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Joe Knouff, Suitability Director
U.S. Office of Personnel Management
1900 E Street NW
Washington, DC 20415

Re: Comment on Draft Confidential Government Information Nondisclosure Agreement
Docket ID OPM-2026-0100; 91 Fed. Reg. 31,478 (May 27, 2026)
Draft form at Document No. OPM-2026-0100-0003

Dear Director Knouff:

I. Introduction and Interest of the Commenter

I am the founding partner of Southworth PC, a law firm that represents federal employees, applicants, and whistleblowers nationwide before the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the U.S. Office of Special Counsel, and related forums. I submit this comment in response to OPM's notice requesting comment on a draft governmentwide Confidential Government Information Nondisclosure Agreement (the "draft NDA"). 91 Fed. Reg. 31,478 (May 27, 2026).

This comment addresses a single, threshold defect: Paragraph 3 of the draft NDA omits language that Congress requires, verbatim, in every federal nondisclosure policy, form, or agreement. Specifically, the draft omits the words "or the Office of Special Counsel" from the mandatory anti-gag statement prescribed by 5 U.S.C. § 2302(b)(13)(A). Because the statute makes

it a prohibited personnel practice to implement or enforce any NDA that "does not contain" the prescribed statement, the draft NDA cannot lawfully be implemented or enforced in its current form. The defect goes to the legal foundation of the entire document on which OPM has solicited comment. For the reasons set out below, OPM should withdraw the draft, correct it to include the statutorily required statement word for word, and republish the corrected draft for a renewed comment period.

II. The Statutory Requirement: A Verbatim, Congressionally Prescribed Statement

In the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, Congress responded to the documented use of nondisclosure agreements and policies that chilled lawful whistleblowing. Congress's solution was unusually precise: rather than direct agencies to draft their own disclaimers, Congress prescribed the exact text that every nondisclosure policy, form, or agreement must contain, and made it a prohibited personnel practice (PPP) to "implement or enforce" any such instrument without it. That requirement is codified at 5 U.S.C. § 2302(b)(13).

As amended, § 2302(b)(13)(A) provides that an agency official may not implement or enforce any nondisclosure policy, form, or agreement if it "does not contain the following statement":

> "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 or the Office of Special Counsel 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."

5 U.S.C. § 2302(b)(13)(A) (emphasis on "or the Office of Special Counsel" supplied in Part III below).

The current text reflects a deliberate congressional amendment. As originally enacted in the WPEA, clause (3) of the prescribed statement referred only to "the reporting to an Inspector General." In Section 1138 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Congress amended § 2302(b)(13) to insert the words "or the Office of Special Counsel" after "Inspector General," designated the statement requirement as subparagraph (A), and added a new subparagraph (B) separately prohibiting NDAs that restrict disclosures to Congress, the Special Counsel, an Inspector General, or internal-review components. Pub. L. No. 116-283, div. A, tit. XI, § 1138, 134 Stat. 3388, 3905 (Jan. 1, 2021). Since January 1, 2021, the statement that federal NDAs "must contain" has included the Office of Special Counsel by name.

Two structural features of the statute bear emphasis. First, § 2302(b)(13) is not a drafting guideline; its violation is a prohibited personnel practice, the same category of unlawful conduct as whistleblower reprisal itself. Second, Congress separately amended the definition of "personnel action" to include "the implementation or enforcement of any nondisclosure policy, form, or agreement." 5 U.S.C. § 2302(a)(2)(A)(xi). The act of administering a non-compliant NDA is therefore itself a personnel action subject to the merit system's enforcement machinery, including Office of Special Counsel investigation and corrective and disciplinary action under 5 U.S.C. §§ 1214 and 1215.

III. Paragraph 3 of the Draft NDA Omits the Statutorily Required Language

Paragraph 3 of the draft NDA ("Exclusions") reproduces what is plainly intended to be the § 2302(b)(13)(A) statement. But it reproduces the superseded, pre-2021 version. The operative clause of the draft reads: "(3) the reporting to an Inspector General of a violation of any law, rule, or regulation . . . ." The words "or the Office of Special Counsel" — which Congress added by statute more than five years ago — do not appear. The comparison is unambiguous:

5 U.S.C. § 2302(b)(13)(A) (current law)	Draft NDA, Paragraph 3 (Exclusions)
". . . (3) the reporting to an Inspector General or the Office of Special Counsel 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 . . . ."	". . . (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 . . . ." *[Required reference to the Office of Special Counsel omitted.]*

The omission is not confined to the form. The Federal Register notice itself, in describing the circumstances in which employees may lawfully disclose confidential information, refers to "disclosures to Congress, an Inspector General, or other designated individuals that are protected under the Whistleblower Protection Act," 91 Fed. Reg. at 31,479 n.2 — again without naming the Office of Special Counsel, the independent agency Congress created to receive precisely those disclosures. See 5 U.S.C. §§ 1213, 2302(b)(8)(B). The pattern suggests the draft was built from a pre-2021 template rather than from the current United States Code.

IV. The Omission Is Material and Renders the Draft NDA Incapable of Lawful Implementation

A. The statute does not permit substantial compliance. Section 2302(b)(13)(A) prohibits implementing or enforcing any NDA that "does not contain the following statement," followed by quoted text. Congress legislated the words themselves. Where Congress prescribes verbatim text, an instrument either contains that text or it does not; there is no statutory safety valve for paraphrase, near-miss, or partial reproduction. The draft NDA does not contain the statement that current law requires. That ends the compliance inquiry.

B. The omitted words embody a specific congressional judgment. The reference to the Office of Special Counsel is not incidental boilerplate. Congress amended the statement in 2021 for the evident purpose of ensuring that every federal employee who signs an NDA is told, in the four corners of the document, that the agreement does not reach disclosures to OSC — the independent, secure channel Congress established for whistleblower disclosures, 5 U.S.C. § 1213, and for complaints of prohibited personnel practices, 5 U.S.C. § 1214. Finalizing a governmentwide form that restores the pre-2021 text would not merely deviate from a formality; it would silently undo an Act of Congress as applied to the very employees the amendment was enacted to inform.

C. The omission defeats the form's stated purpose. OPM explains that the form is intended to "better inform Federal employees of their rights and obligations regarding confidential information," 91 Fed. Reg. at 31,478, while "expressly preserving rights to make disclosures authorized by law, including protected whistleblower disclosures," id. at 31,480. A notice provision that omits the principal whistleblower forum does the opposite: it affirmatively misinforms employees about where they may lawfully go. An employee reading Paragraph 3 as drafted would reasonably — and wrongly — conclude that disclosures to OSC enjoy no comparable protection. In the nondisclosure context, that kind of misimpression is precisely the chilling effect § 2302(b)(13) exists to prevent.

D. The draft's general references to the Whistleblower Protection Act cannot cure the defect. Paragraph 3's first sentence cites "the Whistleblower Protection Act, 5 U.S.C. § 2302(b)," and Appendix A lists 5 U.S.C. § 2302(b)(8) among other authorities. Neither suffices. The statute requires that the instrument contain the prescribed statement itself, not a citation from which a trained lawyer might reconstruct it. Congress chose mandatory plain-language notice over incorporation by reference precisely because rank-and-file employees — not lawyers — sign these forms. A citation to § 2302(b) cannot supply six words Congress ordered to appear on the page.

E. No transition or notice cure is available for a new form. The WPEA's transition provisions permitted agencies to enforce nondisclosure instruments that predated the Act, but only if the employee received notice of the required statement, and those provisions by their terms address agreements "in effect before the effective date" of the WPEA. See Pub. L. No. 112-199 (transition provisions reproduced in the statutory notes to 5 U.S.C. § 2302). A form created in 2026 has no legacy status. It must contain the current statement from the outset, and agencies making use of any nondisclosure policy or form are further obligated to post the required statement, accompanied by the specific list of controlling Executive orders and statutory provisions. Pub. L. No. 112-199, § 104(b)(3), 126 Stat. 1467.

F. Standardizing the defect would propagate a prohibited personnel practice governmentwide. OPM intends the NDA to be an Optional Form available to every federal agency, administered during onboarding and to current employees, advertised in job opportunity announcements, and filed permanently in each employee's eOPF. 91 Fed. Reg. at 31,480. On the

draft's own terms, refusal to sign "may result in removal from federal service and potential debarment." Every agency that administers this form as drafted would be implementing a nondisclosure form lacking the § 2302(b)(13)(A) statement — a prohibited personnel practice — and every adverse action premised on an employee's refusal to sign would rest on a legally defective instrument, inviting OSC complaints, corrective-action proceedings under 5 U.S.C. § 1214, disciplinary actions against responsible officials under 5 U.S.C. § 1215, and affirmative defenses in Board litigation. It would be difficult to design a more efficient mechanism for multiplying legal exposure across the executive branch than a centrally promulgated, eOPF-filed form that fails the one statute written specifically to govern its contents.

V. The Proper Course Is Withdrawal, Correction, and Republication for a New Comment Period

Because the defect lies in congressionally mandated text, OPM's discretion in addressing it is narrow: the final form must contain the § 2302(b)(13)(A) statement verbatim, including the words "or the Office of Special Counsel." No comment, policy consideration, or drafting preference can alter that requirement.

But a quiet line edit in the final version would not be an adequate administrative response. OPM has asked the public ten specific questions — about the form's scope, its clarity, the sufficiency of its notice to employees, and the consequences of refusal to sign. 91 Fed. Reg. at 31,480–81. Each of those questions presupposes a baseline document capable of lawful implementation. Commenters evaluating Paragraph 3's adequacy, the interplay between the Exclusions paragraph and the Remedies paragraph, or the proportionality of removal for refusal to sign are being asked to assess an instrument that, as written, no agency could lawfully administer at all. Meaningful public participation requires a legally compliant baseline. The orderly course — and the course most consistent with OPM's stated goals of transparency and informing employees of their rights — is to withdraw the current draft, correct Paragraph 3 (and the corresponding description in the notice) to conform to current law, and republish the corrected draft with a fresh comment period so the public can evaluate the form Congress actually permits.

In the interim, OPM should make clear to agencies that no nondisclosure policy, form, or agreement lacking the current § 2302(b)(13)(A) statement may be implemented or enforced, and that the draft form in this docket may not be used in its present state.

VI. Requested Action

For the foregoing reasons, Southworth PC respectfully requests that OPM: (1) withdraw the draft Confidential Government Information Nondisclosure Agreement published at Document No. OPM-2026-0100-0003; (2) revise Paragraph 3 to set out the statement required by 5 U.S.C. § 2302(b)(13)(A) word for word, including the phrase "or the Office of Special Counsel"; (3) conform the supporting notice, including its description of protected disclosure channels, to current law; (4) republish the corrected draft for a renewed public comment period; and (5) advise agencies

that no nondisclosure form omitting the required statement may be implemented or enforced pending that process.

The undersigned would welcome the opportunity to provide any further information useful to OPM's consideration of this comment.

Respectfully submitted,

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