Senator Grassley
Questions for the Record

Stuart F. Delery,
Nominee, Associate Attorney General

1. **At your hearing, I asked about the Department's working fund, known as the 3% fund. You committed to providing this Committee as well as the House Judiciary Committee and the House Financial Services Committee the requested information. Please provide the following.**

    a. **The amount currently in the working capital fund.**

    b. **The amount utilized to hire attorneys.**

    c. **A complete accounting of the fund for the last 5 years, including all unobligated funds held.**

RESPONSE: I have been informed that, as of December 2, 2015, the Department had approximately $268.4 million in the Three Percent Fund. I understand that this amount includes certain obligated funds as well as reserve amounts recommended by the Government Accountability Office (GAO). Each year, components may request funding from the Three Percent Fund for term employees, including attorneys, for the purposes stated in the statute that provides the authority for the Three Percent Fund. The Department provides components with allocations for such employees but does not maintain centralized data on amounts allocated from the Three Percent Fund to hire attorneys.

The chart below provides the amounts collected and allocated in the last five fiscal years for the Three Percent Fund. Amounts are rounded to the nearest decimal. Given that collections may fluctuate over time, and on the recommendation of the GAO, the Department maintains a reserve amount in the Three Percent Fund to ensure that sufficient funding is available for the next fiscal year.

Three Percent Fund Collections & Allocations (dollars in millions)					
	Collections	**Annual Allocation**	**2-Year Allocation**	**3-Year Allocation**	**Total Allocation**
FY 2015	393.8	257.3	57.8	0.0	315.1
FY 2014	525.8	215.1	0.0	161.9	377.0
FY 2013	158.3	160.3	0.0	0.0	160.3
FY 2012	162.1	144.9	0.0	0.0	144.9
FY 2011	118.1	128.4	0.0	0.0	128.4
Total	1,358.1	906.0	57.8	161.9	1,125.7

2. **One of your responsibilities as Chief FOIA Officer for the Department of Justice is to recommend to the Attorney General adjustments to Department practices, policies, personnel and funding as may be necessary to improve the implementation of FOIA.**

    a. **Since your appointment to serve as Acting Associate Attorney General, what specific areas in the implementation of FOIA at the Department have you recognized as needing improvement?**

    b. **Since your appointment to serve as Acting Associate Attorney General, what specific recommendations have you made to the Attorney General to improve the implementation of FOIA at the Department? Have your recommendations been implemented, and if so, what have been the results?**

    c. **Going forward, if confirmed as Associate Attorney General, what additional measures do you intend to take to improve the implementation of FOIA at the Department of Justice?**

RESPONSE: Since my appointment as Acting Associate Attorney General, I have been committed to fostering compliance with the FOIA both at the Department of Justice and, based on the Department's role as the lead federal agency responsible for government-wide FOIA implementation, across all federal agencies. The Department itself receives and processes tens of thousands of FOIA requests each year. In Fiscal Year 2014, the Department processed the second-highest number of FOIA requests in the entire government, processing more than 63,000 requests. In doing so, we released information in 94.8% of requests processed for disclosure, closed the Department's ten oldest requests, appeals, and consultations, and proactively posted more information online.

The Department continually strives to improve its administration of the FOIA. As Acting Associate Attorney General, I chair the Department's FOIA Council, which serves as a forum for discussing issues and improving awareness of our administration of the FOIA. I also have supported greater use of technology, including software typically used in the civil discovery context, to facilitate the processing of records under the FOIA.

I am committed to continuing to ensure that all government employees have a proper understanding of the FOIA and the important role they play in implementing this law. Earlier this year, the Department announced the release of a new suite of FOIA training resources designed to assist the federal workforce in understanding their responsibilities under the FOIA. To promote greater awareness and use of these training resources, on October 28, 2015, I sent a memorandum to agency General Counsels and Chief FOIA Officers encouraging them to take advantage of these new course offerings. This collection of training tools will help ensure that resources are available for all federal employees, from the employee whose records may become subject to disclosure, to the FOIA professionals whom we rely on for processing records for disclosure.

Going forward, I will continue to look for additional opportunities to gain efficiencies, increase proactive disclosures, and ensure that all FOIA professionals across the government have the guidance and training they need to carry out their important responsibilities under the law.

3. **On President Obama's first full day in office, he instructed agencies to administer FOIA with "a clear presumption: In the face of doubt, openness prevails." In March 2009, former Attorney General Eric Holder issued government-wide FOIA guidelines to instruct agencies on how to implement the President's presumption of openness. The guidelines set forth a "foreseeable harm" standard for agencies to utilize when making disclosure determinations under FOIA. Specifically, the guidelines provide that the Department "will defend [an agency's] denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."**

    a. **What specific efforts have you taken to ensure the integration of the foreseeable harm standard into the Department's own processing of FOIA requests?**

    b. **What specific efforts have you taken to ensure the integration of the foreseeable harm standard across the government into agencies' processing of FOIA requests?**

RESPONSE: After the Attorney General's FOIA Guidelines were issued in March 2009, the Department of Justice issued guidance to all agencies specifically addressing the foreseeable harm requirement. This guidance encouraged Department and agency personnel to examine individual records for their content and the actual impact of their disclosure, rather than simply looking at the type of record or the type of file in which it was located. The Department also regularly addresses the foreseeable harm standard in the many internal and external FOIA training programs it conducts each year. Through these efforts, the Department works to ensure that FOIA professionals within the Department and across the government are educated about the foreseeable harm standard and its application.

Moreover, in the annual Chief FOIA Officer Reports provided to the Department by each agency, the Department asks agencies to include information about discretionary releases of information after applying the foreseeable harm standard. After reviewing the first set of Chief FOIA Officer Reports submitted in 2010, the Department found a strong correlation between those agencies that reviewed their documents with the foreseeable harm standard in mind and those agencies that were able to identify additional information that could be released as a matter of discretion. Accordingly, the Department's Office of Information Policy issued guidance that each agency "should institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of administrative discretion."

To provide greater transparency to this aspect of the Attorney General's FOIA Guidelines, for the past three years the Department also has asked agencies to provide examples of discretionary releases in their Chief FOIA Officer Reports. These releases consist of information that could have been protected by Exemptions 2, 5, 7(D), 7(E), and 8. Some recent examples include: the Department of State's release of deliberative material in response to requests for information about American families' unsuccessful attempts to adopt children in Vietnam, in order to bring greater transparency to the consular and Department officers' decision-making process; the Department of Transportation's release of internal agency investigatory materials related to motor vehicle recalls and safety related defects in an effort to promote further transparency concerning those safety-related issues; and the FBI's continuing release of information with historical value that could have been protected by the FOIA's law enforcement exemptions, including information about counterintelligence operations and records discussing whether to prosecute Alger Hiss for espionage and perjury.

Going forward, I will continue to identify opportunities to promote the robust application of the "foreseeable harm" standard and to support the Department's role as a leader on FOIA issues across the federal government.

4. **The Department of Justice is charged with encouraging and monitoring FOIA compliance across the federal government and thus is uniquely positioned to serve as a model for openness and transparency. Nevertheless, I've previously expressed my concerns with the Department's "do as I say, not as I do" approach to FOIA. Since your appointment to serve as Acting Associate Attorney General, what specific actions have you taken to ensure that the Department serves as a model for other agencies in the proactive release of information and the implementation of the President's "presumption of openness"?**

RESPONSE: The Department of Justice plays a pivotal role in guiding agencies in their administration of this important statute, and proudly leads by example on many fronts, including in the proactive disclosure of information and the implementation of the presumption of openness. In my remarks at an event in March 2015 honoring the Department employees charged with FOIA administration, I noted that "the purpose of FOIA is to achieve 'the fullest responsible disclosure' of federal records," and recognized the efforts made across the Department to act on "the Attorney General's commitment to achieve a standard of excellence in FOIA administration." My full remarks are available at http://www.justice.gov/opa/speech/acting-associate-attorney-general-stuart-f-delery-delivers-remarks-department-justice-s.

In March 2015, the Department issued new government-wide guidance on proactive disclosures. This guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, provides an overview of the legal requirements of the FOIA with respect to the proactive disclosure of various types of records. It also addresses ways in which agencies can go beyond FOIA's legal requirements to provide additional information to the public. The guidance encourages agencies as a matter of policy to post records online even before receipt of a specific request and it identifies a series of steps that agencies can take to increase their proactive disclosures. The guidance also helps agencies select the method of disclosure and provide useable material.

Building off of this guidance, the Department announced in July 2015 a pilot program to test the feasibility of posting FOIA-processed records online so that they are available to the public at large and not just to the individual FOIA requester. Through this six-month program, the Department is leading the efforts of seven agencies to evaluate the feasibility, costs, and privacy implications of the public disclosure of FOIA responses. The Department plans to make the results of the pilot program public and to solicit feedback about how best to move forward with efforts to increase transparency.

The Department is also committed to applying the presumption of openness. For Fiscal Year 2014, the Department released information in 94.8% of requests processed for disclosure. The Department's 2015 Chief FOIA Officer Report, available at http://www.justice.gov/sites/default/files/oip/pages/attachments/2015/03/16/2015_doj_cfo_report.pdf, contains multiple examples of information that was released as a matter of discretion, despite the availability of one or more FOIA exemptions. Indeed, in FY14, the Department's use of Exemption 5 decreased by 18.2% as compared to FY13. The presumption of openness is also ingrained in the Department's many training offerings, which reach thousands of federal employees each year. The Department's recently released suite of training materials encourages all agency personnel to consider the presumption of openness in their administration of the FOIA.

5. **During my years in the Senate, I have been committed to combating fraud, waste, and abuse in the government and government programs. I believe that the False Claims Act has proved to be the most effective tool in the effort to prevent fraud and abuse against the government and has enabled the government to recover over $40 billion since 1986. The *qui tam* provisions of the False Claims Act encourage citizens, who have knowledge and evidence of false claims of fraud, to report the illegal activity. These patriotic whistleblowers are the federal government's greatest allies in the fight against fraud.**

   As the Senate author of the 1986 Amendments to the False Claims Act, I am one of the Act's biggest supporters and defenders. It is my hope that as the Associate Attorney General, you will also vigorously support the False Claims Act and its *qui tam* provisions.

   a. **As Associate Attorney General, will you vigorously enforce the False Claims Act?**

RESPONSE: Yes. The False Claims Act (FCA) is a powerful tool to prevent fraud and protect the federal fisc, and I am committed to using that tool effectively. During the three years in which I led the Civil Division, the Department of Justice recorded the three largest annual recoveries ever under the FCA – a three-year total of $14.3 billion in settlements and judgments from civil cases involving fraud and false claims against the government, including a record $5.69 billion in fiscal year 2014. The Department also set FCA records for the largest annual recoveries in health care fraud cases ($3 billion in fiscal year 2012), in procurement fraud cases ($887 million in fiscal year 2013), and in financial fraud cases ($3.1 billion in fiscal year 2014).

The FCA's whistleblower provisions are a critical part of what makes the statute successful, and I will continue to promote the appropriate application of those provisions. The past three years have seen record numbers of *qui tam* complaints filed and record recoveries for whistleblowers.

b. Do you have any question as to the constitutionality of the FCA and the *qui tam* provision?

RESPONSE: No. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000), the Supreme Court held that the False Claims Act's *qui tam* provision does not violate the limitations on the judicial power contained in Article III, Section 2 of the Constitution. The Department has filed briefs rejecting arguments that the *qui tam* provision violates the Appointments Clause or the Take Care Clause of Article II of the Constitution, and numerous courts have accepted the Department's position. The Department's view that the *qui tam* provisions are constitutional is well settled.

c. Will you oppose efforts by industry groups, including the health care industry and the defense industry, to weaken the False Claims Act and the *qui tam* provisions of the FCA?

RESPONSE: Yes. As Acting Associate Attorney General and as Assistant Attorney General for the Civil Division, I have spoken on a number of occasions to industry groups, corporate counsel, the relators' bar, and others about the importance of the False Claims Act (FCA). For example, at an American Bar Association event, I told an audience of corporate counsel that "the False Claims Act works" and must be preserved:

> It works because it is an effective tool to fight fraud across the full spectrum of federal programs and initiatives.
>
> The FCA works because it provides powerful incentives for companies to do business the right way.
>
> And the FCA works because it safeguards billions of dollars of taxpayer money, protecting health and safety, improving public confidence in government, and allowing key programs to function better.

Likewise, speaking at an event hosted by a leading national whistleblower organization, Taxpayers Against Fraud, I praised the courage of whistleblowers and the structure of the law that allows them to come forward:

> The whistleblower provisions of the False Claims Act work because they give someone an incentive to break the culture of silence that creates and promotes fraudulent behavior. And that incentive is necessary because, as this group well knows, blowing the whistle on fraud is a painful professional, and personal, decision.

Because the FCA provides an important safeguard for taxpayer funds and a meaningful remedy against misconduct by the recipients of government money, I am committed to continuing engagement in support of these provisions.

d. **Will you ensure that Civil Division attorneys aggressively enforce the False Claims Act, and will you work with the U.S. Attorneys to ensure their vigorous support and enforcement of the False Claims Act and the *qui tam* provisions of the FCA?**

RESPONSE: Yes. The Civil Division achieved historic success in enforcing the False Claims Act under my leadership, and I am committed to working with the leadership of the Civil Division, the United States Attorneys, and the outstanding career attorneys throughout the Department to continue to build on these accomplishments.

e. **Will you agree to promote a close working relationship between *qui tam* relator's counsel and the Justice Department for the purpose of establishing the public/private relationship envisioned when the FCA was signed into law by President Reagan?**

RESPONSE: Yes. In addition to speaking about the False Claims Act (FCA) at relators' bar conferences, I met regularly with the representatives of the relators' bar (as well as with corporate counsel) as head of the Civil Division. I believe a consistent dialogue between government attorneys and counsel for whistleblowers about shared interests, questions, and concerns will help to promote effective FCA enforcement.

6. **When you testified before the committee, you were asked about an internal Department of Homeland Security memo that detailed a proposed regulation that the agency is working on that would authorize people in the country who are being petitioned for a Green Card by an employer to obtain an "open market" work authorization after waiting only one year after approval of the petition, even though their immigrant visa will not be available potentially for many years. The memo lays out four possible options, with the most outrageous being allowing illegal immigrants to obtain a work permit if an employer sponsors them for a Green Card. If the administration were to implement the option including illegal immigrants, it would be a clear violation of the federal court's injunction against the President's deferred action programs.**

   Because you represent the Obama Administration in defending the executive actions on immigration that it announced last November, I would like to know what discussions you have had with others in the administartion about this memo or the proposed regulation discussed in it. Please provide all such discussions you have had, whether orally or throuh written communication, about this internal memo or the proposed regulation in question.

If the administration were to grant work authorizations to people unlawfully present in the United States who are waiting for their immigrant visa numbers to become available:

a. **Would it encourage illegal immigration?**

b. **Would it encourage people to overstay their visas?**

c. **Would it be fair to people outside the country who are waiting their turn and abiding by the law?**

d. **Do you think it would it be a violation of the DAPA/DACA injunction?**

RESPONSE: I only became aware of the above-referenced internal Department of Homeland Security (DHS) memorandum during my testimony before the Committee. I was not previously involved in any communications about the proposed regulations purportedly discussed in that memorandum.

The Department is committed to ensuring that the federal government complies with the U.S. District Court's injunction as it is worded unless or until it is stayed, lifted, or altered by the district court itself, the Fifth Circuit, or the Supreme Court. Regarding policy implications related to work authorization, the authority to grant work authorization to individuals who are not lawfully present in the United States rests with DHS.