UNITED STATES DEPARTMENT OF COMMERCE
Office of Legislative and Intergovernmental Affairs
Washington, D.C. 20230

March 5, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Cummings,

I am writing regarding the Committee's request for Secretary Ross to testify about the "ongoing preparations for the 2020 Census and [the] decision to add a citizenship question" made in your January 8, 2019 letter to the Department. The Secretary takes his commitment to Congress seriously as evidenced by his initial offer to appear early in the 116th Congress and remains committed to appearing voluntarily before the Committee. As you are aware, we responded to your January 8 letter three days later on January 11, expressing our intention to fully cooperate with the Committee, providing potential dates (March 14 and March 28) for the Secretary to appear and testify on those two important subjects. In the days following our written response, our staffs arrived at March 14 as the mutually preferable date and agreed to have the Secretary testify on those specific topics. Since that time, the Department of Commerce ("Department") has begun to plan and prepare for this March 14 testimony. Recognizing the significant oversight role of the Committee, the Department has prioritized its finite resources and personnel to identify and produce a large volume of documents to your staff in its best effort to be responsive.

The Department then received your February 8, 2019 letter. That letter requests another large-scale search and production of documents related to Secretary Ross's financial disclosures and ethics obligations. In the days following our receipt of that letter, it became clear that the Committee intended to expand the scope of the March 14 hearing to ask the Secretary questions about his personal finances and ethics obligations—topics that we did not anticipate nor expect to be covered in such detail and depth based on the frequent and cordial communications between our staffs. In continuing communications, your staff then expressed its desire to review as many documents as possible related to financial disclosures *prior* to the March 14 hearing. In addition, the Department also received your February 19, 2019 letter about reported technology transfer to Saudi Arabia, which requires a further comprehensive search for responsive documents. Based on our limited resources, constrained personnel, timing, and desire to be responsive to the Committee's initial request, my staff reiterated to yours that the agreed scope of the March 14 hearing was the two subjects you identified in your January 8 letter. In response, your staff clarified that the Committee reserves the right to question the Secretary about ***any*** topic on March 14, notwithstanding our earlier correspondence and understood scope of the hearing.

Under the Secretary's leadership, the Department has cooperated fully and in good faith with the Committee's requests. We have produced approximately 5,700 pages of documents responsive to your requests, and another installment of approximately 3,000 pages is scheduled to

be produced on March 6. My staff has stayed in virtually constant communication with yours. We have expended hundreds of hours of staff time to satisfy your requests (including time expended during the 35-day lapse in appropriations, to the extent consistent with the law). This should demonstrate that we take oversight responsibilities and obligations very seriously and accordingly are working as quickly as possible to produce on a rolling basis the significant volume of information you have requested in three separate letters concerning three separate topics.

In light of our good faith efforts and hard work of the Department's personnel, I was surprised to see that your chief oversight counsel sent an email to the Department's Chief of Staff on Friday, March 1, 2019, expressing unfounded "concern[] that the Department does not appear to be making a sufficient effort to produce documents responsive to the Committee's requests." Given the sincere efforts of the Department's staff to be maximally cooperative and responsive to your requests, I found this communication somewhat disappointing given the open and affable relations we have nurtured throughout this process.

On substance, your chief counsel's email appears to make claims about our staffs' working relationship that are at odds with the facts. As previously noted, my team has been in nearly constant communication with yours, has provided voluminous documents responsive to your requests, and is continuing to work as expeditiously as possible to produce the remainder. Moreover, we have now three times responded to the same fourteen questions posed in your January 8 letter. In addition, the Department's Director of Legislative Affairs provided a phone briefing to your staff to further detail those previous written responses to the Committee. You are likely aware that our current staffing levels and the sheer volume of the Committee's and other congressional requests compel us to prioritize those requests in the order in which they are received.

Furthermore, your chief counsel's email states that the Department failed to respond to a February 7, 2017, request from the Subcommittee on Government Operations regarding compliance with whistleblower protection laws. This is simply not true. The Department responded to the Subcommittee letter on March 10, 2017. I have enclosed another copy of that response with this letter.

Your chief counsel's email has raised one fair point, which we have also repeatedly been told by your staff: the Committee would like all of the documents you have requested before the Secretary testifies. Given that legitimate demand, our genuine desire to be responsive to the Committee's requests, and because we feel the Committee expanded the originally agreed upon scope of the hearing, we feel as though we have no choice but to temporarily postpone the Secretary's testimony until a date after March 14. To be clear, the Secretary has every intention to appear before the Committee and continue assisting in your oversight capacity—the Department simply needs more time to produce responsive documents and prepare to testify on the broad range of important topics raised in your letters.

To that end we commit to work with your staff on a more appropriate and reasonable time for the Secretary to testify. As soon as we receive, in writing, a complete list of the subject matter and scope about which the Committee intends to question the Secretary, my office will work with your staff to confirm a hearing date. Based on the extensive array of topics raised in your January

8, February 8, and February 19, 2019 letters, the Department will simply not be adequately prepared to provide responsive documents and testimony before April 29, 2019, upon your return from recess. However, we are open to working with your staff on earlier times if the scope could be limited to allow for proper review and preparation.

We appreciate the opportunity to assist with your inquiries and will continue to cooperate with the Committee fully and in good faith. If you have any additional questions, please contact me at (202) 482-3663.

Sincerely,

Michael Platt Jr.
Assistant Secretary for Legislative
and Intergovernmental Affairs

Cc:
The Honorable Jim Jordan
Ranking Member, Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Enclosure

1. March 10, 2017 Letter to Hon. Mark Meadows, Committee on Oversight and Government Reform, regarding WPEA compliance

March 4, 2019 Letter to Hon. Elijah Cummings

Enclosure 1

UNITED STATES DEPARTMENT OF COMMERCE
Office of Legislative and Intergovernmental Affairs
Washington, D.C. 20230

The Honorable Mark Meadows
Chairman, Committee on Oversight and Government Reform
Subcommittee on Government Operations
Washington, DC 20515

Dear Chairman Meadows:

This responds to your letter of February 7, 2017 requesting information about the Department of Commerce's (the Department) use of nondisclosure agreements and the implementation of its responsibilities under the Whistleblower Protection Act of 2012 (WPEA). The Department takes its obligations under the WPEA seriously and has undertaken a number of appropriate steps to ensure that employees are notified of their rights as they pertain to communications with Congress, the reporting of violations to an inspector general, or other whistleblower protections under the Act.

The Department's Office of Inspector General (OIG) oversees the Whistleblower Protection Program, and promotes awareness of, and compliance with, whistleblower protections. The Department's OIG has posted on its website a notice informing employees of the WPEA's requirement that every nondisclosure policy, form, or agreement (with current or former federal employees) contain the statutorily required language set forth in Section 115 of the Act, codified at 5 USC § 2302(b)(13). The OIG has also posted a list of relevant Executive Orders and statutory provisions. The language from the Department OIG's website is provided below and can also be found online at: https://www.oig.doc.gov/Pages/Whistleblower-Protection-Program.aspx

> **Important Notice: Whistleblower Protection Enhancement Act of 2012 Required Statement — Nondisclosure Agreements**
>
> Pursuant to the Whistleblower Protection Enhancement Act of 2012, the following statement applies to every nondisclosure policy, form, or agreement of the Government (with current or former federal employees), including those in effect before the Act's effective date of December 27, 2012:
>
> "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."

The following Executive orders and statutory provisions are controlling in the case of any conflict with an agency non-disclosure policy, form, or agreement, as of March 14, 2013:

- Executive Order No. 13526;
- Section 7211 of Title 5, United States Code (governing disclosures to Congress);
- Section 1034 of Title 10, United States Code as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
- Section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code; and
- Section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)).

The Department has also posted on its Office of General Counsel website a model standard non-disclosure agreement (NDA), which contains the statutorily mandated provision as well as a separate provision that the agreement does not bar disclosures to Congress. The language from the Department's own model standard NDA is provided below and can also be found online at:

https://ogc.commerce.gov/sites/ogc.commerce.gov/files/gld_standard_nondisclosure_agreement_new.pdf

6. As required by 5 U.S.C. § 2302(b)(13), any restriction with respect to disclosure by a Government employee must be consistent with, not supersede, nor 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. This paragraph shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress.

7. 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.

In addition, several of the Department Bureaus have posted model standard NDAs online that include the required statutory language.[1] Moreover, the Department's No Fear Act training, which is mandatory for all employees, describes avenues for employees to report whistleblowing activities, and includes explicit reference to Congress (as well as to the OIG or the Office of Special Counsel) as an appropriate confidential channel for disclosures involving classified national security information.

Moreover, in the summer of 2014, the Department issued guidance by e-mail to all Department employees reminding them of the WPEA's protections for federal employees who disclose evidence of waste, fraud, or abuse, including that any NDAs signed in order to access classified or other sensitive information include, or if previously executed without the provision, should be read to incorporate, the required language set forth in Section 115 of the Act. In addition to the Department-wide notice, a separate notification was also sent to all Department Bureau and Office heads reminding them of the WPEA's requirement that any non-disclosure policy, form, or agreement include the Section 115 language.

Finally, we note that the Department's Administrative Order DAO 219-1 on Public Communication, which is posted on the Department's website, explicitly references the Lloyd-LaFollette Act (5 U.S.C. § 7211) and states: "The rights of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

See: http://www.osec.doc.gov/opog/dmp/daos/dao219_1.html

We hope this information has been helpful. If you have any further questions, please contact me at 202-482-3663.

Sincerely,

James Schufreider
Performing the non-exclusive duties of the
Assistant Secretary of Commerce
for Legislative and Intergovernmental Affairs

cc: The Honorable Gerald E. Connolly, Ranking Member

[1] *See* e.g. https://www.uspto.gov/about-us/organizational-offices/office-general-counsel/whistleblower-protection-enhancement-act and http://www.wrc.noaa.gov/wrso/forms/sf312.pdf and https://www.nist.gov/sites/default/files/documents/2017/01/12/nist_model_nda_receipt_of_proprietary_information_v2016.2_fillable_for_website.doc_003.pdf