



Office of Inspector General

U.S. International Development Finance Corporation

MEMORANDUM

DATE: September 27, 2024

TO: SCOTT NATHAN
CHIEF EXECUTIVE OFFICER

FROM: Anthony “Tony” Zakel
Inspector General

SUBJECT: Management Advisory – Compliance with the Whistleblower Protection Enhancement Act of 2012 (Report Number DFC-24-006-MA)

At the request of Senator Charles Grassley, our office reviewed the U.S. International Development Finance Corporation’s (DFC) nondisclosure policies, forms, agreements, and related documents to ensure conformity with the anti-gag provision of the Whistleblower Protection Enhancement Act of 2012 (WPEA).¹

The WPEA requires federal entities to include the following anti-gag provision (verbatim) notifying employees of their right to report wrongdoing in all federal nondisclosure policies, forms, and agreements:

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.²

As stated in every annual appropriations act since DFC’s inception, federal entities are prohibited from using appropriated government funds to implement or enforce nondisclosure policies, forms, or agreements that do not explicitly contain this anti-gag provision.³

¹ See Appendix-II for the request from Senator Grassley.

² 5 U.S.C. § 2302(b)(13).

³ Further Consolidated Appropriations Act, 2024, Div. B, Financial Services and General Government Appropriations Act, 2024, Title VII, § 743(a), Pub. L. No. 118-47, 138 Stat. 460 (Mar. 23, 2024); Consolidated Appropriations Act, 2023, Div. E, Financial Services and General Government Appropriations Act, 2023, Title VII, § 743(a), Pub. L. No. 117-328, 136 Stat. 4459 (Dec. 29, 2022); Consolidated Appropriations Act, 2022, Div. E, Financial Services and General Government Appropriations Act, 2022, Title VII, § 743(a), Pub. L. No. 117-103, 136 Stat. 49 (Mar. 15, 2022); Consolidated Appropriations Act, 2021, Div. E, Financial Services and General Government Appropriations Act, 2021, Title VII, § 743(a), Pub. L. No. 116-260, 134 Stat. 1182 (Dec. 27, 2020); Consolidated Appropriations Act, 2020, Div. C, Financial Services and General Government Appropriations Act, 2020, Title VII, § 743(a), Pub. L. No. 116-93, 133 Stat. 2317 (Dec. 20, 2019). Prior to 2021, the anti-gag provision did not include the reference to the Office of Special Counsel.

What We Reviewed

On March 11, 2024, DFC OIG received a letter from Senator Grassley requesting that we review all of DFC's nondisclosure policies, forms, agreements, and related documents to verify the inclusion of the required anti-gag provision. DFC OIG contacted DFC to obtain the relevant documentation. DFC's Office of the General Counsel (OGC) provided the following documents:

- Six executed settlement agreements that include nondisclosure provisions;⁴
- DFC's 2021 settlement agreement template; and
- DFC's current nondisclosure clause.

DFC OIG reviewed these documents to ensure they contained the anti-gag provision required by the WPEA.

The WPEA also requires that agencies making use of any nondisclosure policy, form, or agreement post the anti-gag provision on the agency's website, accompanied by the specific list of controlling Executive orders and statutory provisions.⁵ DFC OIG reviewed DFC's website to determine if the WPEA language was posted, as required.

What We Found

Five of the six settlement agreements executed since 2020 did not comply with the WPEA anti-gag requirements. Further, the 2021 DFC settlement agreement template and the current nondisclosure clause used by DFC for these types of agreements did not fully comply with the WPEA.

Notably, the nondisclosure language in the settlement agreements extended beyond simply restricting the disclosure of the terms and conditions of the settlement. In addition to such confidentiality clauses, two of the agreements contained non-disparagement clauses, and five of the six required the employees to waive legal and administrative remedies against DFC relating to any claim arising from their term of employment. One agreement (which also contained a non-disparagement clause) required a waiver of all claims based on the facts and circumstances surrounding the employee's complaint. Such provisions would prevent an employee from making disclosures of the very nature contemplated by the WPEA.

Additionally, DFC is not in compliance with the WPEA's requirement to post the anti-gag provision on the agency's website, accompanied by the specific list of controlling Executive orders and statutory provisions.

Non-Compliant Executed Settlement Agreements

Two agreements failed to include any mention of the required WPEA anti-gag provision, and three agreements failed to include the full text of the WPEA anti-gag provision.

⁴ According to DFC's OGC, only six agreements with nondisclosure provisions have been executed since 2020.

⁵ U.S.C. § 2302 note (2012) (Agency Websites).

Specifically, two agreements (dated June 2021 and November 2020) did not contain any mention of the required WPEA anti-gag provision. In addition, a settlement agreement from August 2021 included the following incomplete portion of the WPEA anti-gag language:

The provisions of this Agreement are consistent with, and do not supersede, or conflict with, or otherwise alter Employee’s obligations, rights, liabilities created by existing statute or Executive Order relating to: (1) classified information; (2) communications to Congress; or (3) reporting to the IG any violation of law, rule, or regulation or other whistleblower protection.

Further, two agreements (dated August 2022 and February 2024) contained most of the required WPEA anti-gag provision language but omitted the words “or the Office of Special Counsel” from the provision. Prior to January 1, 2021, the language in these two agreements would have complied with the WPEA; however, an amendment to the WPEA on that date required agreements to specifically inform employees of their right to report wrongdoing to Office of Special Counsel.⁶

In a memorandum dated June 14, 2024, responding to DFC OIG’s inquiry, DFC’s General Counsel explained that the anti-gag provision omissions resulted from lack of coordination and proper reviews prior to execution of the agreements.

The table below shows the results of our review of the settlement agreements executed by DFC and their compliance with the WPEA anti-gag provision.

Results of DFC OIG’s Review of DFC’s Executive Settlement Agreements

DFC Provided Settlement Number	Settlement Signature Date	Did Settlement Contain Required Anti-Gag Clause?
1	1/21/2020	Yes
2	6/24/2021	No
3	8/5/2021	Partially
4	11/24/2020	No
5	2/15/2024	Partially
6	8/8/2022	Partially

Table Source: Review of DFC’s negotiated settlement agreements containing nondisclosure clauses.

⁶ National Defense Authorization Act of 2021, § 1138, Pub. L. No. 116-283 (Jan. 1, 2021).

Recommendations

The DFC Chief Executive Officer should:

1. Ensure all settlement agreements that contain nondisclosure provisions are coordinated with OGC and contain the required WPEA anti-gag provision.
2. Ensure that DFC creates and maintains an updated template for non-disclosure language with the complete anti-gag provision to ensure compliance with the WPEA.
3. Post the complete anti-gag provision on the DFC website, along with a list of the controlling Executive orders and statutory provisions, as required by the WPEA. While DFC must post the provision to the external website, the OIG recommends that DFC post the required language on the internal website, as well.

Management Comments

Management concurred with the issues and the three recommendations in the report. DFC's comments are included in Appendix III: Management Comments. DFC explained the target implementation date for recommendation 1 is by the end of October 2024; and recommendation 3 is by the end of December 2024. According to DFC, recommendation 2 has been addressed. DFC also provided a point of contact for each recommendation.

Evaluation of Managements Response

Based on our evaluation of DFC's management comments, we acknowledge DFC's decisions on the recommendations and believe the actions taken and planned will resolve the issues identified in the report.

While management acknowledges that “the anti-gag language is a prerequisite for enforcement of the nondisclosure,” they incorrectly conclude that “failure to include the WPEA language does not invalidate the rest of the agreement, given contract severability.” The *implementation or enforcement* of any nondisclosure policy, form, or agreement that does not contain the anti-gag language is a prohibited personnel practice under the plain language of Section 104 of the WPEA. Also, as discussed above, every annual appropriations act since DFC's inception has expressly stated that federal entities are prohibited from using appropriated funds to *implement or enforce* nondisclosure policies, forms, or agreements that do not explicitly contain the anti-gag provision. The failure to include the required anti-gag language renders DFC unable to *implement or enforce* the agreement as a whole, not simply the nondisclosure provisions.

Management further states that “[f]rom the plain reading of OSC's guidance, and the express language of the confidentiality provisions included in five of the six agreements reviewed, it is clear the latter are confidentiality clauses of the kind that are not technically covered by the WPEA notice requirement.” This is an incorrect reading of the OSC guidance. The OSC guidance cited by DFC in its management response specifically states that “[i]f a confidentiality clause in a settlement agreement extends beyond the terms and conditions of the agreement, agencies must incorporate the WPEA's statement.” As discussed above, the nondisclosure language in the settlement agreements extended beyond simply restricting the terms and conditions of the settlement. Two of the agreements contained non-disparagement clauses, and five of the six required the employees to waive legal and administrative remedies against DFC relating to any claim

arising from their term of employment. One agreement (which also contained a non-disparagement clause) required a waiver of all claims based on the facts and circumstances surrounding the employee's complaint. These additional clauses extend beyond simple confidentiality clauses. Therefore, the settlement agreements do not fall within the class of agreements OSC opined as not falling under the WPEA requirement.

We appreciate the cooperation and courtesies provided by your staff. If you have any questions or need additional information, please contact me at 202-312-2172.

Sincerely,

A handwritten signature in blue ink that reads "Anthony Zake". The signature is written in a cursive, flowing style.

Anthony "Tony" Zake
Inspector General
U.S. International Development Finance Corporation

CC: Nisha Desai Biswal (Deputy Chief Executive Officer)
Sarah Fandell (Vice President and General Counsel)
Dev Jagadesan (Deputy General Counsel)

Appendix I: Objective, Scope, and Methodology

Objective & Scope

The objective of this management advisory was to review DFC's nondisclosure policies, forms, agreements to determine whether the WPEA anti-gag provision was included as required by law. The information gathered for this review was from January 2020 to September 2024.

Methodology

We conducted this review from March to September 2024 and conducted this management alert in accordance with "Quality Standards for Inspection and Evaluation," published in December 2020 by the Council of Inspectors General on Integrity and Efficiency. Those standards require that we adequately plan the evaluation to ensure that objectives are met and that we perform the evaluation to obtain sufficient, competent, and relevant evidence to support the findings, conclusions, and recommendations. We reviewed responses to requests and questions sent to DFC personnel, analyzed relevant criteria, and reviewed supporting documentation to determine the status of the DFC's compliance with WPEA anti-gag provisions. This provided sufficient evidence to provide a reasonable basis for our conclusions.

Appendix II: Congressional Request



March 11, 2024

VIA ELECTRONIC TRANSMISSION

Mr. Anthony Zakel
Inspector General
U.S. International Development Finance Corporation

Dear Inspector General Zakel:

Whistleblowers are patriots and the government's most powerful tool in rooting out waste, fraud, abuse, and misconduct. Nevertheless, federal agencies continue to implement nondisclosure policies and similar agreements without the inclusion of the "anti-gag" provision as required by law.¹ This failure has a chilling effect that discourages whistleblowers from reporting allegations of misconduct to Congress, Inspectors General (IG), and the Office of Special Counsel (OSC). The "anti-gag" provision has been included in almost every appropriations bill since 1988 and was codified in the Whistleblower Protection Enhancement Act.²

The anti-gag law requires all federal agency nondisclosure policies, forms, or agreements to include the following explicit statement notifying the employee of their rights to report wrongdoing:

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.³

Appropriation law prohibits the use of government funds to enforce these agreements if they fail to contain the anti-gag provision.⁴

¹ 5 USC § 2302(b)(13); Pub. L. No. 117-328

² *Id.*

³ 5 USC § 2302(b)(13).

⁴ Pub. L. No. 117-328.

Even though Congress made it abundantly clear that employees are required to be informed of their rights to make legally protected disclosures, there's a growing trend among federal agencies to use nondisclosure policies and similar agreements without the inclusion of the anti-gag provision in violation of the law.⁵ This is unacceptable.

The importance of whistleblowers knowing their rights under the law cannot be stated enough, and federal agencies should encourage their employees to disclose allegations of waste, fraud, and abuse. Federal agencies cannot be allowed to conceal their wrongdoing behind illegal nondisclosure policies and related actions. Accordingly, I request that you review all nondisclosure policies, forms, agreements, and related documents specific to your agency to ensure the anti-gag provision is included as required by law.

Thank you for your prompt review and response. If you have any questions, please contact Brian Randolph on my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

⁵ See Letter from Senators Grassley and Johnson to Inspector General Horowitz (Apr. 19, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_justice_deptinspectorgeneralfbiantigagprovision.pdf; Letter from Senators Grassley and Johnson to Inspectors General Horowitz and George (Jun 6, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_dojoigtiga_-_whistleblower_retaliation.pdf; Letter from Senators Grassley and Johnson to Internal Revenue Service Commissioner Werfel (Jun. 6, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_to_irs_-_protected_whistleblower_disclosure.pdf; Letter from Senator Grassley, Senator Johnson, Representative Smith, and Representative Comer to Special Counsel Kerner (Jul. 5, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_johnson_comer_jordan_smith_to_osc_-_whistleblower_retaliation.pdf; Letter from Senator Grassley to Health and Human Services Secretary Becerra, Administration for Children and Families Acting Assistant Secretary Hild, and Office of Refugee Resettlement Director Marcos (Nov. 21, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_to_hhs_acf_and_orr_-_whistleblower_protections.pdf; Letter from Senator Grassley to Acting Special Counsel Gorman (Nov. 21, 2023) https://www.grassley.senate.gov/imo/media/doc/grassley_to_osc_-_hhs_whistleblower_protections.pdf; Letter from Senator Grassley to DOJ-OIG Horowitz (Feb. 12, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_oig_-_protected_whistleblower_disclosures.pdf; Letter from Senator Grassley to Bureau of Alcohol, Tobacco, Firearms, and Explosives Director Dettelbach (Feb. 12, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_atf_-_protected_whistleblower_disclosures.pdf; Letter from Senator Grassley to Inspector General Horowitz (Mar. 8, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_inspector_general_-_eoir_disclosures_to_congress.pdf; Letter from Senator Grassley to Attorney General Garland (Mar. 8, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_-_eoir_disclosures_to_congress.pdf; Letter from Senator Grassley to Executive Office for Immigration Review Director David Neal (Mar. 8, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_executive_office_for_immigration_review_-_eoir_disclosures_to_congress.pdf.

Appendix III: Management Comments



DATE: September 24, 2024

TO: Anthony Zakel, Inspector General

FROM: Sarah Fandell, Vice President and General Counsel

SUBJECT: Advisory Letter DFC in Response to Senator Grassley's Request for DFC OIG to Review DFC's Nondisclosure Policies, Forms, Agreements, and Related Documents

DFC values the work of the OIG and carefully considered the findings and recommendations described in the subject advisory letter. This memo summarizes DFC management's response to the letter and specific steps that DFC intends to take in connection with this matter. We have not identified any information contained in this report is within scope of an applicable FOIA exemption.

DFC is committed to sustaining a workplace that protects employees' rights and obligations to report wrongdoing. We agree with the recommendations made and propose to implement them as follows:

1. Ensure all settlement agreements that contain nondisclosure provisions are coordinated with OGC and contain the required WPEA anti-gag provision. *This recommendation will be implemented with an email reminder to OHRM and EEO offices to coordinate all settlement activity via OGC – target completion by end of October 2024. POC OGC.*
2. Ensure that DFC creates and maintains an updated template for non-disclosure language with the complete anti-gag provision to ensure compliance with the WPEA. *This task has already been completed via an update of the template language to include the 2021 WPEA update.*
3. Post the complete anti-gag provision on the DFC website, along with a list of the controlling Executive Orders and statutory provisions, as required by the WPEA. While DFC must post the provision to the external website, the OIG recommends that DFC post the required language on the internal website, as well. *We have begun coordinating this recommendation with OGC, OEA, and OIT - target completion date December 2024. POC OGC.*

With respect to the conclusions outlined in the advisory letter, as a purely technical matter we understand the inclusion of the anti-gag language is a prerequisite for enforcement of the nondisclosure, and failure to include the WPEA language does not invalidate the rest of the agreement, given contract severability.

Moreover, per OSC guidance on implementation of WPEA, we understand that “Agencies may distinguish between a non-disclosure policy, form, or agreement and a confidentiality clause in a settlement agreement. A confidentiality clause in a settlement agreement is generally not covered by the WPEA's notice requirements. A confidentiality clause only restricts disclosure of the terms and conditions of the settlement and does not otherwise restrict disclosure of any other information. If a confidentiality clause in a settlement agreement extends beyond the terms and conditions of the agreement, agencies must incorporate the WPEA's statement.”¹

From the plain reading of OSC’s guidance, and the express language of the confidentiality provisions included in five of the six agreements reviewed, it is clear the latter are confidentiality clauses of the kind that are not technically covered by the WPEA notice requirement.

As previously stated, DFC is committed to sustaining a workplace that protects employees’ rights and obligations to report wrongdoing. DFC management appreciates OIG’s recommendations to bolster our WPEA compliance, and thanks OIG for its continued commitment to promoting accountability and transparency both within and outside of DFC. We look forward to working together to ensure that DFC continues to deliver on its mission.

¹ U.S. Office of Special Counsel, Memorandum for Executive Departments and Agencies, The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements (Nov. 27, 2012) available at <https://osc.gov/Resources/OSC%20Memorandum%20on%20Whistleblower%20Law%20and%20Non%20Disclosure%20Agreements%2003%2014%2013.pdf>.