



May 6, 2024

TO: Alexander Hoehn-Saric, Chair  
Peter A. Feldman, Commissioner  
Richard L. Trumka Jr., Commissioner  
Mary T. Boyle, Commissioner  
Douglas Dziak, Commissioner

FROM: Christopher W. Dentel, Inspector General

***THE CPSC IS OUT OF COMPLIANCE WITH THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT***

This management alert<sup>1</sup> notifies you of an urgent issue that requires immediate attention and action. The Whistleblower Protection Enhancement Act (WPEA) requires that federal agencies that have or use nondisclosure policies, forms, or agreements ensure that said policies, forms, or agreements include an explicit statement (“anti-gag provision”) notifying the signatory employees that they retain their rights to report wrongdoing to Congress, the Inspector General (IG), or the Office of Special Counsel (OSC).<sup>2</sup> Two of the Consumer Product Safety Commission’s (CPSC) recent nondisclosure agreements did not fully comply with this requirement. The CPSC must act to remedy this non-compliance going forward.

**Background**

On November 27, 2012, the WPEA was enacted, which amended the Whistleblower Protection Act of 1989. The WPEA strengthened protections for federal employees who disclose evidence of waste, fraud, or abuse and required that any nondisclosure policy, form, or agreement include a statement informing employees of their rights to report wrongdoing to Congress, the IG, or the OSC.<sup>3</sup> This anti-gag provision had also been included in almost every appropriations bill since 1988. After further amendment on January 1, 2021, the WPEA now requires each agreement to include the following specific anti-gag language:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) *communications to Congress*, (3) ***the reporting to an Inspector General***

<sup>1</sup> A management alert is an Office of Inspector General (OIG) independent assessment that provides timely and useful information to Consumer Product Safety Commission (CPSC) stakeholders.

<sup>2</sup> See 5 USC § 2302(b)(13).

<sup>3</sup> See 5 USC § 2302(b)(13).

MANAGEMENT ALERT

*or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority,* or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

See 5 USC § 2302(b)(13) (emphasis added).

### **The CPSC Failed to Comply with the Anti-Gag Provision of the WPEA In Two Recent Nondisclosure Agreements**

The CPSC Office of the Inspector General reviewed the five relevant nondisclosure agreements (NDA) executed by the CPSC since January 1, 2019. We found that two recent agreements did not comply with the WPEA's anti-gag provision.

An agreement from 2022 contained most of the required anti-gag provision language but omitted the words "or the Office of Special Counsel" from the statement. This omission failed to inform the employee of their right to report wrongdoing to the OSC, an agency whose primary mission is to safeguard employees from prohibited personnel practices, especially reprisal for whistleblowing. The language included in this agreement would have been compliant prior to January 1, 2021, but an amendment to the WPEA on that date mandated agreements also specifically inform employees of their right to report wrongdoing to the OSC. In this instance, it appears the CPSC simply was not aware of the amendment to the WPEA and, as a result, executed an NDA that did not contain the amended language regarding the OSC.

In 2023, the CPSC executed an NDA that omitted the required anti-gag provision in its entirety. It appears the agreement was drafted by the employee's counsel rather than the agency and the agency failed to adequately review the agreement. Although acknowledging that the required anti-gag provision was not included in the agreement, the CPSC's Office of General Counsel contended a paragraph within the document that broadly indicated the agreement should be governed by federal law adequately incorporated the WPEA into the agreement by reference. We do not concur. The WPEA explicitly requires that the specific anti-gag provision set out in the statute be included. The WPEA states: "...any employee...shall not... implement or enforce ***any nondisclosure policy, form, or agreement, if such policy, form, or agreement... does not contain the [anti-gag provision]***" (emphasis added).<sup>4</sup> Therefore, the 2023 NDA does not comply with the WPEA because it does not include the required anti-gag provision.<sup>5</sup>

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<sup>4</sup> See 5 USC § 2302(b)(13).

<sup>5</sup> The Office of General Counsel now concurs that a violation of the WPEA occurred, see Appendix B.

In 2024, the CPSC initiated another NDA. After being made aware of the issues with earlier agreements discussed above, the CPSC revised the document to include the amended language of the anti-gag provision. That NDA is now final. We have reviewed this NDA and concur that it does now comply with the anti-gag provision of the WPEA.

### **It Is a Prohibited Personnel Practice to Omit the Required WPEA Anti-Gag Provision**

It is a prohibited personnel practice for any employee to implement or enforce any nondisclosure policy, form, or agreement if it does not contain the specific anti-gag provision required by the WPEA. Notably, the WPEA states:

(a)

(1) For the purpose of this title, *“prohibited personnel practice” means any action described in subsection (b).*

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(b) **Any employee** who has authority to take, direct others to take, recommend, or approve any personnel action, **shall not, with respect to such authority—**

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(13) **implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement—**

**(A) does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection.**

The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

*See* 5 USC § 2302 (emphasis added). In this instance, prohibited personnel practices occurred on two occasions when the CPSC implemented two NDAs that did not contain the required anti-gag provisions.

### **The CPSC Must Comply with the WPEA’s Anti-Gag Provision**

The CPSC must ensure it complies fully with the anti-gag provision of the WPEA in future NDAs. Failure to include this anti-gag provision has a chilling effect that discourages

whistleblowers from exercising their constitutional and statutory right to report allegations of misconduct to Congress, IGs, and the OSC. The OSC has obtained more than 25 corrective actions addressing similar violations of the anti-gag provision at other agencies over the past twelve months. As discussed above, the CPSC recently implemented an NDA that included a fully compliant anti-gag provision. The agency must take whatever actions are necessary to ensure that they continue to include the full anti-gag provision in NDAs moving forward.

## **Conclusion**

The CPSC was not compliant with the anti-gag provision of the WPEA in two recent NDAs. The CPSC must ensure full compliance with this provision of the law moving forward.

## **Appendix A. Objective, Scope, and Methodology**

### **A.1 Objective & Scope**

The objective of this Management Alert is to immediately notify the CPSC of an area of non-compliance that requires urgent attention. Specifically, the CPSC did not include required anti-gag provisions in two recent NDAs. We gathered information for this matter from March to April 2024.

### **A.2 Methodology**

We performed the work for this matter from March to April 2024 and conducted this management alert in accordance with the CPSC OIG Standard Operating Procedure - 012: *Management Alerts* and not generally accepted audit standards. This standard requires that we obtain sufficient evidence to provide a reasonable basis for our conclusions. We reviewed responses to questions sent to key CPSC personnel, analyzed relevant criteria, and reviewed supporting documentation to determine the status of the CPSC's compliance with anti-gag provisions of the WPEA.

We are issuing this management alert under the authority conferred by the Inspector General Act of 1978, as amended, Section 2(2), "to promote economy, efficiency, and effectiveness in the administration of, and . . . to prevent and detect fraud and abuse in, [CPSC] programs and operations."<sup>6</sup>

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<sup>6</sup> See 5 U.S.C. § 402(b)(2).

## APPENDIX B. Management Response



United States  
**Consumer Product Safety Commission**  
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## Memorandum

**TO:** Christopher W. Dentel, Inspector General  
**FROM:** Jessica L. Rich, General Counsel  
**SUBJECT:** Management Response to Alert Regarding  
Whistleblower Protection Enhancement Act

**DATE:** April 29, 2024

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OGC agrees that two of the five settlement agreements executed by CPSC since January 1, 2019, did not fully comply with the WPEA's requirement to include specific language (the "anti-gag provision") in any such agreement. OGC has taken steps to ensure that all future settlement agreements contain the anti-gag provision required under the WPEA. Indeed, as the Inspector General noted, CPSC's most recent settlement agreement includes a fully compliant anti-gag provision. Thus, the agency has taken the necessary actions to ensure that all settlement agreements moving forward are fully compliant with the WPEA.

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