



# **The National Background Investigations Bureau Impact Assessment of the FY2017 National Defense Authorization Act, Section 951 Implementation Plan**



September 2017

## Executive Summary

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In the FY2017 National Defense Authorization Act (NDAA), Section 951 plan submitted to Congress on August 29, 2017, the Department of Defense (DoD) asserts that a three-year phased migration of background investigation activities for DoD personnel to DoD is the best approach to address current challenges with the investigative process. The National Background Investigations Bureau (NBIB) does not agree with this conclusion, which was based on a premise today's Government-wide challenges can be mitigated by an organizational shift of a significant portion of the mission, and which does not fully account for the complexities of the investigative mission. The 951 plan does not adequately account for the inherent risks which, if realized, will have negative impacts on the enterprise and will reverse progress on reform initiatives underway. NBIB reached these conclusions after performing an analysis, conducted at the direction of the Acting Director of the Office of Personnel Management (OPM), and upon receipt of DoD's 951 plan, of challenges and impacts associated with a migration of the DoD portion of the investigative mission if the 951 plan is implemented.

NBIB offers an alternate solution to address the government-wide challenges and recommends that consistent with its submitted 951 plan, DoD undertake efforts in coordination with the Performance Accountability Council's (PAC) current governance structure and the Security, Suitability and Credentialing Executive Agents to explore and develop innovative and streamlined approaches to personnel vetting.<sup>1</sup> This will enable the government to more rapidly sharpen its focus on background information that is most relevant to identifying and maintaining a trusted workforce while maintaining NBIB's role as the consolidated investigative service provider (ISP) for DoD and its other federal customers. NBIB already has the expertise, resources, and infrastructure in place to support the actual work of conducting background investigations and should continue to serve in that operational role with no migration of background investigation activities to DoD. It will be of greater benefit to the entire government to permit the newly-created NBIB to continue to facilitate and enhance the background investigation process while maintaining momentum to transform business processes, than to divert attention and resources toward undertaking an organizational shift that would result in duplication of effort and inconsistent application of standards. Additionally, keeping the mission at NBIB will free DoD to focus on its important work on the development of the National Background Investigation Services (NBIS) IT architecture that will serve the federal community by providing responsive end-to-end services.

In general, the 951 plan, if implemented as the Senate Armed Service Committee (SASC) has suggested in its draft FY2018 NDAA Section 938 language, will direct the bifurcation of the role of the Government's designated primary background investigations provider, contrary to Congressional policy as expressed in the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>2</sup> and contrary to the

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<sup>1</sup> Pursuant to EO 13467 (2008), as amended, DoD has been a key member of the PAC governance structure, along with OPM, ODNI, OMB, and NBIB, and continues to play a critical role in reforms achieved by the Executive Agents.

<sup>2</sup> 50 U.S.C. 3341

consensus judgment of Executive Branch formulated through an exhaustive interagency review process, and codified in Presidential Executive Orders.<sup>3</sup> Such action will generate unnecessary costs, adversely impact agencies across government, exacerbate the current investigative backlog, distract attention from other Administration priorities, and infringe upon the President's longstanding authority over background investigations for access to classified information and suitability for Executive Branch appointment. The significant costs and delays that would be associated with starting up a separate investigative provider within DoD can be avoided by leaving the operational aspects of the investigative process with NBIB and focusing the PAC Executive Agents, DoD, and the other stakeholders on transformation of the background investigative process through revised policy and agile technology.

Moreover, the bifurcated approach contemplated by DoD's 951 plan would significantly disrupt enduring and well-considered legal authorities and policy determinations that have long favored a centralized, consolidated approach to background investigations by a civilian agency focused on personnel vetting. In 2005 when the DoD and OPM programs were consolidated into one unified ISP, with express congressional approval,<sup>4</sup> the Deputy Secretary of Defense acknowledged that the Personnel Security Investigation function was not a core mission of the Department. In communicating the Memorandum of Understanding between OPM and DoD to the Office of Management and Budget (OMB) in 2003, Paul Wolfowitz, Deputy Secretary of Defense wrote: "The proposed transfer of function would improve the timeliness of investigations and leverage the success that OPM and the private sector have achieved over the last several years in this area. It also would make OPM the central provider of these services for the government and enable OPM to better address the critical national need for these services through improved utilization of existing resources. In addition, the transfer would allow DoD to concentrate its efforts on other security functions, which are part of the Department's core mission responsibilities." The logic conveyed in Mr. Wolfowitz' memo has been reaffirmed through ongoing interagency dialog, including a 90-day review that resulted in the consolidation of investigative functions with NBIB under E.O. 13741 (2016).

In addition, DoD's plan would create ambiguities about operative authorities (and what background investigations may be used for which purposes) and undermine efforts to achieve true reciprocity. Under the suitability program delegated by statute to the President, and by the President, in turn, to OPM, only OPM may delegate authority to conduct an investigation to be used for a suitability determination.<sup>5</sup> DoD does not address how its new authority to conduct its own national security investigations would align with OPM's obligation to perform those investigations itself, if OPM has not delegated investigative authority to another agency. DoD does not address the impacts on reciprocity, if, it diverges from Federal Investigative Standards jointly issued by the Executive Agents. This would erode the lengthy, collaborative, interagency effort to

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<sup>3</sup> E.O. 13741 of Sept. 29, 2016; E.O. 13764 of Jan. 23, 2017.

<sup>4</sup> See Public Law 108-136, § 906(a), 5 U.S.C. § 1101 note.

<sup>5</sup> See 5 U.S.C. §§ 3301, 3302; E.O. 13764 (setting out current text of the President's Civil Service Rule II, codified at 5 C.F.R. § 2.1).

coordinate and issue a comprehensive statement of authorities in E.O. 13764 on January 17, 2017.

NBIB has identified the impacts and potential consequences the DoD 951 plan will have on NBIB and the rest of government.<sup>6</sup> NBIB's assessment is based on the 951 plan submitted to Congress on August 29, 2017. DoD's plan did not include costs associated with the transfer, projected manpower or processes, therefore NBIB's ability to fully understand and assess potential impacts was limited to available information. NBIB will continue to assess impacts as more information is learned on DoD's future processes, manpower, funding and timeline. Based on what is known today, if implemented, Section 951 will:

1. **Disrupt the progress and momentum achieved** by NBIB and its interagency partners to increase the effectiveness and efficiency of the investigative process
2. **Increase unit costs for background investigations, services and products** due to a loss of economies of scale, competition among government agencies over for the same limited contract resources, duplication of functions, and increased overhead expenses.
3. **Increase to inventory, backlogs and timeliness** as current efforts to drive down the current investigative inventory will be severely impacted.
4. **Dilute standardization** due to inevitable inconsistencies in the application of investigative standards, training, techniques and procedures, and reporting.
5. **Destabilize Government's current initiative to increase investigator capacity** with both Federal and contractor personnel by discouraging contract vendors from making the investment to continue to recruit and onboard investigators.
6. **Hinder transferability of clearances (reciprocity)** by affording the DoD unique, single-agency discretion to develop and use different methods and techniques to investigate its population without deference to the Executive Agents' approval or Government-wide buy-in and risk acceptance
7. **Reduce effectiveness of a Government-wide Counterintelligence and Threat Coordination capability** by splitting NBIB's unique authorities, data sets, and employee expertise.
8. **Increase concern from other stakeholders** as the 951 plan would potentially result in adverse Government-wide impacts to NBIB's other stakeholder agencies and customers.
9. **Conflict with statutes recognizing the President's discretion**, consistent with Article II of the Constitution, to prescribe investigative requirements and to select investigative service providers;<sup>7</sup> and conflict with a statute enacted

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<sup>6</sup> OPM has also undertaken a review of the impacts of this action upon OPM in its entirety. That study is not discussed here, but a summary of findings can be provided upon request.

<sup>7</sup> 5 U.S.C. 3301, 5 U.C.C. 11001(e)(5), 50 U.S.C. 3161.

as a result of the 9/11 Commission to ensure that a single Executive Branch agency, to the extent practicable, conducts security clearance investigations under presidential direction.<sup>8</sup>

10. **Undermine and counter the Administration's direction** to improve the efficiency, effectiveness and accountability of the Executive Branch<sup>9</sup> by dismantling the existing consolidated program with its assigned roles and responsibilities and consistency of standards, replacing it with a diluted program carried out by multiple providers with different mission goals.

There is universal agreement across Government and industry that it is critical to continue to drive positive change and transformation in the process for identifying and maintaining a trusted workforce. However, an organizational shift, should such legislation be enacted, will likely derail continued enterprise-wide process reform, introduce unnecessary risk and fragmentation into the investigative process, degrade timeliness, and increase inventory. The Government, both the Executive and Legislative Branch, should fully consider these likely consequences before implementing a transition of responsibility for DoD's background investigation (BI) workload.

## NBIB's Progress

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NBIB was established in October 2016, following a comprehensive interagency effort led by OMB to improve, modernize and streamline background investigation processes across Government. Since its establishment, NBIB has accomplished the following.

- **Streamlined processes, reallocated resources, and amended internal policies** for greater efficiencies and effectiveness while maintaining quality and reciprocity for all of Government. This has allowed NBIB to reform traditionally manually-intensive practices, saving roughly 145,000 man-hours, the equivalent of 75 Agents working a full year. These initiatives include, but are not limited to:
  - Improving fieldwork logistics by centralizing and prioritizing cases, increasing efficiencies of Enhanced Subject Interviews (ESIs) and reporting, leveraging video teleconferencing (VTC) for Subjects in remote locations, and using telephonic interviews more liberally when applicable to quickly conduct investigative leads on clean non-issue cases (collectively: 11,463 hours of work);
  - Digitizing and automating data, records and information by proactively reaching out to record providers to negotiate direct connections, access to terminals, and revised interagency agreements to more quickly facilitate downstream actions, such as case closings and adjudications;

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<sup>8</sup> 50 U.S.C. 3341(b)-(c).

<sup>9</sup> OMB Memo M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*, Apr. 12, 2017

- Successfully expediting 14,000 cases in accordance to agency prioritized lists with an average timeliness of 95 days, from date identified;
  - Making more targeted use of flags to trigger expanded investigations, resulting in the cancellation of 563 unnecessary enhanced subject interviews (5,224 hours of work);
  - Converting top secret legacy cases to the new Tier 5 investigations for federal workforce (128,000 hours of work); and
  - Launching a continuous evaluation product to satisfy the Office of the Director of National Intelligence's (ODNI's) August 2017 requirement.
- **New organizational structure** with strong interagency representation through full-time employees recruited to OPM from stakeholder agencies as well as through a newly established joint duty program. This organizational structure addresses current challenges and introduces mitigation activities to best serve the interests of all Government agencies and departments, as well as Government-wide reform efforts. The structure will help facilitate NBIB's strategy that concentrates on addressing three key areas for reform: innovation, risk management, and customer and stakeholder engagement in transformation activities.
  - **Strong interagency partnerships** with the broader Security, Suitability, and Credentialing Line of Business (SSCLoB) community to identify and implement background investigation program improvements, to include the role of the NBIB Director on the PAC. As a member of this governance structure, NBIB engages with PAC Principals and DoD on daily to weekly basis as the government's primary ISP, and coordinates the 22 other delegated agencies that leverage NBIB's infrastructure in some capacity (e.g., electronic questionnaires, automated record checks, investigations, clearance repository, training materials, implementation policy guidance; etc.)
  - **Conducted a comprehensive, interagency diagnostics assessment in FY16** that identified 57 pain points. NBIB finalized its Business Process Reengineering (BPR) Plan in FY 17 and formed a new Strategy and Business Transformation office that will address technology, process changes and data-based decisions to realize results in efficiency gains and to further support the development of NBIS, a shared government-wide IT service. Successes and progress, thus far include:
    - Release of the new national security questionnaire to be used by agencies (August 2017);
    - On-track to release eApplication (fall 2017); on-track to release eAdjudication as a shared service to all agencies (fall 2017);
    - Completion of a social media pilot (summer 2017);
    - Launch of a law enforcement liaison office and campaigns to improve quality of criminal checks conducted by all 23 ISPs (February 2017);

- Completion of a pilot to inform Executive Agents of the benefits of more liberal use of VTC in conducting investigations (April 2017)
- **Increased workforce capacity** through both a new contract with four suppliers and sustained additional hiring by NBIB. The federal and contractor workforce capacity increased by 25% to address the current investigative inventory. This allowed NBIB to increase average monthly production by 6% in FY2017 for the T3 (secret) and T5 (top secret) population; and 15% higher in the last quarter of FY2017 compared to the FY2016 monthly average. As investigators complete training and reach maximum productivity, NBIB's monthly production rate is projected to continue to increase into FY2018.
- **Continued engagement** and provided solutions as part of an interagency initiative with the Presidentially-delegated Executive Agents (OPM and ODNI), OMB, and other stakeholders, including DoD, to reduce the investigation inventory more quickly. NBIB provided a substantial number of the ideas considered based on its vast expertise and ability to provide rich, historical data to inform decisions. Many of the efforts resulting from this idea sharing initiative are already underway by NBIB in close partnership NBIB's 100-plus federal customers and stakeholders.

NBIB, with support from its interagency partners, has made and will continue to make improvements to the background investigation process. Considering the additional disruption, costs, and duplication of effort associated with executing a transfer of certain investigative responsibilities to DoD, we are confident that more can be accomplished for the whole of Government in reducing the backlog to identifying and employing innovations in the background investigations process by leaving the mission intact and with NBIB.

## Impacts of Section 951

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Section 951 contradicts the long-standing decision to consolidate investigative functions that began with language in the Intelligence Reform and Terrorism Prevention Act of 2004 and has been considered and validated in subsequent Executive Orders (E.O. 13467 issued in 2008, E.O. 13741 issued in 2016, and E.O. 13764 issued in 2017) following extensive interagency dialogue. This history of a focused, consolidated investigative function is consistent with the current Administration's policy to improve efficiency, effectiveness, and accountability of Federal agencies. Bifurcating the mission would run counter to statute and to the policy of the Executive branch, and it would create unnecessary redundancy within the Federal government resulting in significant increases in costs, duplication of efforts, dilution of standards, and erosion of transferability of clearances and other forms of vetting adjudications.

It is important for the negative impacts to NBIB, OPM, and the rest of Government to be acknowledged as part of an informed and responsible decision making process. Only by doing so do we provide a realistic representation of the challenges that lie ahead. Before decisions are made to split and/or transfer certain investigative responsibilities, DoD has an obligation to:

- Provide specific insight on its strategy to address the backlog, including realistic funding requirements and key milestones;
- Provide insight into how DoD expects to constitute the blended workforce that would be required to support the initiative; many of the available resources are already committed to NBIB contracts;
- Provide clarity on the level of risk that DoD is willing to accept to reduce its investment of costs and time;
- Address the implications to reciprocity of adjudicated security clearances if DoD accepts greater risk in the background investigations process than customer agencies are willing to accept, including customers within DoD, and customers using DoD services;
- Enumerate and provide a plan for addressing challenges to DoD and the greater government as a result of accepting this mission;
- Provide a plan to supplement the diminished funding, resources and capabilities available to NBIB to serve as the primary ISP for the government; if DoD starts conducting its own investigations; economies of scale will be lost to NBIB if DoD no longer makes its requests to NBIB;
- Provide specific information regarding how DoD intends to comply with standards and align with operative guidance from the Director of National Intelligence in his role as the Security Executive Agent and the Director of Office of Personnel Management as Suitability and Credentialing Executive Agent.

As a matter of good government, the tradeoffs introduced by Section 951 should be made as clear to the decision makers as possible, as a number of adverse impacts are likely should Section 951 be implemented. Specifically, its implementation is expected to:

1. **Disrupt the progress and momentum achieved by NBIB and its interagency partners.** Since NBIB was launched on 1 October 2016, NBIB has made great progress on both quick-return initiatives and long-term solutions to reengineer processes and build out the requirements of NBIS. If NBIB is faced with splitting its program over the next three years, including leveraging its current infrastructure and resources for DoD's use, assuming that can be achieved within applicable legal constraints, NBIB will be forced to redirect its attention and resources from transformational initiatives to less beneficial initiatives supporting an organizational shift. That redirection will, in turn, have additional negative effects:
  - Dismantling and bifurcating processes is likely to result in innovations being developed in silos, therefore not being adopted for Government-wide consumption. Today, NBIB is the primary initiator of innovation to investigative processes across Government, even for agencies that have delegations to perform investigations themselves. In one example, NBIB has established a Law Enforcement Liaison Office that works with state and local law enforcement offices around the country

to improve the quality and accuracy of criminal checks for all agencies. NBIB, and other delegated agencies, may not benefit from innovative solutions that are unique or customized to DoD operations.

- Section 951 creates a need to build out inter-agency access to NBIB legacy systems, just when we were on the cusp of beginning to phase out these systems as NBIS came online. This could have significant impacts and require interface development, changes to access controls and permissions, and other modifications that could cost significant time and money.

2. **Increase unit costs for background investigations, services and products** due to a loss of economies of scale, competition among government agencies over for the same limited contract resources, duplication of functions, and increased overhead expenses.

NBIB expects that the combined workforce of both NBIB and DoD will be significantly larger than NBIB's current workforce, as DoD will need additional personnel to duplicate headquarters support that both programs will require to operate. This will result in a higher total annual operating cost, as NBIB estimates that the annual overall costs for both BI programs, NBIB and DoD, will increase the total cost to the government by 28%, which does not include transition or startup costs for the DoD

NBIB anticipates impacts to the cost of investigative products and services during and after the transition as a result of the increased government-wide footprint that will result, duplication and transition. Congress will need to increase appropriated funding to all departments and agencies to pay for the net increase in costs for background investigations, services, and products. Many of these products and services (e.g., National Agency Checks, Central Verification System, etc.) are used by DoD today and would continue to be used by DoD, as they are by other delegated service providers (e.g., DIA, DHS, ATF, NGA). Costs that are part of the NBIB products would need to be readdressed using a different model, as revolving fund receipts from DoD will decrease as DoD assumes responsibility for investigative products. As a result, agencies would likely need to acquire or reallocate appropriated funds to enable reimbursement to NBIB for the resulting increase in unit costs for background investigations, services and products. Also, agencies, including DoD, would need to continue to contribute to NBIB through the revolving fund model for ongoing overhead costs associated with NBIB's shared services (e.g., investigative forms, promulgating implementation guidance and policy, and other functions that NBIB will still be obligated to perform on a Government-wide basis. To this point, NBIB estimates that prices to the remaining non-DoD customers have the potential to increase measurably.

To function as separate ISPs, OPM and DoD will each need basic operational resources that cannot be scaled directly to investigative workload. For this reason, the overall program footprint and resulting costs will increase as a result of the significant duplication of effort. In order to continue to perform its

obligations to other agencies, NBIB would need to retain resources and services that DoD would then need to replicate on its own, such as: leased property for facilities, a record center and mailing operation, an extensive field investigation structure for coverage (with field office supervisors), headquarters support staff (legal, legislative, case review, human resources, IT, contracting, budget, FOIA / Privacy, administrative staff), vehicle fleets, mobile device inventory, case submission and tracking systems, travel management systems, etc.

3. **Increase to inventory, backlogs and timeliness.** Today, NBIB's inventory is approximately 700K investigative products, including simple record checks, suitability and credentialing investigations, and more labor-intensive national security investigations. To better understand the impacts of a transfer in responsibility, it is important for decisions makers to fully understand the true "backlog" of investigations.

- It is important to note that the ~700K does not represent the individuals that are waiting for a security clearance to begin working for or on behalf of the Government. Many of these products are not for a security clearance, or the individuals are currently working for the government with a current clearance and/or granted an interim clearance enabling them to work pending the completed investigation.
- Of the ~700K investigative products, ~545K are for national security determinations or clearances.
- The remaining ~155K are either simple record checks that move in and out of the inventory daily or investigations that support credentialing and suitability determinations.
- Of the ~545K national security investigations in the current inventory, ~335K are for initial investigations and ~210K are reinvestigations.
- Due to the varied nature of the products and related timelines, a steady state inventory would typically be approximately 180K.

Understanding that NBIB's inventory is not inconsequential, NBIB is working with customer agencies to prioritize investigations, improve timeliness for the most critical investigations, and thus mitigate the impact of the inventory, which has been higher than usual.

Under normal circumstances, new case submissions from agencies fluctuate from month to month throughout the fiscal year. The impact of a transition to DoD will add additional stress to the system. If DoD is able to turn work on/off as a result of the 3-year phased transition enacted by Section 951 in order to meet timeliness goals and obtain a low inventory, NBIB efforts to drive down the current investigative inventory will be significantly affected and Government will face a great risk of the inventory further increasing.

4. **Dilute standardization** as advances made to standardize investigation and adjudication procedures will regress. A division of NBIB's mission will result in

competing personnel security programs and create both real and perceived negative impacts to quality. NBIB has made significant investments in improving investigative quality by building quality checkpoints into every phase of the BI process. These standardized investigation and adjudication procedures have been credited as part of an interagency reform initiative with NBIB's predecessor at the helm, and instrumental in Government-wide program success.

5. **Destabilize Government's current initiative to increase investigator capacity** with both Federal and contractor personnel by discouraging contract vendors from making the investments necessary to continue to recruit and onboard additional investigators. The 951 plan, which would enact DoD's phased approach in transitioning NBIB personnel to DoD over the course of three years, will negatively impact NBIB's ability to grow capacity and work down the current inventory that resulted from the full implementation of the 2012 Federal Investigative Standards and the dissolution of one of the largest fieldwork contractors.

NBIB will incur expenses to continuously hire and train new personnel who may transfer to DoD at a later date. Such uncertainty may impact candidates' willingness to accept offers from either NBIB or DoD. Because NBIB's current levels of personnel and resources are not optimal for current operations and to address the annual BI inventory, NBIB has a continuing need to recruit, train and fund additional personnel to address the backlog in the near term.

6. **Hinder transferability of clearances (reciprocity)** by affording the DoD unique, single-agency discretion to develop and use different methods and techniques to investigate its population without deference to the Executive Agents' approval or Government-wide buy-in and risk acceptance. If DoD employs such measures, non-DoD agencies and departments are unlikely to accept investigations and adjudications across Government, negatively impacting the efficiencies created through reciprocity. The section 951 plan, if implemented, thus introduces risks that will essentially undo the efforts and activities of the Executive Branch over the last ten years, and through the existing governance structure, to build a streamlined, standardized, and universal process. Decisions made based on what is best for the Executive Branch as a whole in support of reciprocity and full process efficiency are in jeopardy if decisions are based solely on individual agency considerations.

7. **Reduce effectiveness of a unique Government-wide Counterintelligence and Threat Coordination capability.** NBIB's authorities, data sets, and experienced Counterintelligence and Threat Coordination Activities (CITCA) team provide a unique government-wide capability to support and identify National Security and Insider Threats. NBIB's CITCA is able to identify potential threats and risks based on its unique position and data, and a potential split and/or transfer of certain investigative responsibilities to DoD would greatly reduce the effectiveness of this program. If this capability were to be split into different organizations and/or ISPs going forward (e.g., if CITCA analysts could look only at DoD cases vs. working on the

comprehensive threat picture and both data sets), this could result in this one-of-a-kind U.S. Government threat identification capability being lost or severely damaged.

8. **Increase concern from other stakeholders:** : It is important to implement transformational changes across all ISPs in a cohesive manner to continue progress made in instituting reciprocity throughout the investigative enterprise, thus promoting efficiency and cost savings for the U.S. Government and American taxpayers. However, the 951 plan would potentially result in adverse Government-wide impacts to NBIB's other stakeholder agencies and customers. Stakeholder agencies that use NBIB as its primary service provider have voiced concern with splitting the investigative program, and submitted the following statements to NBIB for consideration:

- Splitting the program represents an inherent conflict of interest if the largest consumer of BIs becomes the largest provider of background investigations. Agencies noted that DoD's expressed interest in modifying the investigative process on its own investigations to save money and time, will redound to the detriment of the investigations' quality and thus undermine reciprocity.
- It will also drive up costs through duplication of functions and unnecessary overhead expenses. Coupled with declining budgets, agencies will be forced to delay reinvestigations and be selective in ordering initial investigations, which in turn will detract from their ability to meet their individual missions and comply with congressional and presidential directives.
- There will be increased demand for limited resources, which will likely exacerbate the current backlog issues, further degrade overall timeliness, and drive up costs, as contractor resources will make themselves available to the entity willing to pay the most for their services. The American taxpayer would not be well-served if, by competing against itself in this limited market, the Government cannot control its costs.
- The organizational shift envisioned will result in loss of resources, as many mature and experienced personnel will choose to leave instead of participating in yet another significant transition (following the privatization of a significant portion of the OPM investigative function in the 1990s, and the transfer of the bulk of the investigative program at the Defense Security Services to OPM 2005). This loss of experienced employees occurred during the transition of the investigative function from DoD to OPM in 2005. Constant churning of the workforce depresses productivity and demoralizes even the best employees.
- It will trigger cascading adverse impacts in terms of timeliness, customer service, billing, quality, reciprocity and costs.

- It will damage the consistency and reciprocity that has been achieved.
- It will degrade the investigative process itself in scope and content, as agencies are wary of DoD's expressed desire to rely more on automated record checks as the basis for investigations.
- It will damage reform progress already made and impede the positive impact of new standards that represent the needs of the entire Federal community.

It is NBIB's understanding that a more comprehensive effort under OMB purview is underway to solicit feedback from additional agencies, including those that conduct their own investigations, to inform the decisions makers of unintended consequences and the best approach to mitigate the challenges that will result from an organizational shift.

9. **Conflict with statutes recognizing the President's discretion.** The 951 plan disrupts the long-standing Executive Branch discretion over national security and employee vetting matters, and create significant interpretive questions under existing law. To date, DoD has not addressed the complex legal landscape underpinning security, suitability, and credentialing efforts. Should FY 2018 NDAA, Section 938 be enacted and DoD is mandated to implement the 951 plan, the Administration will need to divert attention to interpreting conflicting statutes, revising Executive Orders, to adjust the security and suitability governance structure, and determining whether policies and standards related to investigations, adjudications, continuous evaluation, quality, and training must be reissued, revised, or repealed to comply with the new legal substrate. Ironically, this would undo a lengthy and labor-intensive, Interagency process undertaken just last year, to support NBIB's new role and the work of the two Executive Agents.

Specifically, a transfer of OPM's investigative responsibilities to another entity by administrative action would require a presidential Executive Order repealing or significantly amending several recent Executive Orders. Even then, the President would have to establish a means of adhering to 50 U.S.C. 3341's requirement that there be a single ISP to the extent practicable, as the designated entity is currently NBIB.

Conversely, if Congress directly reassigns OPM's investigative responsibilities to another entity, it will create conflicts with existing law unless it simultaneously amends 50 U.S.C. 3341's language requiring a single ISP to the extent practicable, and requiring a separate entity to designate other service providers in the event of impracticability. Congress arguably would also have to amend the language in 5 U.S.C. 3301, 5 U.S.C. 11001, 50 U.S.C. 3161, and 50 U.S.C. 3341 which recognize the President's discretionary authority to select ISPs, which he has exercised through Executive Orders making OPM the Government's primary and, for some case types, sole ISP; such provisions are incompatible with Congress' direct assignment of investigative functions to a particular agency, without regard to presidential discretion. For Congress to relieve the President of his authority

would be a significant step away from the President's historic role in personnel vetting relating to the hiring process and national security matters. A step of such significance should not be undertaken without careful and deliberate consideration, as it presents constitutional concerns.

Regardless of whether an Executive Order or a statute is used to transfer part of OPM's authority to conduct background investigations to DoD, separate legislation would need to be enacted to transfer personnel from OPM to DoD.

10. **Undermine and counter the Administration's direction** to improve the efficiency, effectiveness and accountability of the Executive Branch; and detract from Administration objectives to achieve civil service and other reforms. The 951 plan conflicts with the current Administration's goal to merge redundant functions split across agencies where consolidation supports efficiency, effectiveness and accountability.<sup>10</sup>

Additionally, the 951 plan will consume significant time, attention, and personnel and financial resources due to the inevitable complications and challenges that will arise during a transition of this magnitude. Contrary to DoD's stated plan, its time will likely be spent developing capability instead of driving reform, as DoD's time and resources will be primarily consumed by building the basic, day-to-day capabilities required to conduct BIs at scale for the entire DoD population, leaving little time or capacity for the consideration and pursuit of reform.

Serious consideration should be given to the cost the 951 plan has on the U.S. Government as a whole, to include DoD and the other Federal agencies, with respect to the retained workload within NBIB. This would provide a perspective on the total enterprise cost to provide BI processing across the U.S. Government and enable a comparison to the current state. While NBIB agrees that continued process reform is critical to minimize investigative delays and maximize support for national security, an organizational transition of function from one agency to another is not needed to achieve process reform and instead will introduce unnecessary risk and fragmentation into the investigative process in addition to reducing timeliness and increasing inventory. Given the in-depth analysis of the current state conducted as part of NBIB's recent BPR effort, we are confident that the relatively high costs of implementing the 951 plan would outweigh the quantifiable benefits to the whole of Government.

## Conclusion

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Great strides have been made over the last few years on reform efforts to the Personnel Security Process. These reforms have been driven by representatives from across the Executive Branch, to include DoD, and resulted in standards and processes that represent the needs of the entire Federal community. While much work is still needed, agencies rely on the governance structure that has grown out of these efforts and the

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<sup>10</sup> Executive Order 13781 of March 13, 2017, Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13959, sec. 2

related statutes and Executive Orders, including the leadership role of the Executive Agents for Security, Suitability, and Credentialing (OPM and ODNI) for government-wide buy-in. The current governance structure offers significant benefit in its ability to support the integrity of the Personnel Security Process across the enterprise. This proven model should be leveraged to modernize the BI process to improve performance, increase efficiency, and incorporate innovative techniques.

The 951 plan, if enacted, would transfer investigative capacity for DoD-affiliated individuals, and present a radical departure from the carefully and thoughtfully honed plans developed and implemented across the previous two administrations. It would also be incompatible with the current administration's emphasis upon improving the efficiency, effectiveness, and accountability of Federal agencies and efforts to merge functions, because it lacks an enterprise perspective on the cost and impact to the Government as a whole, and fails to consider key risks. For these reasons, NBIB strongly recommends further analysis and clarification, in coordination with the PAC PMO and the Executive Agents, of the issues noted above before moving forward with Section 951 implementation. The focus on innovation and process improvement suggested by DoD in its Implementation Plan can be achieved under the current governance structure while permitting NBIB to continue to perform its operational role.