

Recommendations for OSTP's Guidance for Implementing NSPM-33 on National Security Strategy for US Government-Supported Research and Development

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Subcommittee on Research Security, National Science and Technology Council
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Alliance of Asian Faculty and Staff Associations
Asian American Academy of Science and Engineering (AAASE)
Asian American Scholar Forum (AASF)
Case Western Reserve University Asian Faculty Association
University of Michigan Association of Chinese Professors

To maintain the United States' leadership in science and technology, encourage academic collaborations, and attract talent to the US, we support the development of a transparent and supportive disclosure process while ensuring confidentiality.

A chilling effect is palpable in the scientific community. A recent survey conducted by the Asian American Scholar Forum polled university faculty members across the United States. Of the 1354 respondents, 98% are US citizens or permanent residents of Chinese descent. 64% of respondents indicated that they feel unsafe as academic researchers, and 67% are considering leaving the US, even though 89% would like to contribute to strengthening US leadership in science and technology. In addition, 44% are wary of applying for federal grants and 90% note that it is more difficult to recruit top international students compared to five years ago. To reduce the chilling effect, we propose the following recommendations:

- 1. Require Training on Research Security/Disclosure**

Where: Research Security Program → [Implementation Guidance](#), page 18.

Recommendation:

We recommend that OSTP guidance requires all research institutions to provide training on research security and disclosure for both scientists and staff, including how to safely conduct federal sponsored research and open science research, disseminate research, and fulfill disclosure requirements. We recommend that OSTP provide standardized materials for such training. The training session should provide clear guidance on federal grant application policies and procedures and should include follow-up support if questions arise during the grant application and administration periods. Ideally, that follow-up support would include a channel for questions to be asked on an anonymous basis, if desired,

to maximize participation. All training materials should be developed in collaboration with and reviewed by people trained in bias mitigation to avoid 'threat awareness' briefings that single out people, whether that be race, ethnicity, national origin, or other factors.

Rationale:

Currently, most US universities do not provide training on research security and disclosure requirements. For those universities that provide training, the quality and content covered vary dramatically. Standardized training materials from OSTP will not only provide more uniform training, they will also set clear policies and procedures for the faculty and staff to follow in a consistent way. Conveying such important knowledge in a non-discriminatory manner is critical to building trust between the research community and the government. Such proper training would further reduce ambiguity and confusion with respect to policies, procedures, and disclosure requirements for federal funding applications and grant administration. Consistent training would also improve transparency and accountability of all parties involved, thus reducing the chilling effect and benefiting the research community and US society as a whole.

Building trust will help create channels of communication so that, going forward, the research community and government can discuss, and if necessary adjust, requirements based on experience. In other words, creating guidance on NSPM-33 is the next step in research security, not the end point.

2. Establish a Public Office for Reporting Wrongful Penalties

Where: Information Sharing → [Implementation Guidance](#), pages 15-17.

Recommendation:

We recommend that OSTP establish a public office that will collate and curate thoughtful reports by researchers of wrongfully-imposed penalties and actions taken against them by universities, research institutions, and funding agencies. This office should have the authority to independently review integrity issues of any kind including, but not limited to, penalties imposed on researchers. It should also have the authority to enforce corrections. The public office should be staffed by senior leadership to assure that the office has credibility within OSTP and the government more broadly. The public office should further create an external advisory board to advise on best practices in research integrity, build trust between the research community and the government, and aid in case reviews, including weighing in on recommended actions. The external advisory board should bring together a range of expertise; for example, by including not only university administrators but also faculty who do not hold administrative positions

and civil rights experts, as well as other persons with relevant expertise. The increasing use of ‘conviction integrity units’ by prosecutors’ offices across the country provides a helpful model for structuring such a public office and external advisory board within OSTP.

Rationale:

Enormous power asymmetries exist among individual scientists, research institutions, and funding agencies. For example, research institutions are financially dependent on funding agencies. Individual researchers are in the weakest position, especially if they are not supported by their research institutions. These asymmetries have caused wrongful investigations and penalties. The proposed office and external advisory board can partially mitigate such asymmetries, which can reduce the fear factor and other concerns when applying for federal grants.

3. Clarify Regular Academic Activities and Exempt Them From Disclosure

Where: [Consequences for Violation of Disclosure Requirements](#) → [Implementation Guidance](#), pages 11-14.

Recommendations:

We recommend that the OSTP guidance **not only state that** *regular academic activities* are **not** acts of intellectual property theft nor economic espionage, but also **provide** explicit examples of regular academic activities that are *not* subject to disclosure requirements and thus will not be recommended to the Department of Justice for criminal investigation, with the potential to result in criminal charges. This list should be maintained as a living document and resource.

Specifically, we recommend that the OSTP guidance include language that “regular academic activities” include, but are not limited to, the following:

- writing letters for scholars for their academic advancement or award nominations;
- receiving an honor or award from an academic institution or scientific society (see next recommendation if it comes with money above certain threshold);
- reviewing research proposals;
- disseminating published research results via research talks hosted by international research institutions, as well as at conferences and workshops (including via online platforms);
- releasing software and datasets into the public domain in compliance with US federal laws and regulations;

- serving on advisory boards and visiting committees of peer institutions or academic societies, award committees, academic conference organizing committees, or editorial boards of journals (see next recommendation if compensation is above certain threshold);
- recommending and hosting scholars with fellowships from academic or non-profit organizations;
- publishing the results of collaborative research;
- providing published materials, such as a plasmid, to the international research community, as mandated or recommended by scientific journals.

These activities generally require disclosure regardless of the nations involved. We recognize, however, that certain government grants might limit some of the above activities for work done specifically under that grant. In such cases, we recommend that the OSTP guidance expressly states that limits on the above activities must be made explicit in the grant forms and be acknowledged explicitly by the grantee.

We also recognize that researchers may wish to proceed with what they believe to be a “regular academic activity” involving entities outside the US, yet not be certain whether those research activities should be disclosed. In such cases, we propose that OSTP, along with the funding agencies, consider implementing a ‘no action letter’ procedure similar to that employed by the U.S. Securities and Exchange Commission. Such a procedure would involve describing the request, analyzing the particular facts and circumstances involved, discussing applicable laws and rules, and, if the staff grants the request for no action, would conclude with a statement that OSTP, and the relevant funding agency, would not recommend enforcement action by the federal government against the requester based on the facts and representations described in the individual's or entity's request. While we recognize that OSTP has constrained resources, even limited use of this procedure would enhance dialogue between OSTP and the research community, increase transparency in how OSTP makes its determinations, and build a body of guidance for the research community. OSTP should work with the external advisory board (as proposed above) to develop guidelines and procedures for redacting confidential information in such ‘no action letters’ so that OSTP’s guidance is available to the broader research community.

In addition, we recommend that the OSTP guidance provides clear and understandable criteria to federal funding agencies on the types of academic activities that warrant referral to the Department of Justice for criminal investigation.

Rationale:

The vast majority of researchers want to do the right thing but are afraid of being wrongfully targeted for pursuing regular academic activities. Establishing the 'safe harbors' listed above, and providing additional clarity on the meaning of compliance will allow scholars to better cooperate in meeting the larger national security guidelines, while pursuing their normal academic activities, in a climate of greater understanding and reduced fear.

The lack of understanding by the federal law enforcement agencies about the difference between criminal activities and regular academic activities has sent a ripple of fear across academia. Some of that fear stems from the criminal complaint filed by FBI agent McCarthy¹ against Prof. Gang Chen at MIT, in which writing recommendation letters for Chinese students and being invited to review research proposals by the Chinese NSF since 2015 are listed as criminal activities. We note that our NSF had an office in Beijing to collaborate with Chinese NSF until February 2018.

The authors of these recommendations and our colleagues are actively influenced by that fear. It is real, and it is serious. The resulting chilling effect is harmful to US interests. The fear would be eased significantly by an explicit statement that regular academic activities, particularly ones that have been wrongly construed as criminal in criminal complaints in the past, are not subject to disclosure requirements.

4. Simplify Disclosure of Foreign Funding/Support/Income, Clarify Timelines

Where: [Disclosure Requirements and Standardization](#) → [Implementation Guidance](#), page 7

Recommendation:

We recommend that, going forward, OSTP guidance require PIs to disclose current and pending foreign funding, participation in talent programs, labs under the PIs direction, appointments of supervision responsibility, and external income in excess of \$5000 per year. The forms should be clear in citing these requirements, adhering to a standardized format across various grant-making agencies, and not subject to length limits. The forms should require this information in a country-neutral manner (i.e., *all* foreign funding should be disclosed, not just that sourced in certain countries). The OSTP guidance should clarify that, in general, disclosure of past activities is not required. If specific

¹ [Criminal complaint](#). HSI Special Agent Matthew **McCarthy**, Jan. 13, 2021.

grants require disclosure of past activities, those grants should explain specifically which disclosures are required and the rationale for the disclosure.

In addition, we recommend that OSTP guidance states that researchers will not be reprimanded or criminally prosecuted for not disclosing activities if disclosure was not required at the time of the grant application. If disclosure rules shift during a grant period, the guidance likewise should state that researchers will not be reprimanded or criminally prosecuted for not disclosing activities *unless* the researcher is provided with, and confirms receipt of, notice of the change in disclosure rules and, after a reasonable time for compliance, still does not disclose ongoing activities that fall within the scope of required disclosure. As OSTP and federal agencies update disclosure requirements, the updated requirements should not be applied retroactively.

Rationale:

Some wrongful prosecutions have indicted American scientists for their failures to disclose collaborations with Chinese research institutions at a time when such activities were encouraged and/or when rules prohibiting such collaborations were not clearly stated or publicized. For example, the DOJ charged Prof. Gang Chen for failure to disclose certain activities in his grant application in 2017 but then dropped all charges a year later after learning that DOE did not have disclosure requirements in 2017. DOE's new rule was not effective until October 2020.

By making such timelines clear in the OSTP guidance, the DOJ, other agencies, and researchers are less likely to make mistakes. This will help to reduce the chilling effect caused by wrongful prosecutions and punishments.

We suggest \$5k per year as the threshold for external income disclosures because many universities have been using this amount as the threshold for internal conflict of interest reports. Payments below this threshold generally are for minor interactions, such as honoraria for guest lectures or travel expenses.

5. Ask for Disclosure of Overlapping Support rather than of In-Kind Contributions

Where:

[Disclosure Requirements and Standardization](#) → [Implementation Guidance](#) → Collection of information associated with the required Tier I disclosure requirements within R&D award application processes (including pre-award and post-award

Recommendation:

We recommend that the OSTP guidance require PIs to disclose current or pending support from foreign sources that overlap with proposed or awarded federal grants. We recommend that the guidance provide a clear definition for an overlapping support that requires disclosure, such as:

- Any compensation above a threshold amount (e.g. \$5,000/year) from a foreign source to the PI or any participants in the PI's research laboratory to provide overlapping support to a proposed or awarded project.
- Any compensation from the awarded federal grant to a foreign individual or institutions above a threshold amount (e.g. \$5,000/year).
- Any foreign research grants, gifts, and fellowships that exceed a threshold (e.g. \$10,000/year) to provide overlapping support to the PI's federal funded research.

We recommend that the OSTP guidance (1) differentiate overlapping support from collaborations or from material sharing mandated by publications and (2) exclude collaboration and material sharing mandated by publications from disclosure. Collaborations aim to have joint publications. Resources belonging to collaborators (e.g., their office or laboratory space, salary, equipment, supplies, employees, or students) are not support for the PI and should not require disclosure. Regarding disclosures by participants in the PI's research laboratory, provided that the PI makes reasonable efforts to alert participants of this rule and makes clear that compliance is required, the PI themselves will not be held responsible if a participant thereafter fails to make the required disclosures.

Rationale:

We believe it is better to address the problem of overlapping funding from foreign sources directly, instead of requiring the disclosure of in-kind contributions and then trying to identify overlapping funding, which is an indirect approach.

This recommendation has several advantages over the disclosure requirements of in-kind contributions. First, it clearly tells researchers and research institutions that a federal grantee should not have overlapping funding from foreign sources, whereas the disclosure requirements of in-kind contributions do not convey the reasoning underlying the rule as effectively.

Second, it can greatly reduce administrative and investigative burdens on federal agencies. Federal agencies would need substantial resources to identify overlapping funding from the disclosed information of in-kind contributions and

OSTP would need to define what types of in-kind contributions constitute overlapping funding.

Third, it can substantially reduce the administrative burden on researchers and research institutions. The concept of overlapping funding is clear and is already required for different federal grants, whereas the requirements of in-kind contributions are ambiguous and confusing, which has the unintended consequence of creating fear of making errors.

Fourth, by differentiating overlapping funding from collaborations, the guidance can avoid the unintended consequence of discouraging international collaborations. Resources belonging to collaborators (e.g., their office or laboratory space, salary, equipment, supplies, employees, or students) are not foreign support for the PI.

Finally, we note that materials described in publications are mandated by scientific journals and funding agencies to be shared with the international research community. Such sharing should be regarded as a regular academic activity (see Recommendation 3) and should not require disclosure.

6. Differentiate In-Kind Contributions from Collaborations and Add Thresholds

Where:

[Disclosure Requirements and Standardization](#) → [Implementation Guidance](#) → Collection of information associated with the required Tier I disclosure requirements within R&D award application processes (including pre-award and post-award elements), pages 2-4.

Recommendation:

If Recommendation 5 is rejected in favor of disclosure of in-kind contributions, this recommendation addresses how the disclosure of in-kind contributions could be improved. We recommend that the OSTP guidance (1) differentiates in-kind contributions from collaborations and material sharing mandated by publications and (2) excludes collaboration and material sharing mandated by publications from disclosure. In-kind contributions are those made without return to the contributors. By contrast, collaborations aim to have joint publications.

We recommend that the guidance simplify the in-kind disclosure requirements to include only resources provided directly to the PI that exceed certain thresholds, e.g, \$10,000/year to the PI. Resources belonging to collaborators (e.g., their office or laboratory space, salary, equipment, supplies, employees, or students)

are not in-kind contributions for the PI.

Rationale:

Materials described in publications are mandated by scientific journals and funding agencies to be shared with the international research community.

Collaborators are co-authors of their joint publications. It is unnecessary to further disclose the collaborators and often impractical to put dollar amounts on their resources.

In-kind funding support should be disclosed, but OSTP should provide a specified threshold to minimize administrative burden. We suggest \$10k as the threshold for in-kind contributions to the PI to reduce the burden on researchers and research institutions. Moreover, we believe the \$10k threshold is appropriate because contributions under these amounts generally are minor, such as a small hardware donation.

Currently, the requirements of disclosure of in-kind research support are ambiguous and confusing, which has the unintended consequence of creating fear if any errors are made and, thus, incentives to avoid engagement in international collaborations. Furthermore, they also cause reluctance to prepare and submit research grant applications, due to the administrative burdens of managing the risks associated with administering grants, and fear of heightened scrutiny on scientists and researchers of Asian, particularly Chinese, descent. Lastly, these requirements do not help identify or eliminate duplicate funding of research.

7. Provide information on how the disclosed information may be used and/or may impact the PIs

Where:

[Disclosure Requirements and Standardization](#) → [Implementation Guidance](#)

Recommendation:

We recommend that the OSTP guidance requires government agencies and funding programs to provide information on how the information disclosed by the PIs is used and how it may impact the researchers and/or their institutions. This may include information about what efforts may negatively affect the PIs' chance to obtain funding, what efforts may warrant careful discussions to mitigate various concerns, and what efforts may have a positive impact that is not well-known by the community.

Rationale:

Providing sufficient insight on how the disclosed information would be used provides transparency of government operations and improves the mutual trust and strong sense of shared responsibilities between government and researchers toward utilizing taxpayers' money in advancing science and technologies. This information on the "how" and "why" can improve the understandings of researchers and the general public, and encourage PIs toward more desired, positive behaviors and curtail undesired behaviors in clearer terms.

The absence of such background information can lead to unnecessary fear and mistrust from the research community toward government operations, and worsen the chilling effects that are already serious today.

As agencies such as NSF encourage healthy international collaborations, the collaboration information disclosed by the PI may provide evidence of the positive impact on how the U.S. taxpayers' fund is leveraged and further augmented through collaborations to accelerate the advancement of science and technologies, which in turn helps the U.S. maintain its leadership roles in the world. Knowing the positive effect of their disclosed information can encourage researchers to participate in the disclosure process and foster healthy partnerships.