June 26, 2026

The Honorable Scott Kupor
Director
U.S. Office of Personnel Management
1900 E Street NW
Washington, DC 20415-1000

RE: *Confidential Government Information Nondisclosure Agreement (Docket ID: OPM-2026-0100)*

Dear Director Kupor:

Democracy Defenders Fund (DDF) respectfully submits this comment on the notice published by the Office of Personnel Management (OPM) on May 27, 2026, at 91 FR 31478 titled *Confidential Government Information Nondisclosure Agreement (Docket ID: OPM-2026-0100)* (Notice). DDF is a nonpartisan, non-profit section 501(c)(3) organization committed to strengthening democracy while ensuring that all Americans can freely exercise their fundamental civil rights by defending the rule of law, fighting corruption, and protecting elections.

As described below, the Notice and proposed government-wide nondisclosure agreement (NDA) are procedurally and substantively infirm.

- First, the NDA impermissibly imposes an overbroad and vague prior restraint on employee speech in violation of the First Amendment to the U.S. Constitution. Worse, the Notice provides unbridled discretion to agencies to determine whose speech is burdened and whose is not, thereby granting a veiled "power to discriminate—to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly."[1]

- Second, OPM does not have the authority to promulgate the NDA. The proposed NDA establishes new obligations on employees' use and disclosure of information. These new obligations have the "force and effect of law."[2] It is axiomatic that OPM can only establish new substantive rules if it has the statutory power to do so.[3] OPM does not, however, have the authority to regulate employees' use or disclosure of government information. In fact, that authority has largely been delegated to a completely different agency: the U.S. Office of Government Ethics (OGE).

Given the serious deficiencies with the Notice and the proposed NDA, OPM must withdraw it.

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[1] Laurence H. Tribe, American Constitutional Law, § 12-38, at 1056 (2d Ed. 1988).
[2] *Chrysler Corp. v. Brown,* 441 U.S. 281, 295 (1979) (stating that a legislative rule has the "force and effect of law").
[3] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress").

1. Background

According to OPM's press release, the proposed template nondisclosure agreement (NDA) "would allow agencies to use standardized confidentiality agreements for covered employees and contractors whose duties involve routine access to sensitive systems or protected information" that would "become an official government form that agencies could use as a standard part of the employee onboarding process."[4] The Notice provides that OPM promulgated the template NDA based on a general concern about the release of pre-decisional documents and points to three specific events as evidence:

> In 2025, several Federal employees in the Federal Bureau of Investigation and Department of Homeland Security (DHS) engaged in unauthorized disclosure on planned immigration enforcement actions—disclosures that impeded enforcement of Federal law and put the lives of Federal agents in danger. In early 2026, the New York Times and Washington Post received unauthorized disclosures from Federal employees divulging the secret U.S. raid on Venezuela prior to it occurring. These leaks put the lives of members of the armed forces at risk, leading news organizations to delay "publishing what they knew to avoid endangering US troops." Also this year, the personal information of approximately 4,500 ICE employees—including nearly 2,000 employees working in frontline enforcement—was disclosed by a Federal employee, including names, addresses, email addresses, phone numbers, and job titles. This leak jeopardized the safety of the agents.[5]

The NDA broadly prohibits employees' disclosure of "Confidential Government Information" (CGI) both before and after they leave office. The Notice and NDA treat as CGI all: "non-public, confidential, or proprietary information, whether or not marked as such, which may include, but not be limited to, information relating to internal agency operations, personnel matters, personally identifiable information (PII), personal health information (PHI), procurement processes, or any sensitive, pre-decisional or deliberative material that is not currently publicly available and should not be disclosed under applicable law, Federal regulation, or government-wide policy."[6] The Notice takes the position that "Federal employees do not have discretion to disclose Confidential Government Information outside of narrow circumstances prescribed by relevant authorities and implemented by procedures which may differ by agency."[7] The Notice does not define "disclosure."

The NDA further provides that employees understand that they are required to follow applicable laws related to CGI *and* that employees agreed to*, inter alia* "use [CGI] solely for the purposes of performing the official duties and responsibilities of Employee's position at the Agency" and "use or disclose [CGI] created or obtained during the course of Employee's employment with the Agency only as authorized by law, rule, regulation, and applicable Agency policies and

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[4] Press Release, Office of Personnel Management, OPM Prepares NDA for Federal Employees Handling Sensitive Information Following Series of Major Leaks (last visited Jun. 16, 2026), https://www.opm.gov/news/news-releases/opm-prepares-nda-for-federal-employees/.
[5] 91 Fed. Reg. 31478 (May 27, 2026).
[6] NDA; 91 Fed. Reg. 31478 (May 27, 2026).
[7] 91 Fed. Reg. 31478 (May 27, 2026).

procedures."[8] Failure to sign "may result in removal" and "potential debarment."[9] The NDA requires that before any disclosure to any person of CGI, an employee must seek and receive approval from an authorized official who must determine that (1) "[t]he information, if made public, would not compromise or impede the Agency's mission"; and (2) "[t]he information does not contain or comprise national security, classified, or other information prohibited from disclosure by law."[10] The NDA provides not only that the government may take disciplinary action or action under existing law, but that the government will effectively place a constructive trust on all "royalties, remunerations, and emoluments" that "will result, or may result" from the disclosure of CGI.[11]

2. Discussion

a. The Proposed NDA Impermissibly Infringes on Employees' First Amendment Rights

"[C]itizens do not surrender their First Amendment rights by accepting public employment."[12] "Speech by citizens on matters of public concern lies at the heart of the First Amendment" and "[t]his remains true when speech concerns information related to or learned through public employment."[13] "There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees."[14] For this reason, not only does the First Amendment protect employee's speech, but it also ensures that the government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[15]

In *United States v. National Treasury Employees Union*, the Supreme Court explained that before imposing a prior restraint on employees' speech "as a citizen upon matters of public concern" "[t]he government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the government."[16] It is not merely enough to recite potential harms:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. (...) It must demonstrate that the

[8] NDA § 1.
[9] NDA § 7.
[10] NDA § 2.
[11] NDA § 4.
[12] *Lane v. Franks*, 573 U.S. 228, 231 (2014); *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967)).
[13] *Lane v. Franks* at 235-236.
[14] *Id.*
[15] *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)); *Guffey v. Mauskopf,* 45 F.4th 442, 446 (D.C. Cir. 2022).
[16] *United States v. National Treasury Employees Union*, 513 U.S. 454, 466, 468 (1995) (citing *Connick v. Myers*, 461 U. S. 138, 147 (1983) and *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968)).

> recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[17]

To pass this balancing test (often referred to as the *NTEU/Pickering* standard) the government "is entitled to considerably less deference in its assessment that a predicated harm justifies a particular infringement on First Amendment rights."[18] The *NTEU/Pickering* test "resembles exacting scrutiny."[19] This heightened scrutiny recognizes the longstanding "theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."[20]

The NDA broadly restrains covered employees' ability to speak on matters of public concern. And while "A government entity has broader discretion to restrict speech when it acts in its role as employer (...) the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[21] Consistent with the case law, the Department of Justice's Office of Legal Counsel has previously counseled that an agency can only limit an employee's publication upon "a persuasive showing that serious harm to the United States would be likely to result from [the] publication."[22]

The Notice does not show how the broad prohibition on CGI meets this exacting balancing test, nor does OPM "demonstrate that (...) the regulation will in fact alleviate these harms in a direct and material way."[23] OPM simply states that it "believes that a standard NDA form will promote consistency across Government, better protect confidential information, and better inform Federal employees of their rights and obligations regarding confidential information." Those conjectural assumptions do not clear the heavy burden imposed by the First Amendment.

First, OPM's view that the NDA will promote consistency across the Government fails for several reasons. Most obviously, OPM has provided that the NDA is an "Optional Form" and provides no criteria for which classes of employees must sign. The result is that agencies may elect to not utilize the form, or to only utilize it for a subset of employees, completely at their own discretion. The result is that there is likely to be less consistency, not more. Of course, even if the NDA was applied globally, achieving "consistency" is not a compelling reason to impose broad limits on employee speech.

Second, the NDA does nothing to materially advance protections against those categories of information *most* likely to cause damage to the government. For example, while the Government certainly has a "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"[24] there already exist a plethora of laws prohibiting the release

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[17] *National Treasury Employees Union* at 475 (cleaned up).
[18] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 907 (2018).
[19] *Id.*
[20] *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975).
[21] *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S. Ct. 1951, 1958, 164 L. Ed. 2d 689 (2006).
[22] *Constitutionality of Reguls. Requiring Prepublication Clearance of Books by Former Iranian Hostages*, 5 U.S. Op. Off. Legal Counsel 161 (1981).
[23] *National Treasury Employees Union* at 475.
[24] *Snepp v. United States*, 444 U.S. 507, 510 (1980).

of such information (many of which have criminal repercussions) and a system of preclearance for publications relating to that information.[25] Much the same could be said about any specific class of information, such as personally identifiable information (protected by the Privacy Act, which provides for personal liability for release of information), personal health information (protected by the Privacy Act and, in certain instances, the Health Insurance Portability and Accountability Act), procurement information under the Procurement Integrity Act (instituting criminal and civil liability for disclosing nonpublic procurement information), and sensitive and material nonpublic financial information. Likewise, all employees are prohibited from using nonpublic information for personal gain under 5 C.F.R. 2635.703. Against the background of these existing laws and regulations, it is not clear how the NDA would "directly and materially" prevent disclosure of confidential information likely to cause harm to the United States in ways that are not already covered by existing, more narrowly tailored, prohibitions.

Third, the Notice doesn't support how signing the NDA will "better inform employees of their rights and obligations." The Notice itself is full of vague terms, and the concept of CGI is so expansively conditioned that it is near impossible for an employee to assess where the line stands on whether something is covered or not. It also is not clear how *changing* employees' rights by requiring them to sign an additional obligation will better inform them of *what* they are obligated to do. OPM could far better meet the objective of informing employees of their rights and obligations in a less burdensome manner by requiring training on nonpublic information rules and regulations during an employee's onboarding, rather than having employees sign a vaguely worded NDA. Such training is, however, already being completed under the auspices of the OGE ethics training regulations, which requires that all employees receive ethics training within 90 days of entering government service and that each employee must receive a copy of the Standards, including provisions concerning use of nonpublic information.[26] Because a more tailored approach exists to educate employees on their rights and obligations, neither the ends nor the means of the NDA are appropriately limited to prevent overbreadth into protected speech.

Taken together, OPM fails to show how the NDA would "directly and materially" prevent harm to the government that warrants burdening "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression."[27] It therefore fails to meet the careful balancing required under *NTEU/Pickering*.

Moreover there is an "obvious lack of 'fit' between the government's purported interest and the sweep of its restrictions."[28] The sweeping prior restraint covers speech that touches on any form of nonpublic, confidential, or proprietary information without showing how use or disclosure of any and all such information would harm the government. OPM's proffered examples, such as disclosure of war plans, are already illegal. OPM does not sufficiently explore why the robust penalties found in the NDA are required for any and all instances of an employee discussing nonpublic information for up to 5 years after they leave government. The NDA attaches to far

[25] *Id.*
[26] 5 C.F.R. § 2638.304(e).
[27] *National Treasury Employees Union* at 468.
[28] *Sanjour v. E.P.A.,* 56 F.3d 85, 95 (D.C. Cir. 1995).

more speech than is necessary to protect the government' s interests. It is therefore overbroad and incompatible with the First Amendment.

Were that not enough, the NDA is an "Optional Form." That means that the question of whether it will be adopted or not, and who will be required to sign, has been delegated fully to the discretion of individual agencies. Giving unbridled discretion to agencies to decide who should be subject to the NDA raises serious concerns that the NDA could be utilized to surreptitiously engage in viewpoint discrimination. For example, an agency might choose to require all career employees of a disfavored scientific office to sign the NDA, while not requiring political appointees to sign the same NDA. This type of unbridled discretion is simply incompatible with the First Amendment.

b. OPM Lacks the Legal Authority to Promulgate the NDA

Contrary to OPM's assertion in the Notice that "[t]he proposed NDA does not create new substantive restrictions on employee speech or disclosure rights," the NDA does exactly that. Because OPM lacks the legal authority to create a government-wide NDA, the Notice and NDA are invalid and must be withdrawn.

i. *The NDA imposes new restrictions and therefore operates as a substantive rule*

Dozens of statutes relate to the disclosure of classified, confidential, and nonpublic information.[29] These existing statutes are nuanced and, while they can overlap to a certain extent, there is no single statute or regulation that broadly reaches to any use or disclosure of CGI by employees and former employees in all cases.

The broadest prohibition on the use and disclosure of nonpublic information is found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) and Executive Order 12674, as modified, which prevent employees (but not former employees) from disclosing nonpublic information if (1) the employee knows or reasonably should know that the information is nonpublic (e.g., it is marked as such or routinely exempted from disclosure) and (2) the unauthorized use or disclosure is "to further their own private interests or those of another."[30] As the U.S. Office of Government Ethics—the agency responsible for promulgating and implementing the Standards—has explained, an employee has not violated the Standards by inadvertently disclosing information or disclosing information when doing so is not for the purpose of furthering any private interest.[31]

The NDA goes far beyond the penumbras of any existing law. The NDA does not merely recite existing laws, but rather "fill[s] in the gaps" between those rules.[32] In doing so, the NDA establishes a new obligation, separate from any existing requirement, that operates with the

[29] *See, e.g.,* 5 U.S.C. § 552a; 18 U.S.C. § 798, 18 U.S.C. § 1905, 50 U.S.C. § 421; 50 U.S.C. § 783(a); 42 U.S.C. § 2161-2166; 5 C.F.R. § 2635.703(a).
[30] 5 C.F.R. § 2635.703(a).
[31] *See, e.g.*, 5 C.F.R. § 2635.703(b), Example 4.
[32] *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 559 (D.C. Cir. 1983).

"force and effect of law."[33] This is the *sine qua non* of a substantive (or "legislative") rule that must comply with the informal rulemaking procedures under the Administrative Procedure Act (APA)[34] the Congressional Review Act (CRA)[35] and applicable Executive Orders.[36]

ii. *OPM lacks the legal authority to create a government-wide NDA*

It is axiomatic that to promulgate a legislative rule, an agency must have the legal authority to promulgate the rule in the first place.[37] OPM does not, however, have jurisdiction over the release of regulation of nonpublic information. As such, the NDA lacks a legitimate legal basis.

OPM's Notice attempts to elide this fundamental requirement. Although the Notice recites several laws and regulations, it does not explain how those rules authorize *OPM* to establish new requirements concerning government employees' use or disclosure of nonpublic information. Among the recited provision of law are the President's authority under 5 U.S.C. §§ 3301 and 7301 to, in OPM's words, "prescribe regulations for admission to the civil service, to assess applicant fitness and character, and to regulate employee conduct in the executive branch"; Executive Order 14210; OPM's regulations "governing suitability and fitness determinations" at 5 C.F.R. 731; 5 C.F.R. § 2635.703; and 36 C.F.R. § 1222.24(a)(6). The NDA's Privacy Act Statement also lists these same authorities. At no point, however, does the Notice or NDA provide how the Executive Order, statutes, or regulations authorize OPM to establish the NDA either.

A review of each of the provisions cited makes clear that none provide OPM with the authority to establish a government-wide NDA.

First, Executive Order 14210 directs OPM to update the suitability criteria set out in 5 C.F.R. § 731.202(b) to list "refusal to certify compliance with any applicable nondisclosure obligations, consistent with 5 U.S.C. 2302(b)(13), and failure to adhere to those compliance obligations in the course of Federal employment" as a basis for considering suitability. The Executive Order states that OPM must prepare a rule listing failure to abide by *applicable* nondisclosure obligations as a criteria for a suitability determination but does not direct OPM to *create* new nondisclosure

[33] *Chrysler Corp. v. Brown,* 441 U.S. 281, 295 (1979) (stating that a legislative rule has the "force and effect of law").
[34] 5 U.S.C. § 553. Note that the exception from APA notice-and-comment rulemaking for matters concerning internal agency operations does not apply to OPM's personnel regulations. 5 U.S.C. § 1103(b)(1) (subjects the Director of OPM to the requirements of notice-and-comment rulemaking for "any rule or regulation (...) the application of which does not apply solely to the Office or its employees"); 5 U.S.C. § 1105 ("in the exercise of the functions assigned under this chapter, the Director shall be subject to subsections (b), (c), and (d) of section 553 of this title, notwithstanding subsection (a) of such section 553"); *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 96 (2015). The fact that OPM "expects that the proposed NDA will be an Optional Form" has no bearing on the question of whether the NDA is a legislative rule. The Notice *authorizes* agencies to impose additional restrictions on government employees. By doing so, the Notice constitutes a "rule (...) of general or particular applicability and future effect designed to (...) prescribe law or policy" that is subject to the APA. 5 U.S.C. § 551(4).
[35] 5 U.S.C. § 801, et seq.
[36] *See, e.g.,* Exec. Ord. 12866 (Regulatory Planning), Exec. Ord. 13569, Exec. Ord. 13132 (Federalism), Exec. Ord. 12674, as modified by Exec. Ord. 12731 (Supplemental Ethics Rules).
[37] *See, e.g., Am. Min. Cong. v. Mine Safety & Health Admin*., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

obligations. Therefore, Executive Order 14210 does not independently provide OPM with any new delegation of authority to create new nondisclosure requirements.

Second, OPM's suitability regulations concern assessments of whether an individual's "character or conduct (...) may have an adverse impact on the integrity or efficiency of the service."[38] The regulations are authorized both by OPM's statutory responsibilities as the personnel agency for the executive branch,[39] and 5 U.S.C. § 3301(a), which permits the President to:

> **(1)** prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
> **(2)** ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
> **(3)** appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

The suitability regulations effectively provide a process to determine whether an individual has failed to live up to *existing* conduct expectations. The regulations at 5 C.F.R. § 731 currently provide nine bases for determining whether someone has engaged in conduct that is not suitable for government employment. Those include "misconduct or negligence in employment" and "dishonest conduct."[40] In essence, the regulations identify that misconduct can be a basis to determine someone is not suitable for federal service. The regulations do *not*, however, provide that a government employee must sign any document, nor do they give OPM the authority to create new conduct expectations regarding nonpublic information. As discussed below, the responsibility for establishing new *conduct* expectations rests predominantly with the U.S. Office of Government Ethics. OPM's suitability regulations simply do not provide OPM with the authority to police the nonpublic information.

Furthermore, it should be noted that OPM has not yet promulgated a final rule implementing Executive Order 14210, so that the "refusal to certify compliance with any applicable nondisclosure obligations (…) and failure to adhere to those compliance obligations in the course of Federal employment" does not even appear in the current suitability regulation. Any reliance on the *proposed* rule would be putting the horse before the cart (if the OPM rule stood for authority for the NDA, which it doesn't).

Third, neither 5 C.F.R. § 2635.703, which is promulgated by the U.S. Office of Government Ethics, or 36 C.F.R. § 1222.24(a)(6), which is promulgated by the National Archives and Records Administration (NARA), provides OPM with any authority whatsoever. Section 2635.703 provides that government employees cannot use nonpublic information for private gain, but the rule does not provide that an employee must sign an NDA. Nor does the rule apply to any and all disclosure of information. Section 1222.24(a)(6) provides that employees leaving the government can't take government *records* without authorization. Not only does the latter not deal expressly with nonpublic information (as many government records are public), but it provides no authority to OPM to create a unified system for preventing the release of all

[38] 5 C.F.R. § 731.101.
[39] 5 U.S.C. § 1302.
[40] 5 C.F.R. § 731.202.

nonpublic information. Either way, both regulations are administered by completely different agencies: OGE and NARA, respectively.

iii. *Any attempt to broaden the scope of generally applicable responsibilities regarding nonpublic information is a conduct regulation reserved to OGE*

OGE, not OPM, is primarily responsible for establishing standards of conduct by employees, including those related to the use of nonpublic information.[41] Although there was a time when OPM—"[h]istorically" as the Notice puts it—defined employee conduct regulations, that authority was shifted to OGE in the late 1980s by Congress and the President. The Notice, however, elides this fact in its historical recitation of the statutory authorities. In doing so, the Notice mischaracterizes OPM's role in policing disclosure of nonpublic information. A fuller description provides a better lay of the land.

Prior to 1978, the Civil Service Commission conducted all activities related to personnel matters, including issues related to ethical conduct.[42] In 1978, however, Congress created both OPM—through the Civil Service Reform Act—and OGE within OPM—through the Ethics in Government Act. Between 1978 and 1988, OGE was part of OPM. In 1983, OGE was given mission independence but was still housed within OPM.[43] In 1988, Congress made OGE an independent agency through the OGE Reauthorization Act of 1988.[44]

Pursuant to the Ethics in Government Act, as amended, matters that deal with "conflict[s] of interest and ethical problems" are principally the domain of OGE, not OPM.[45] This responsibility was recognized by President George H.W. Bush in signing Executive Order 12674 which directed OGE to "Promulgating, in consultation with the Attorney General and the Office of Personnel Management, regulations that establish *a single, comprehensive, and clear set of executive-branch standards of conduct* that shall be objective, reasonable, and enforceable."[46] While agencies may supplement these standards of conduct, they must do so "as addenda to the branch-wide regulations and promulgated jointly with the Office of Government Ethics, at the agency's expense, for inclusion in Title 5 of the Code of Federal Regulations."[47]

Executive Order 12674 established that use of nonpublic information for private gain is an *ethics* issue to be part of the Standards and administered by OGE. The Standards therefore include several provisions that prevent the use of nonpublic information for financial transactions or the improper use of such information to further private interests, including 5 C.F.R § 2635.703.[48] The STOCK Act of 2012 reinforces OGE's primary responsibility in overseeing matters related to the use and disclosure of nonpublic information for private gain.[49]

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[41] 5 U.S.C. § 13122(a), (b); Executive Order 12674, § 201.
[42] *See* Exec. Ord. 11222 § 201(b) (May 8, 1965) (providing that the Civil Service Commission was to oversee agency regulations dealing with standards of conduct).
[43] OGE Reauthorization Act of 1983, Pub. L. 98-150, 97 Stat. 959 (1983).
[44] OGE Reauthorization Act of 1988, P.L. 100-598, 102 Stat. 3031 (1988).
[45] 5 U.S.C. § 13122.
[46] Exec. Ord. 12674, § 201(a) (emphasis added).
[47] *Id.* § 301(a); 5 C.F.R. § 2635.105.
[48] 5 C.F.R.§ 2635.101(b)(3); 5 C.F.R. § 2635.703; 5 C.F.R. § 2635.807.
[49] STOCK Act, Pub. L. No. 112–105, § 9(a), 126 Stat. 291 (2012).

Given Congress' direction to OGE in the STOCK Act to oversee principles dealing with use and disclosure of nonpublic information, it seems clear that absent separate statutory authority and matters related to nonpublic information are generally ethical issues that are delegated to OGE to regulate. OPM has no separate authority to create new limitations on the disclosure of nonpublic information, and no authority to require any agency or employee to enter into an NDA to that effect. As such, OPM cannot unilaterally promulgate the NDA.

iv. *OPM doesn't have the authority to take action against former employees*

OPM's suitability and fitness regulations apply to "applicants," "appointees" and "employees."[50] OPM does not have jurisdiction over former employees. Yet, the "constructive trust" provisions of the NDA, which require an employee to "assign[] to the United States Government all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation of Government Information in violation of terms of this Agreement" would continue to apply for 5 years after an employee leaves Federal service. This attempt to regulate conduct that would occur after an employee leaves government service raises serious jurisdictional questions.[51] This issue is compounded by the fact that OPM's NDA leans heavily on 5 C.F.R. § 2635.703, which itself only applies to "employees" and does not apply after an individual leaves government.[52]

3. Conclusion

OPM's Notice and proposed government-wide template NDA are procedurally defective and would impose an undue burden on employees' First Amendment rights. More importantly, they are a solution in search of a problem. As a result, DDF respectfully requests that OPM withdraw the Notice and proposed NDA.

[50] 5 C.F.R. §§ 731.101, 731.202.
[51] NDA §§ 4, 7.
[52] 5 C.F.R. §§ 2635.101(b), 2635.102(h), 2635.703.