131 Stat. 1235, honors a Department of Veterans Affairs psychologist who suffered retaliation for reporting wrongdoing and who ultimately committed suicide. The act strengthens whistleblower protections for Federal employees, increases awareness of Federal whistleblower protections, and increases accountability and required discipline for Federal supervisors who retaliate against whistleblowers.

information on how to disclose misconduct and illegal activities.[5] Although the website contains guidance on including the WPEA statement in non-disclosure policies, forms, and agreements, neither DHS nor all of its components have updated their NDAs with the required WPEA statement.

Use of WPEA Statement in Settlement Agreements Is Inconsistent

According to the WPEA, agencies are required to include the statement regarding disclosure in "any NDA policy, form or agreement." In its WPEA-related guidance, OSC recognizes that this WPEA requirement may apply to personnel settlement agreements containing confidentiality clauses. Specifically, according to OSC, a confidentiality clause in a settlement agreement that "only restricts disclosure of the terms and conditions of the settlement" does not obligate an agency to include the WPEA statement, but a settlement agreement with a broader confidentiality clause (i.e., a clause with non-disclosure extending beyond the terms and conditions of settlement) must include the statement. The OSC has not addressed in its guidance any other type of non-disclosure provision that might be included in a settlement agreement beyond a confidentiality clause.

We reviewed 11 personnel settlement agreement templates and found that many contained provisions outside of a confidentiality clause that could constrain protected disclosures and warrant including the WPEA statement. For example, according to one template, the employee "shall not make any comments or take any actions with the effect of disparaging or undermining [DHS], including undermining the operations or leadership of [the component]." Some templates require employees to withdraw any complaints or allegations they raised against DHS, including those outside the purview of the complaint that initiated the settlement action. This type of provision might be construed to cover complaints or allegations made to OIG or other permissible recipients. Several templates require employees to waive their ability to file further complaints against the component about events that pre-date the agreement. Such a provision could be viewed as covering complaints that might otherwise be submitted to OIG or other permissible recipients. We did note that two components did include the WPEA statement in their templates.

As with the templates, many of the component settlement agreements we reviewed contained language that could restrict or prohibit disclosure of information to permissible recipients. Specifically, of the 88 agreements we reviewed, many included provisions ranging from broad confidentiality clauses to other provisions that could warrant including the WPEA statement. Yet, only 25 of the 88 settlement agreements we reviewed contained the WPEA statement. For example, one agreement that did not include the WPEA statement

[5] The website, located on the DHS intranet, describes the type of information that can be reported, how to report it, and the protections afforded to employees who report it.

explicitly notes that the agreement resolves all matters involving "disclosures to … any organization or individual inside … [DHS]," without acknowledging that the signee can report to OIG or other permissible recipients evidence of fraud, waste, or abuse.

DHS and component officials we contacted during our review expressed awareness of the WPEA-required statement. Component attorneys also asserted they were familiar with OSC's guidance regarding when the WPEA statement is required in settlement agreements. In some cases, the WPEA statement was included in settlement agreements with specific confidentiality clauses, when, according to OSC, it may not have been required. In other cases, however, overly broad confidentiality clauses and other non-disclosure provisions appear to necessitate presence of the WPEA statement, which was not included. Officials' inconsistent inclusion of the WPEA statement, despite their professed knowledge of OSC's guidance, highlights the difficulty of determining whether a settlement agreement prevents a signee from disclosing information to a permissible recipient. Some components might have included the WPEA statement out of an abundance of caution, with one attorney noting, "[i]t's better to have it and not need it than to need it and not have it."

Failure to include the WPEA statement in all settlement agreements might lead employees to believe they cannot disclose information to DHS OIG and other permissible recipients. For example, during a DHS OIG whistleblower retaliation investigation in 2017, a complainant who was an employee of U.S. Immigration and Customs Enforcement (ICE) informed OIG she could not cooperate with its investigation because she had signed a settlement agreement that included provisions she viewed as curbing her ability to communicate with OIG. Notably, the perceived non-disclosure provisions were not part of a confidentiality clause in the settlement agreement, and the agreement did not include the WPEA statement. After analyzing the provisions, the Inspector General notified ICE that the WPEA language should have been included in the settlement agreement, and that by omitting it, the component impeded OIG's investigation. To date, ICE has not updated its settlement agreement template to include the WPEA statement.

OSC's guidance does not offer a standard for deciding whether to include the WPEA statement in settlement agreements. Further, the Department has not developed guidance on this issue distinct from OSC. Leaving the statement out of such agreements may be in accordance with OSC guidance regarding specific confidentiality clauses, but if the agreements contain other non-disclosure provisions or overly broad confidentiality clauses, omitting the statement could potentially prevent or discourage people from communicating with permissible recipients, such as DHS OIG. For this reason, DHS and the components should include the WPEA statement in all settlement agreement

templates and settlement agreements. They should also take this action, regardless of whether they construe a particular provision as restricting protected disclosures, because the signee may view the same provision differently and may be dissuaded from providing information to DHS OIG and other permissible recipients. By including the WPEA statement in all templates and agreements, the Department can minimize the risk that a whistleblower will cite a settlement agreement as the reason for not providing information.

DHS Does Not Comprehensively Track Settlement Agreements

The Department does not comprehensively track settlement agreements, which leads to delays in gathering information and problems in ensuring the information is complete and accurate. Though some components do maintain human resource databases and other case management systems to track certain aspects of the settlement agreement process, they are neither comprehensive nor standardized. Some components' responses to our requests for information were delayed because they had to search through hardcopy personnel files manually for completed settlement agreements. Manual review of all settlement agreement files is inefficient and not an effective use of resources. DHS components also do not have tracking mechanisms to categorize the settlement agreements they issue by type, meaning the Department cannot readily determine the number of settlement agreements for any given category, such as discrimination, employee performance, or employee misconduct. Not knowing how many settlement agreements fall under particular categories makes it difficult for DHS to analyze trends, to identify risk areas, and to develop mitigation strategies to address those risks. Without a tracking system in place, DHS does not have an efficient means to determine settlement agreement expenses. For example, payments associated with attorneys' fees and damages, such as back pay, are not separately tracked for trend analysis. Finally, without a tracking system, we cannot be certain the 6,883 settlement agreements reported by the Department and its components represent the actual number signed from fiscal years 2014 through 2017. Department officials we contacted are aware of this issue and stated that manual reviews of files would be required to collect these costs.

Recommendations

We recommend the Secretary of the Department of Homeland Security:

Recommendation 1: Ensure that the Department and its components update all non-disclosure agreement forms to include the required statement from the *Whistleblower Protection Enhancement Act of 2012* on disclosing information to permissible recipients.

Recommendation 2: Ensure that all DHS and component personnel settlement agreement templates and settlement agreements include the statement from the *Whistleblower Protection Enhancement Act of 2012* on disclosing information to permissible recipients.

Recommendation 3: Develop and implement a method to track the use of settlement agreements throughout the Department and its components.

Management Comments and OIG Analysis

DHS concurred with recommendations 1 and 3 and non-concurred with recommendation 2. Appendix B contains a copy of DHS' management comments in their entirety. We also received technical comments and incorporated them in the report where appropriate. We consider the recommendations to be resolved and open. A summary of DHS' response and our analysis follows.

DHS Response to Recommendation 1: DHS concurred with the recommendation. The Deputy Under Secretary for Management will ensure that all NDA forms are updated, as appropriate. Specifically, OIG identified nine forms missing the WPEA statement, the most commonly used of which is DHS Form 11000-6, "DHS Non-Disclosure Agreement," dated August 2004. Other noted forms will either be updated or discontinued. DHS anticipates all Department NDAs will be WPEA-compliant by February 28, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. We will close this recommendation when we receive copies of the updated Department non-disclosure agreements, including DHS Form 11000-6.

DHS Response to Recommendation 2: DHS non-concurred with the recommendation, taking the position that some personnel settlement agreements are not non-disclosure policies, forms, and agreements, as contemplated by the WPEA. Despite this non-concurrence, the Department noted that it is committed to promoting protected disclosures and that it will take several steps to advance that goal. Specifically, in coordination with the U.S. Office of Special Counsel (OSC), it will issue guidance that expands on OSC's own guidance on the WPEA, as it applies to non-disclosure policies, forms, and agreements. It will also issue guidance about language to be included in all settlement agreements on signees' rights to make protected disclosures. It will complete these actions by December 31, 2018.

OIG Analysis: Although DHS non-concurred with the recommendation, it has committed to taking corrective actions that will, if properly implemented, address the key concerns underlying the recommendation. Specifically, the Department has agreed to develop guidance in coordination with OSC to clarify when the WPEA statement must be included in a settlement agreement. In addition, the Department will issue guidance on plain language to be inserted into all settlement agreements apprising signees of their whistleblower rights. Because the Department has identified corrective actions that meet the spirit of the recommendation, OIG will treat this recommendation as open and resolved until it has an opportunity to evaluate the Department's draft guidance. If the OIG determines that the guidance is insufficient to ensure all settlement agreement signees are properly notified of their rights as whistleblowers, OIG may change the status of this recommendation from "resolved" to "unresolved."

DHS Response to Recommendation 3: DHS concurred with the recommendation and indicated tracking promotes trend analysis and developing risk mitigation strategies. Many components have systems in place to track some elements of settlement agreements; however, one component does not currently track these agreements. DHS Office of General Counsel (OGC) will issue guidance on minimum standards for tracking key elements of settlement agreements such as the type of legal claim and monetary consideration, if any, paid to resolve the claim. DHS anticipates completing actions to implement this recommendation by March 31, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. The Department recognizes the value in tracking settlement agreements and their key elements, and in conducting a trend analysis of those agreements to identify and mitigate risk. As a result, DHS OGC will issue guidance on minimum standards for tracking settlement agreements, and will allow each component to determine how to meet those standards. The guidance will instruct each component to review existing systems or processes for conformity with the minimum standards and to report on that review. If component systems do not meet the minimum standards, the component will be required to devise a specific plan to meet them.

Appendix A
Objective, Scope, and Methodology

DHS OIG was established by the *Homeland Security Act of 2002* (Pub. L. No. 107-296) by amendment to the *Inspector General Act of 1978*.

The objective of our review was to determine whether DHS and component non-disclosure forms and personnel settlement agreements include WPEA-required language allowing for protected disclosures to OIG or other permissible recipients, and whether such NDAs pose constraints to OIG's access to information.

To understand the use of NDAs and non-disclosure clauses in settlement agreements, we reviewed DHS' policies, procedures, forms, and templates. We asked DHS how many settlement agreements were issued starting in FY 2014. We then requested a judgmental sample of completed settlement agreements, based on the total number each component identified.

The Department indicated 6,883 settlement agreements were signed from FY 2014 through FY 2017. To validate our objective, we obtained and evaluated a certain number of completed settlement agreements per fiscal year according to the following terms:

- If fewer than 99 total agreements were reported, we requested 1 per year.
- If between 100 and 199 agreements, we requested 2 per year.
- If between 200 and 299 agreements, we requested 3 per year.
- If between 300 and 399 agreements, we requested 4 per year.
- If greater than 500 agreements, we requested 5 per year.

We conducted this review from September 2017 to February 2018 under the authority of the *Inspector General Act 1978*, as amended, and in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency. Major contributors to this report are: John D. Shiffer, Chief Inspector; Michael Rich, Lead Inspector; Adam Brown, Senior Inspector; Russell Carlberg, Assistant Counsel to the Inspector General; Christopher Zubowicz, Assistant Counsel to the Inspector General; Kelly Herberger, Communications and Policy Analyst; and Anthony Crawford, Independent Reference Reviewer.

Appendix B
Department Comments to the Draft Report

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

Homeland Security

July 16, 2018

MEMORANDUM FOR: John V. Kelly
Acting Inspector General

FROM: Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

SUBJECT: Management's Response to OIG Draft Report: "DHS Non-disclosure Forms and Settlement Agreements Do Not Always Include the Required Statement from the Whistleblower Protection Enhancement Act of 2012"
(Project No. 17-101-ISP-DHS)

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

The Department is pleased to note OIG's positive recognition of the many non-disclosure agreement (NDA) forms that contained the required "Whistleblower Protection Enhancement Act of 2012" (WPEA) statement. The Department and the Components will ensure that those forms which currently do not have the required WPEA statement are updated in the near future, as appropriate.

Additionally, the DHS Office of the General Counsel (OGC) plans to issue guidance regarding tracking settlement agreements, and will work with the one outstanding Operational Component currently without a system to develop one for tracking these agreements. Because not all settlement agreements are NDAs, policies, or forms, the Department non-concurs with the recommendation to include the WPEA statement in all personnel settlement agreements. The Department remains committed to ensuring that all employees and former employees are not chilled from making lawful disclosures.

The draft report contained three recommendations; two of which the Department concurs, and one which the Department non-concurs. Attached find our detailed response to each recommendation. Technical comments were previously provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Feel free to contact me if you have any questions. We look forward to working with you in the future.

Attachment

Attachment: Management Response to Recommendations Contained in 17-101-ISP-DHS

The OIG recommended that the Secretary of Homeland Security:

Recommendation 1: Ensure that the Department and its components update all non-disclosure agreement forms to include the required statement from the "Whistleblower Protection Enhancement Act of 2012" on disclosing information to permissible recipients.

Response: Concur. The Deputy Under Secretary for Management will ensure that all NDA forms are updated, as appropriate. Specifically, according to the OIG, there were nine forms that were missing the required WPEA statement: three from the DHS Office of the Chief Security Officer (OCSO), three from the Transportation Security Administration (TSA), and three from the U.S. Secret Service (USSS). Below find the current status for each of these forms:

OCSO: The DHS Form 11000-6, "DHS Non-Disclosure Agreement," dated August 2004, is signed by individuals who require access to Sensitive But Unclassified (SBU) information and covers several categories of SBU information. Updating this form will require coordination with multiple DHS offices and stakeholders. DHS OCSO will add the required WPEA language, in accordance with section 115(b) of the WPEA, Pub. L. No. 112-199.

DHS Special Access Program Format 2, "Special Access Program Non-Disclosure Agreement," dated June 2013, is a security form signed by individuals who require access to Special Access Programs. DHS OCSO will add in the required WPEA language.

The DHS Form 11036, "DHS Statement of Understanding Relative to the Protection of Classified National Security Information by Private Sector Personnel," dated October 2014, is signed by private sector personnel who require access to classified national security information. Updating this security form will require coordination with multiple DHS offices and stakeholders. DHS OCSO will add the required WPEA language, in accordance with section 115(b) of the WPEA, Pub. L. No. 112-199.

TSA: The unnumbered and undated form "Acknowledgement Agreement for Personnel Participating in the Transportation Security Administration (TSA) Senior Federal Air Marshall (SFAM) Leadership Job Simulation (LJS) is no longer in use by the Federal Air Marshals Service (FAMS). Instead it has been replaced with TSA Form 1154, "Transportation Security Officer (TSO) Airport Assessment Non-Disclosure Agreement,"

dated November 2006 which includes the required WPEA statement. A copy of this form was provided to OIG under separate cover.

The unnumbered and undated form "Individual Non-Disclosure Agreement for Work on behalf of the Department of Homeland Security Regarding the Committee on Foreign Investment in the United States (CFIUS)," is used Department-wide. DHS intends to discontinue the use of this NDA by July 1, 2018, throughout the Department and instead is establishing procedures to ensure DHS employees and contract staff working on CFIUS matters are aware of the statutorily mandated confidentiality requirements associated with CFIUS.

The unnumbered and undated form "Conditional Access to Sensitive Security Information," was updated with the required WPEA statement, and distributed to the user community on April 24, 2018. A copy of this new form was provided to OIG under separate cover.

USSS: The SSF 4024, "Conditional Access To Sensitive But Unclassified Information Non-Disclosure Agreement," Rev. January 2015, is used for contractors and other individuals who need access to USSS information. These individuals are not employees, thus the language from the WPEA is not applicable to this form as the Act specifically references "employee obligations, rights or liabilities." The SSF 4024 already contains whistleblower protection language in paragraph 13 that is tailored to the non-employee in accordance with section 115(b) of the WPEA, Pub. L. No. 112-199.

The SSF 4334B "USSS Volunteer Service Program (Internship) and Non-Disclosure Agreement With School/Academic Institution" Rev. May 2018, form heading indicated it was a non-disclosure agreement; however, there is no non-disclosure language in the form. The title has been changed to reflect this. A copy of the new form was provided to the OIG under separate cover.

The SSF 4334A "USSS Volunteer Service Program (Internship) and Non-Disclosure Agreement with Student" Rev. May 2018, this document is signed by student volunteers and states that the student is not considered a federal employee except for the purposes of the Federal Tort Claims Act and Workers' Compensation Program. Given that these students are not employees and the WPEA language only applies to employees, whistleblower language that is tailored to non-employees has been added to the form in accordance with section 115(b) of the WPEA, Pub. L. No. 112-199. A copy of the new form was provided to the OIG under separate cover.

Estimated Completion Date (ECD): February 28, 2019.

Recommendation 2: Ensure that all DHS and component personnel settlement agreement templates and settlement agreements include the statement from the

Whistleblower Protection Enhancement Act of 2012 on disclosing information to permissible recipients.

Response: Non-concur. The Department, however, is committed to ensuring that employees are not chilled from making lawful disclosures and will issue guidance that is consistent with, and that expands upon, OSC guidance regarding Non-disclosure policies, forms, or agreements. The Department will not include the WPEA statement in all personnel settlement agreements templates and settlement agreements because some do not constitute NDAs, policies, and forms.

The WPEA prohibits agencies from "implement[ing] or enforce[ing] any non-disclosure policy, form or agreement" if such agreement does not include the WPEA statement. [1] Immediately upon enactment of the WPEA, OSC issued guidance regarding the change in the law to "assist agencies in understanding and/ implementing the WPEA." [2] OSC's 2012 guidance noted that the WPEA does not define a non-disclosure policy, form, or agreement, but that Standard Form 312, the "Classified Information Nondisclosure Agreement" is an example of an NDA. SF 312 restricts disclosure of classified information and states that failure to adhere to the restrictions in the agreement may result in termination of a security clearance.

Settlement agreements are not "non-disclosure agreements, policies, and forms." They are contracts memorializing the negotiated compromise of a legal dispute. Settlement agreements are the product of negotiation and not all settlement agreements are the same. Settlement agreements often include general releases of legal claims that have been or could have been made against the agency. A general release that does not include a promise not to disclose information cannot be construed as an NDA, policy, or form. Rather, such settlement agreements resolve pending legal disputes and the legal relationship among the parties. NDAs prohibit the disclosure of information, not the release of legal claims.

OSC's 2012 guidance specifically contemplated the impact of the WPEA on settlement agreements and, contrary to the OIG's Recommendation 2, provided that "a confidentiality clause in a settlement agreement *is generally not covered by the WPEA's notice requirements*." [3] OSC further educated agencies that "[a] confidentiality clause only restricts disclosure of terms and conditions of the settlement, and does not otherwise

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1 5 U.S.C. § 2302(b) (13).
2 U.S. Office of Special Counsel, Memorandum for Executive Departments and Agencies, The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements (Nov. 27, 2012) available athttps://osc.gov/Resources/OSC%20Memorandum%20on%20Whistleblower%20Law%20and%20Non%20Disclosure%20Agreements%2003%2014%2013.pdf.
3 *See supra* note 2. (emphasis added)

restrict disclosure of other information. *If* a confidentiality clause in a settlement agreement extends beyond the terms and conditions of the agreement, agencies must incorporate the WPEA's statement."[4] In February 2018, shortly before OIG's draft report was issued, OSC updated its guidance on NDAs and again reiterated that "[a] confidentiality clause in a settlement agreement *is not covered by the WPEA's notice requirements if* it only restricts disclosure of the terms and conditions of the settlement."[5] Nothing in OSC's guidance suggests that the WPEA statement is required in settlement agreements with confidentiality provisions that are limited to the terms and conditions of the settlement. And, unlike the OIG's recommendation, neither OSC's 2012 or 2018 guidance recommends including the WPEA statement in settlement agreements that do not include confidentiality provisions at all.

The Department disagrees with the report's assessment that OSC's guidance cannot be implemented, and that OSC's guidance "does not offer a standard for deciding whether to include the WPEA statement in settlement agreements." To the contrary, OSC's guidance identifies a specific standard: if the agreement restricts the disclosure of information *other than the terms and conditions of the settlement agreement*, agencies must incorporate the WPEA's statement.

Moreover, a Department-wide policy mandating the inclusion of the WPEA statement in agreements that do not, under any conceivable construction, include an NDA, form, or policy, as the OIG report recommends, could create serious adverse consequences not anticipated or considered by the OIG's draft report. In particular, mandating the WPEA statement in *all* agreements could lead to confusion regarding the terms of the negotiated settlement because there may be instances in which the provisions of the WPEA conflict with a lawfully negotiated settlement term resolving an employee's legal claim against the government. The WPEA statement provides, among other things, that its

> provisions are consistent with and *do not supersede, conflict with, or otherwise alter* the employee obligations, *rights* or liabilities created by existing statute or *Executive order* relating to (1) *classified information* . . . (4) any other whistleblower protection.[6]

In a settlement agreement, however, the parties might lawfully and appropriately agree to terms that supersede or alter an employee's rights under statute or Executive Order relating to classified information or other whistleblower protection. Examples of such

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4 *Id.* (emphasis added).
5 U.S. Office of Special Counsel, Memorandum for Executive Departments and Agencies, The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements, note 5 (Feb. 1, 2018) available at https://osc.gov/Resources/NDA%20Memo%20Update.pdf.
6 5 U.S.C. § 2302(b) (13) (emphasis added).

terms are general releases. Indeed, every time that any agency throughout the government successfully resolves a whistleblower retaliation legal dispute through OSC's Alternative Dispute Resolution Unit[7] or the Merit System Protection Board's Mediation Appeals Program,[8] and enters into a settlement agreement to resolve that legal claim, it has entered into a contract that alters the individual's statutory whistleblower protection rights: the employee has agreed to discontinue pursuing the legal claim for retaliation and the agency agrees to provide the negotiated consideration to resolve the claim. The same can be said for the resolution of legal claims invoking statutes or executive orders regarding classified information, such as adverse action claims by employees removed after the revocation of a security clearance, which may alter individuals' rights under Executive Order 12968. A mandate to include the WPEA statement in every single settlement agreement, regardless of whether the agreement includes an NDA, form or policy, and regardless of whether or how the inclusion of the WPEA statement may contradict negotiated, lawful terms of the agreement, may result confusion and ambiguity, increased litigation expenses on both sides and, ultimately, compromise the Department's ability to constructively resolve matters through alternative dispute resolution programs. The WPEA does not require this result. Moreover, there is no indication that the WPEA intended to substantively limit agencies' ability to resolve legal claims through alternative dispute resolution.

Although the Department non-concurs with the OIG's recommendation and analysis, DHS agrees that it is important that applicants, employees, and former employees are not chilled from making protected disclosures. The Department will issue guidance regarding the inclusion in all settlement agreements of plain language concerning applicants', employees', and former employees' rights to make protected disclosures. The Department will also issue guidance expanding upon the Special Counsel's February 2018 memorandum, and will seek to coordinate with the OSC regarding the same. ECD: December 31, 2018.

Recommendation 3: Develop and implement a method to track the use of settlement agreements throughout the Department and its components.

Response: Concur. The Department agrees that there is value in tracking the use of settlement agreements and in recording relevant information about the matter settled so that it is readily available for trend analysis and to develop risk mitigation strategies. As of May 30, 2018, the vast majority of Department components each use systems through which settlement agreements, along with other relevant information about the underlying matter, are recorded and tracked. Indeed, all but one operational component currently records settlement agreements through databases or other systems. It is important to note that despite the existence of systems to record settlement agreements, manual review of

7 https://osc.gov/Pages/ADR.aspx
8 https://www.mspb.org/MSPB-Mediation-Appeals-Program.html

the cases in response to requests from third parties may still be necessary to address specific requests.

The DHS OGC will issue guidance on minimum standards for tracking settlement agreements, and will enable each component to determine how to meet those standards. The minimum standards will include the fact of the settlement, basic information about the type of legal claim at issue, and the monetary consideration, if any, paid to settle the claim. This will enable components to leverage the existing resources already in place, including case matter tracking systems. The guidance will instruct that each component review existing systems or processes for conformity with the minimum standards and report on that review. To the extent that component systems do not meet the standards, or, in the case of the one component that is not presently tracking, components will be required to devise a component-specific plan to meet the minimum standards. ECD: March 31, 2019.

Appendix C
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