



Evaluation of the U.S. Nuclear Regulatory Commission's Use of Anti-gag Clauses in Nondisclosure Agreements

OIG-24-E-02
September 20, 2024



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MEMORANDUM

DATE: September 20, 2024

TO: Mirela Gavrilas
Executive Director for Operations

FROM: Hruta Virkar, CPA /*RA*/
Assistant Inspector General for Audits & Evaluations

SUBJECT: EVALUATION OF THE U.S. NUCLEAR REGULATORY
COMMISSION'S USE OF ANTI-GAG CLAUSES IN
NONDISCLOSURE AGREEMENTS (OIG-24-E-02)

Attached is the Office of the Inspector General's (OIG) evaluation report titled: *Evaluation of the U.S. Nuclear Regulatory Commission's Use of Anti-gag Clauses in Nondisclosure Agreements.*

The report presents the results of the subject evaluation. Following the September 16, 2024, exit conference, agency staff indicated that they had no formal comments for inclusion in this report.

Please provide information on actions taken or planned on each of the recommendation(s) within 30 days of the date of this memorandum.

We appreciate the cooperation extended to us by members of your staff during the evaluation. If you have any questions or comments about our report, please contact me at 301.415.1982 or Paul Rades, Team Leader, at 301.415.6228.

Attachment:
As stated

cc: J. Martin, ADO
M. Meyer, DADO
S. Miotla, DADO
J. Jolicoeur, OEDO



Results in Brief

Why We Did This Review

The anti-gag provision in the WPEA requires all federal agency nondisclosure policies, forms, or agreements to include specific language from 5 U.S.C. section 2302(b)(13), that explicitly notifies federal employees of their right to report wrongdoing. Under this provision, agencies may not impose NDAs or policies without including language informing employees that their statutory right to blow the whistle supersedes the terms and conditions of the NDA or policy. Among other things, NDAs must inform employees of their overriding right to communicate with Congress, Inspectors General, and the U.S. Office of Special Counsel. No agency may seek, through an NDA or otherwise, to chill such communications.

In March 2024, Senator Charles E. Grassley (R-IA) requested that all Inspectors General confirm their agencies are including the required “anti-gag” language from the Whistleblower Protection Enhancement Act in their NDAs.

The evaluation objective was to determine if the NRC’s nondisclosure agreements and policies comply with 5 U.S.C. Section 2302(b)(13).

Evaluation of the U.S. Nuclear Regulatory Commission’s Use of Anti-gag Clauses in Nondisclosure Agreements

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What We Found

The Office of the Inspector General (OIG) found that the U.S. Nuclear Regulatory Commission’s (NRC’s) nondisclosure agreements (NDAs) involving federal employees do not comply with the requirements of Title 5 of the United States Code (5 U.S.C.), section 2302(b)(13). Specifically, NRC employees hired before the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA) were not informed of their whistleblower rights, as the law required. In addition, the NRC has NDAs with other federal agencies that lack required anti-gag language. Further, the OIG found that anti-gag language is not included in NRC Form 176A, *Security Acknowledgement*.

This occurred because the NRC did not ensure its employees were fully informed of the WPEA’s anti-gag requirement. In addition, the NRC does not have a policy or guidance to ensure that all NDAs created by its offices contain the required anti-gag language. Further, NRC offices are not required to have NDA templates reviewed by the Office of the General Counsel prior to their use.

These issues led to NRC employees being unaware of their rights to report wrongdoing and potentially created a chilling effect regarding whistleblower disclosures. Additionally, the NRC is currently unable to enforce Standard Form (SF)-312s, *Classified Information Nondisclosure Agreement*, for over 1800 NRC employees who joined the agency prior to July 2013.

What We Recommend

The OIG makes three recommendations to address the issues identified during the evaluation.

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ABBREVIATIONS AND ACRONYMS

| | |
|----------|---|
| 5 U.S.C. | Title 5 United States Code |
| ADAMS | Agencywide Documents Access and Management System |
| NDA | Nondisclosure Agreement |
| OGC | Office of the General Counsel |
| OIG | Office of the Inspector General |
| OSC | U.S. Office of Special Counsel |
| SF | Standard Form |
| WPEA | Whistleblower Protection Enhancement Act |

I. BACKGROUND

NDAs are agreements in which parties agree that certain information will remain confidential. As such, an NDA binds a person who has signed it and generally prevents discussion of information included in the agreement with anyone not specifically identified in the NDA.

Whistleblower Protection Enhancement Act of 2012

Congress enacted the WPEA in 2012 to strengthen protections for federal employees who disclose fraud, waste, or abuse. Specifically, the WPEA clarified which types of information disclosures were protected from prohibited personnel practices.¹ The WPEA also required agencies to include specific language in any nondisclosure policies, forms, and agreements they may use stating that such policies, forms, and agreements conform with certain whistleblower protections.

Anti-gag Provision in Agency-Issued Nondisclosure Agreements

Title 5 U.S.C. Section 2302(b)(13), added under the WPEA, requires agencies to inform employees who are subject to NDAs that such agreements do not supersede employees' whistleblowing rights, such as the right to report wrongdoing to the U.S. Office of Special Counsel (OSC) or to Congress.

Specifically, the WPEA states that “an agency official may not 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

¹ Prohibited personnel practices are employment-related activities banned in the federal workforce because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practice, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles. Title 5, United States Code (U.S.C.) Section 2302, “*Prohibited personnel practices*,” contains 14 prohibited personnel practices, including imposing nondisclosure agreements that do not allow whistleblowing.

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.; or,

- B. prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review any information that relates to any 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 any other whistleblower protection.”

Standard Form 312, “Classified Information Nondisclosure Agreement”

In response to the WPEA, the language in the Standard Form (SF)-312, *Classified Information Nondisclosure Agreement*, was updated to incorporate the anti-gag clause in its July 2013 revision. The SF-312 NDA informs individuals of the trust that is placed in them with their access to classified information. It also advises individuals of their responsibility to protect that information from unauthorized disclosure and the possible consequences if they fail to honor that responsibility. All persons with authorized access to classified information are required to sign an SF-312. In the case of SF-312 agreements in effect before the WPEA’s effective date, the law allows agencies to continue to enforce a policy, form, or agreement that does not contain the statement if the agency gives an employee notice of the anti-gag provision.² Agencies using the SF-312 form shall also post the required statement on the agency’s website, accompanied by the specific list of controlling Executive Orders and statutory provisions.³

² OSC Memorandum for Executive Departments and Agencies, “Non-Disclosure Policies, Forms, or Agreements” (Feb. 1, 2018) at 2.

³ *Id.* at 2–3.

Congressional Request

In March 2024, Senator Grassley requested that Inspectors General review all nondisclosure policies, forms, agreements, and related documents specific to their agencies to ensure the anti-gag provision is included as required by law.

II. OBJECTIVE

The evaluation objective was to determine if the NRC's nondisclosure agreements and policies comply with 5 U.S.C. Section 2302(b)(13).

III. FINDINGS

The OIG determined that not all of the NRC's NDAs comply with the requirements of 5 U.S.C. Section 2302(b)(13).

1. Failure to Inform NRC Employees of Their Rights

The OIG found that NRC employees hired prior to the implementation of the WPEA in 2013 were not informed of their anti-gag rights. While the SF-312s for employees who signed after July 2013 included the anti-gag language informing them of their rights, this information was not retroactively communicated to employees who signed the form prior to that date.

The OSC issued memoranda in 2013 and 2018 that stated "in the case of non-disclosure policies, forms, or agreements in effect before the WPEA's effective date, the law allows agencies to continue to enforce a policy, form, or agreement that does not contain the statement if the agency gives an employee notice of the statement." The OSC further stated that "[a]gencies may cure a non-complying non-disclosure policy, form, or agreement with an email to agency employees, and thereby avoid the need to reissue non-disclosure agreements."⁴

⁴ OSC Memorandum (Feb. 1, 2018); OSC Memorandum for Executive Departments and Agencies, "The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements" (Nov. 27, 2012).

The OIG searched the Agencywide Documents Access and Management System (ADAMS)⁵ and the NRC's internal SharePoint sites. The OIG was unable to locate documentation informing NRC employees of their anti-gag rights. After a search, an NRC official was likewise unable to locate any documentation notifying employees of their rights and was unaware of any actions taken to inform employees of their rights.

The OIG determined this occurred because the NRC was unaware of the requirement. A December 13, 2012, memorandum from the Office of the General Counsel (OGC) to the NRC Commissioners summarizing the WPEA did not expressly state that anti-gag language needed to be included in all NDAs. Further, the memorandum stated that the OGC was unaware of the NRC asking employees to sign NDAs covered by the WPEA.

Because the NRC did not provide notifications required by the WPEA, the agency is currently unable to enforce SF-312s for over 1800 NRC employees who started prior to the implementation of the July 2013 SF-312. Additionally, NRC employees lack awareness of their rights to report wrongdoing, which may increase the risk of them not reporting potential fraud, waste, and abuse.

Recommendation

The OIG recommends that the Executive Director for Operations (EDO):

- 1.1. Notify all affected employees of their rights in writing under the anti-gag provision.

2. NDAs with Other Federal Agencies Lack the Required Anti-gag Language

The NRC has NDAs with other federal agencies that do not contain the required anti-gag language. The OIG requested documents used with other agencies that contain NDAs. In addition, the OIG requested NDA templates the NRC used with other federal agencies to determine if the documents included the required anti-gag language. The OIG reviewed three memoranda and one template provided by the NRC and found that the required language was not included in the documents. Although the NRC does not control an NDA once it leaves the NRC's possession, the OIG determined that it is not a

⁵ ADAMS is the NRC's official recordkeeping system.

best practice to have NDAs that lack the required language in memoranda and templates used by federal employees in other federal agencies. Specifically, these NRC documents could increase the risk that other agencies violate the WPEA's anti-gag provisions.

The Standards for Internal Control in the Federal Government (Green Book) state that management should implement control activities through policies. Management Directive 9.7, *Organization and Functions, Office of the General Counsel*, states that the office prepares or provides legal review, as appropriate, for legal documents, including interagency agreements. The OIG determined that the NRC does not have a policy or guidance to ensure that all NRC offices are aware of the WPEA's requirements and ensure NDAs contain the required anti-gag language. Further, NRC offices are not required to have NDA templates reviewed by the OGC prior to their use. Not including OGC in the development or review of NDAs and NDA templates increases the risk that the NRC will implement agreements that lack the required anti-gag language and, for that reason, are unenforceable.

Recommendation

The OIG recommends that the EDO:

- 2.1. Issue guidance for the review and approval of NDAs to ensure that all NDAs for federal employees include the required anti-gag language.

3. NRC Form 176A Does Not Contain the Required Anti-gag Language

The OIG found that NRC Form 176A, *Security Acknowledgement*, does not contain the required anti-gag language. NRC Form 176A is currently being updated for use as an NDA for employees who will be granted access to NRC systems. OIG auditors informed NRC staff that the required language was not contained in the draft document. NRC staff stated that they would work to include the required language in the draft document for approval by the Office of Management and Budget.

This occurred because the NRC does not have a policy or guidance to ensure that all NRC offices are aware of the WPEA's requirements and ensure NDAs contain the required anti-gag language. Not informing NRC employees of

their rights can create a chilling effect. A chilling effect is a condition that occurs when an event, interaction, inaction, decision, or policy change results in a reasonable perception that the raising of a mission-related differing view to management is being suppressed, is discouraged, or will result in reprisal.

Recommendation

The OIG recommends that the EDO:

- 3.1 Update NRC Form 176A to include the required anti-gag language.

IV. CONSOLIDATED LIST OF RECOMMENDATIONS

The OIG recommends that the EDO:

- 1.1. Notify all affected employees of their rights in writing under the anti-gag provision;
- 2.1 Issue guidance for the review and approval of NDAs to ensure that all NDAs for federal employees include the required anti-gag language; and,
- 3.1 Update NRC Form 176A to include the required anti-gag language.

V. NRC COMMENTS

The OIG held an exit conference with the agency on September 16, 2024. Before the exit conference, agency management reviewed and provided comments on the discussion draft version of this report, and the OIG discussed these comments with the agency during the conference. During the conference, agency management stated their general agreement with the findings and recommendations in this report and opted not to provide additional comments. The OIG has incorporated the agency's comments into this report, as appropriate.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

The evaluation objective was to determine if the NRC's nondisclosure agreements and policies comply with 5 U.S.C. Section 2302(b)(13).

Scope

This evaluation focused on nondisclosure agreements created by the NRC or signed by NRC employees. The OIG conducted this evaluation at NRC headquarters in Rockville, Maryland, from May 2024 to August 2024.

Methodology

The OIG reviewed relevant criteria for this evaluation, including, but not limited to:

- Title 5 United States Code Section 2302(b)(13);
- U.S. Office of Special Counsel memoranda to federal agencies;
- Standard Form 312, Rev. 7-2013, *Classified Information Nondisclosure Agreement*;
- NRC Management Directives;
- NRC Settlement Agreements;
- NRC Templates; and,
- Interagency memoranda.

The OIG interviewed personnel from the Office of the General Counsel, Office of Small Business and Civil Rights, and Office of Nuclear Regulatory Research.

The OIG conducted this evaluation in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*. The OIG believes that the evidence obtained provides a reasonable basis for our findings and conclusions based on the evaluation objectives. Throughout the evaluation, auditors considered the possibility of fraud, waste, and abuse in the program.

The evaluation was conducted by Paul Rades, Team Leader; Diane Parker, Audit Manager; and, Connor McCune, Senior Auditor.

TO REPORT FRAUD, WASTE, OR ABUSE

Please Contact:

Online: [Hotline Form](#)
Telephone: 1.800.233.3497
TTY/TDD: 7-1-1, or 1.800.201.7165
Address: U.S. Nuclear Regulatory Commission
Office of the Inspector General
Hotline Program
Mail Stop O12-A12
11555 Rockville Pike
Rockville, Maryland 20852

COMMENTS AND SUGGESTIONS

If you wish to provide comments on this report, please email the OIG using this [link](#).

In addition, if you have suggestions for future OIG audits, please provide them using this [link](#).

NOTICE TO NON-GOVERNMENTAL ORGANIZATIONS AND BUSINESS ENTITIES SPECIFICALLY MENTIONED IN THIS REPORT

Section 5274 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, amended the Inspector General Act of 1978 to require OIGs to notify certain entities of OIG reports. In particular, section 5274 requires that, if an OIG specifically identifies any non-governmental organization (NGO) or business entity (BE) in an audit or other non-investigative report, the OIG must notify the NGO or BE that it has 30 days from the date of the report's publication to review the report and, if it chooses, submit a written response that clarifies or provides additional context for each instance within the report in which the NGO or BE is specifically identified.

If you are an NGO or BE that has been specifically identified in this report and you believe you have not been otherwise notified of the report's availability, please be aware that under section 5274 such an NGO or BE may provide a written response to this report no later than 30 days from the report's publication date. Any response you provide will be appended to the published report as it appears on our public website, assuming your response is within the scope of section 5274. Please note, however, that the OIG may decline to append to the report any response, or portion of a response, that goes beyond the scope of the response provided for by section 5274. Additionally, the OIG will review each response to determine whether it should be redacted in accordance with applicable laws, rules, and policies before we post the response to our public website.

Please send any response via email using this [link](#). Questions regarding the opportunity to respond should also be directed to this same address.