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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Cass R. Sunstein 
Administrator
SUBJECT: Informing Consumers through Smart Disclosure

In the Memorandum on Transparency and Open Government, issued on January 21, 2009, the President called for the establishment of “a system of transparency, public participation, and collaboration.”¹ The Memorandum required the Office of Management and Budget (OMB) to issue an Open Government Directive “that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum.” Following the President’s Memorandum, OMB’s Open Government Directive requires a series of concrete measures to implement the commitments to transparency, participation, and collaboration.²

Section 4 of the Directive specifically instructs the Administrator of the Office of Information and Regulatory Affairs (OIRA) to “review existing OMB policies . . . to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government.” On June 18, 2010, OIRA issued a Memorandum on Disclosure and Simplification as Regulatory Tools, which set out guidance to “inform the use of disclosure . . . in the regulatory context.”³

Executive Order 13563 directs agencies “[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law” to “identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.”⁴ Executive Order 12866 provides that “[e]ach agency shall identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public.”⁵

¹ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, “Memorandum on Transparency and Open Government,” available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900010.pdf>.

² Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, “Open Government Directive,” M-10-06, available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

³ See, e.g., Memorandum for the Heads of Executive Departments and Agencies, “Disclosure and Simplification as Regulatory Tools,” available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf

⁴ Executive Order 13563, Sec. 4., available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

⁵ Executive Order 12866, available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866.pdf>.

The purpose of this Memorandum is to set out guidance for agencies to inform and facilitate the use of disclosure, specifically “smart disclosure.” As used here, the term “smart disclosure” refers to the timely release of complex information and data in standardized, machine readable formats in ways that enable consumers to make informed decisions. Smart disclosure will typically take the form of providing individual consumers of goods and services with direct access to relevant information and data sets. Such information might involve, for example, the range of costs associated with various products and services, including costs that might not otherwise be transparent. In some cases, agencies or third-party intermediaries may also create tools that use these data sets to provide services that support consumer decision-making. Such decision-making might be improved, for example, by informing consumers about the nature and effects of their own past decisions (including, for example, the costs and fees they have already incurred).

To the extent permitted by law, and where appropriate in light of government-wide policies,⁶ including those designed to protect privacy, agencies should give careful consideration to whether and how best to promote smart disclosure. This Memorandum was informed by input from, among others, the National Science and Technology Council’s Task Force on Smart Disclosure, which continues its efforts to promote smart disclosure.

I. The Benefits of Smart Disclosure

Under relevant statutes, disclosure is one of the chief tools that agencies can use to improve the operation of consumer markets. To be effective, disclosures should be designed in recognition that “[p]eople have limited time, attention, and resources for seeking out new information, and it is important to ensure that relevant information is salient and easy to find and understand.”⁷

Smart disclosure makes information not merely available, but also accessible and usable, by structuring disclosed data in standardized, machine readable formats. Such data should also be timely, interoperable, and adaptable to market innovation, as well as disclosed in ways that fully protect consumer privacy. In many cases, smart disclosure enables third parties to analyze, repackage, and reuse information to build tools that help individual consumers to make more informed choices in the marketplace.

Consumers will frequently be able to make better choices when they have accurate information about the economic consequences of those choices (including their own past choices and those of others). The best product for a particular consumer, such as an insurance plan, will often depend on that consumer’s distinctive situation. In some cases, consumers must take into account many details about their own current circumstances when selecting a product. In addition, they must often make predictions about their future circumstances. In practice, it is often time-consuming and difficult for consumers to track and analyze the complex information

⁶ See, e.g., Office of Management and Budget Circular A-130, “Management of Federal Information Resources,” available at http://www.whitehouse.gov/omb/circulars_a130_a130trans4. See also Memorandum for the Heads of Executive Departments and Agencies, “Information Collection under the Paperwork Reduction Act,” available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf

⁷ See *supra* note 3.

they need to make these judgments. Smart disclosure can help consumers to find and use relevant data, including data about the effects of their own past choices and those of others, to make decisions that reflect their individualized needs, and to revise and improve those decisions over time or as new circumstances arise.

Third parties can also use smart disclosure to create tools that help consumers to make informed choices. When individuals have access to their own consumer data, these tools can help them track their own information and analyze it to make better and more tailored choices. Such tools can also promote well-informed comparisons. Examples include comparison-shopping websites and mobile phone applications that help people to identify and compare local providers of many relevant goods and services. These tools can greatly reduce the cost to consumers of seeking out relevant information from individual companies. They can also help individuals search efficiently based on very specific criteria that would be burdensome and time-consuming to extract from traditional print disclosures.

Smart disclosure initiatives can help promote innovation, economic growth, and job creation in the market for consumer tools. Smart disclosure of consumer data yields other benefits, including allowing consumers to monitor more easily the accuracy and use of the information that companies hold on them.

II. Disseminating Smart Disclosure Data

There are two primary ways that agencies typically authorize or promote the disclosure of consumer information to members of the public. First, agencies may require or allow companies or other entities to make information (including individualized disclosures) directly available to consumers, such as when consumers log on to company websites. Second, agencies may collect the information from those entities and then make the information available, sometimes in modified form, to the public.

In many cases, agencies have released data sets to promote informed choices by consumers. Data.gov is a government-wide platform established on May 21, 2009, as a flagship Open Government initiative, to facilitate access to Federal data from across government. The platform houses numerous and diverse data sets relevant to consumer markets and can be used to disseminate smart disclosure data sets going forward. Other examples include a website that provides consumers with up-to-date product recall information,⁸ and another that releases information about automobile safety and crash ratings, along with data rating child safety seats.⁹

Agency use of smart disclosure, to the extent consistent with law and government-wide policies, promotes the goals of OMB's Open Government Directive.¹⁰ The Directive is intended in part to ensure that high-value government data sets are placed online. Indeed, many high-value data sets count as such because their publication helps agencies to further their statutory

⁸ See, e.g., www.recalls.gov.

⁹ See, e.g., www.safercar.gov.

¹⁰ Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, "Open Government Directive," M-10-06, available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

missions. In addition to posting such data sets, agencies are encouraged to collaborate with other agencies and the public to ensure the usefulness of the data sets and to increase awareness of their availability. Posting such data sets can also facilitate regulatory goals, often at low cost, by fostering transparency and promoting accountability.

In some cases, agencies may wish to create their own tools for consumers using smart disclosure. Agencies may build their own tools for a number of reasons. For example, there may be instances when it is not possible or preferable to make the underlying data sets public (e.g., for proprietary or privacy-related reasons). Alternatively, an agency tool might meet a consumer need that is not readily addressable by making data available to third parties. One example of such a tool is a searchable database of product information on an agency website. After a careful analysis of the likely effects, agencies are encouraged to consider whether there are appropriate opportunities to create their own smart disclosure tools for consumers, particularly when the underlying data sets will not be released to the public.

Agencies are also encouraged to consult with the public and relevant stakeholders, as well as to work collaboratively with other agencies, in identifying further opportunities for smart disclosure.

III. Types of Smart Disclosure Data

Below are different types of information that agencies are encouraged, to the extent appropriate, to help make available in the form of smart disclosures.

- A. *Product or service data.* Such data are comprehensive information on the products and services being offered. Examples include full pricing information, geographic availability, and complete listings of features, terms, and conditions of products. This type of information is often disclosed directly by providers to consumers.
- B. *Data on providers.* Consumers may need to know relevant information about providers to make informed choices. For example, before they do business with a company, consumers may be interested in the financial position of the company, or whether other consumers have complained about that company.
- C. *Individualized consumer data.* Such data are information pertaining to a particular consumer that is made available directly to that consumer. Such information can help inform a consumer's choices in the marketplace. Examples of this kind of information include an individual's past purchases and product usage history. In some contexts, Congress might require or permit agencies to make such individualized data available to consumers. In other cases, agencies might require, encourage, or permit companies or other entities to do so. In addition, agencies may be required or permitted to make individualized information available that is not directly related to a consumer product but can nonetheless be valuable in informing future consumer decisions (including investment decisions). For example, a consumer may want to know her expected Social Security benefits in order to determine what retirement products best meet her needs.

IV. Characteristics of Smart Disclosure

There are a number of characteristics agencies should consider when formulating smart disclosure initiatives.

- A. *Accessibility.* Smart disclosure should generally make information as accessible as possible to the consumer, which ordinarily means that such information should be made available on the Internet (e.g., through government websites or directly on the websites of providers), to the extent permitted by law and government-wide policies. Agencies should also consider other ways to make relevant information as accessible as possible, for example by making it available through Application Programming Interfaces (APIs), a set of specifications that allow software programs more readily to communicate with each other.
- B. *Machine readability.* Machine readable data are digital information stored in a format enabling the information to be processed and analyzed by computer. These formats allow electronic data to be as usable as possible. Examples of machine readable data include formats that may be readily imported into spreadsheet and database applications. In contrast, computer files that are simply image reproductions of print disclosures or that contain only unstructured narrative text generally do not represent machine readable formats.
- C. *Standardization.* In order for consumers and third parties to process information cheaply and efficiently, such information should be available in standardized vocabularies and formats. Standardized vocabularies and formats allow for meaningful comparisons and other analyses across datasets. For example, smart disclosure data on pricing for products in the same category should be comparable across providers, so that third parties can efficiently create accurate price comparison tools for consumers. In some cases, standard vocabularies and formats already exist (e.g., XML languages such as XBRL are used to share standardized information among private entities and to report information to regulators). In other cases, agencies may wish to develop new standards when no appropriate industry-based or other widely-accepted standards exist.

A potential challenge for standardization regimes is the diversity of consumer markets, many of which contain highly differentiated products and services. To the extent feasible and appropriate, standardization should occur in a way that promotes useful comparisons. Agencies should also consider mechanisms to combat attempts to evade standards (e.g., attempts to conceal the true price by hiding or shrouding fees or by categorizing them under misleading headings).

- D. *Timeliness.* Smart disclosures should be available in a timely manner in order to achieve the goal of promoting transparency for consumers. For example, product disclosures should be updated as new products are released, just as many print disclosures are required to be updated today. To the extent possible, smart disclosure data should be time-stamped and updated as rapidly as necessary, which will sometimes be in real time or near-real time.

E. Market adaptation and innovation. Many consumer products and services evolve rapidly over time to include new features, pricing models, and product categories. In light of these innovations, agencies should periodically consult with user communities, including consumers, developers, and entrepreneurs, to review and adapt smart disclosure regimes so that the information conveyed remains accurate and relevant.

F. Interoperability. Smart disclosure data sets will often be more valuable to consumers if they can be linked to other sources of data. For example, a consumer may be interested in linking required product disclosures, information on providers collected by a government body (e.g., administrative actions taken against a provider), and third-party product reviews.

One mechanism to promote interoperability is the use of common identifiers that can link disparate data sets. Another mechanism is to harmonize data standards across different contexts, such as by using consistent vocabulary (e.g., defining “late fee” the same way across similar product categories). To the extent possible and consistent with law and government-wide policies, agencies should design smart disclosures to be interoperable with public and private data sets that can enhance their impact.

G. Personally identifiable information and protecting privacy. With respect to any disclosure policies, agencies must comply with all applicable privacy laws, regulations, and policies. In particular, agencies must comply with laws, regulations, and policies that protect against disclosure of personally identifiable information (PII).¹¹

Consistent with applicable laws, regulations, and policies, agencies are encouraged to look for opportunities to disclose useful information in a form that cannot be used to distinguish or trace any individual’s identity. Even when information does not contain direct identifiers, it can often be used to identify an individual by extrapolation or through combination with other available information. In general, however, privacy laws, regulations, and policies may allow agencies or companies to disclose information that does not identify individuals (e.g., information about consumer products), or to disclose an individual’s PII to the individual himself. Whenever an agency is considering smart disclosure of PII, the agency should consult with its legal counsel and the Senior Agency Official for Privacy.¹²

¹¹ For the definition of “personally identifiable information,” see the Appendix to Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, “Guidance for Agency Use of Third-Party Websites and Applications,” M-10-23, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf.

¹² See Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, “Designation of Senior Agency Officials for Privacy,” M-05-08, available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-08.pdf>.