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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 2, 2014

The Honorable Carolyn N. Lerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Dear Ms. Lerner,

Attached is a report on the implementation of the "anti-gag" provision relating to the use of nondisclosure agreements at Section 115(a) of the Whistleblower Protection Act of 2012 (WPEA). Given the importance of this provision, please consider including compliance with the provision as one of the criteria in your office's 2302(c) Certification Program. As you know, 5 U.S.C. § 2302(c) states:

> The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title . . . .

In addition to the five requirements your office has identified for the 2302(c) Certification Program, a sixth could be a requirement to demonstrate compliance with 5 U.S.C. § 2302(b)(13) by ensuring that all non-disclosure agreements include the mandated language, as well as posting the language on their website.[1]

Implementing this provision as the law requires is vital to ensure that potential whistleblowers are not intimidated into silence. I hope you will consider this suggestion.

Sincerely,

Charles E. Grassley
Ranking Member
Committee on the Judiciary

[1] The five steps are outlined at http://www.osc.gov/outreachCertificationProgram.htm.

Memorandum

TO: **Special Counsel Carol Lerner; Inspector General Phyllis K. Fong; Inspector General Todd J. Zinser; Inspector General Jon T. Rymer; Inspector General Kathleen S. Tighe; Inspector General Gregory H. Friedman; Inspector General Daniel R. Levinson; Inspector General John Roth; Inspector General David A. Montoya; Inspector General Mary Kendall; Inspector General Michael E. Horowitz; Inspector General Scott S. Dahl; Inspector General Steve A. Linick; Inspector General Calvin L. Scovel III; Inspector General Eric M. Thorson; Inspector General J. Russell George; Acting Inspector General Richard J. Griffin**

FROM: **Senate Judiciary Committee Staff for Senator Chuck Grassley**

SUBJECT: **Report on the Implementation of Section 115(a) of the Whistleblower Protection Enhancement Act of 2012 (WPEA)**

DATE: **April 2, 2014**

I. Introduction

Whistleblowers are the lynchpin of accountable government. At great risk to their careers, whistleblowers expose waste, fraud, and abuse. In return for their courage, whistleblowers are too often singled-out for retaliation and other personnel practices prohibited by law.[1] Agencies that require employees to enter so-called "non-disclosure agreements" can abuse such agreements to prevent the flow of information about wrongdoing to Inspectors General and to Congress. Enforcing cover-ups in this manner mocks the rule of law and undermines the public trust.

For this reason, Senator Grassley introduced an amendment known as the "anti-gag" provision to the Treasury, Postal Service and General Government Appropriations Act.[2] This provision was adopted in 1988,[3] and was included in every appropriations bill since that time until the Consolidated and Further Continuing Appropriations Act of 2013.[4] In late 2012, the Whistleblower Protection Enhancement Act (WPEA) codified that any violation of the anti-gag provision is a prohibited personnel practice.[5]

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[1] *See* 5 U.S.C. § 2302(a) (2006) (outlining prohibited personnel practices).
[2] Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1756 (1988).
[3] *See generally* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 932 (2011); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 685 (2009).
[4] Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, Div. F, Title I, Sec. 1105 (referencing back to Pub. L. No. 112-74, Div. C, Title VII, Sec. 715).
[5] Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

The new federal law now requires every U.S. Government nondisclosure policy, form, or agreement to contain an explicit statement notifying employees of the following: government nondisclosure requirements do *not* supersede employees' rights and obligations created by existing statute or Executive Order relating to (1) classified information, (2) communications to Congress, (3) reporting violations and/or misconduct to an Inspector General, or (4) any other whistleblower protection.[6]

Moreover, this statement, along with a specific list of controlling Executive orders and statutory provisions, must be posted on the website of any agency using a nondisclosure policy, form, or agreement.[7]

If an agency complies with this posting requirement or gives its employees notice of the statement referenced above, only then may any nondisclosure policy, form, or agreement that was in effect *before* the effective date of the WPEA be enforced. Otherwise, those policies, forms, or agreements must contain the statement required by § 115(a)(1) of the WPEA.[8] As author of the anti-gag provision and original cosponsor of the WPEA who worked closely with Senator Akaka in drafting the Act, Senator Grassley sought information from agencies across government to evaluate the level of implementation and enforcement of this important WPEA provision.

II. Senator Grassley's Letter to Each Department

On May 10, 2013, Senator Grassley wrote to all fifteen Executive Departments inquiring as to the implementation of the anti-gag provision of the WPEA captured in Section 115(a) of that Act. In this letter, each Department was asked to provide the following:

> 1) All forms, policies, or agreements which mention communications with Congress used within the last five years, including those with either non-disclosure or non-disparagement provisions.
>
> 2) All forms, policies, or agreements which include the statutorily-defined statement informing employees of their rights on every nondisclosure policy.
>
> 3) All forms, policies, or agreements which purport to limit a current or former employee's ability to communicate directly with Congress, whether explicitly or as a part of a general prohibition without a specific Congressional exemption.
>
> 4) A detailed statement of the various efforts that your department has taken to post the "anti-gag" provision on its website, along with a specific list of controlling Executive orders and statutory provisions.

[6] *See id*. § 115(a)(1).
[7] *See id*. § 115(a)(2).
[8] *See id*. § 115(a)(3).

The deadline for production was May 24, 2013, but no Department produced the requested documents on time. To date, nearly ten months past the deadline in question, responses have been received from all but the following Departments: (1) Commerce, (2) Interior, (3) Justice, and (4) Veterans Affairs.

III. How Each Department Was Graded

Based on responses to Senator Grassley's May 10, 2013 letter, each Department was assigned a letter grade rating its implementation of Section 115(a) of the WPEA according to the following grading scale:

Grade	Description	Criteria
A	Implementation of the WPEA exceeds minimum requirements of its anti-gag provisions.	Demonstration that all nondisclosure policies and all nondisclosure forms and agreements issued after the enactment of the WPEA have been updated to contain the statement required by § 115(a)(1); *and* The statutorily defined statement along with a specific list of controlling Executive orders and statutory provisions have been posted on the department's *website; and* Demonstration that notice of the statement defined in § 115(a)(1) was provided for all employees covered under a nondisclosure policy, form, or agreement that *predated* the WPEA.

B	The minimum requirements of WPEA's anti-gag provisions have been fully implemented.	Demonstration that all nondisclosure policies and all nondisclosure forms and agreements issued after the enactment of the WPEA have been updated to contain the statement required by § 115(a)(1); *and* The statement defined in § 115(a)(1) along with a specific list of controlling Executive orders and statutory provisions have been posted on the department's *website.*
C	The WPEA's anti-gag provisions have been **only partially** implemented.	Failure to demonstrate that all nondisclosure policies and all nondisclosure forms and agreements issued after the enactment of the WPEA have been updated to contain the statement required by § 115(a)(1); *or* Failure to post on the department's website **all** of the following: (1) a specific list of controlling Executive orders; (2) a specific list of controlling statutory provisions; and (3) the statement defined in § 115(a)(1).

D	**None** of the WPEA's anti-gag provisions have been implemented, **but** implementation is underway.	Failure to demonstrate that all nondisclosure policies and all nondisclosure forms and agreements issued after the enactment of the WPEA have been updated to contain the statement required by § 115(a)(1); *and* **None** of the following has been posted on the department's website: (1) a specific list of controlling Executive orders; (2) a specific list of controlling statutory provisions; or (3) the statement defined in § 115(a)(1). *However*, the department explained the steps it is taking to come into compliance.
F	Questions about WPEA's anti-gag provisions have been completely disregarded.	Failure to demonstrate any level of compliance with § 115(a) by failing to reply to Senator Grassley's May 10, 2013 letter at all.

In addition, to arrive at a *final* letter grade, the letter grade that a Department received on its compliance with WPEA's anti-gag provisions was adjusted by a "plus (+)" or "minus (-)" which was awarded for each of the following categories of responsiveness to Senator Grassley's May 10, 2013 letter: (1) Timely Response, (2) Explanation of Efforts to Implement WPEA, and (3) Production of Requested Documents.

The following table displays how each Department performed, overall:

Department	Implementation of WPEA's Anti-gag Provisions	Timely Response	Explanation of Efforts to Implement WPEA	Production of Requested Documents	Final Grade
Agriculture	C	-	+	-	**C-**
Commerce	F	-	-	-	**F**
Defense	C	-	+	+	**C+**
Education	D	-	+	+	**D+**
Energy	C	-	+	-	**C-**

Health and Human Services	D	-	+	-	**D-**
Homeland Security	C	-	+	+	**C+**
Housing and Urban Development	C	-	+	-	**C-**
Interior	F	-	-	-	**F**
Justice	F	-	-	-	**F**
Labor	C	-	+	-	**C-**
State	C	-	+	+	**C+**
Transportation	C	-	+	-	**C-**
Treasury	B	-	+	+	**B+**
Veterans Affairs	C	-	+	+	**C+**

IV. How Each Department Responded

Agriculture: The Department of Agriculture responded to Senator Grassley's letter on July 15, 2013 – nearly two months past the requested deadline. The Department fully responded to Question 4 by providing examples of its efforts to implement the WPEA, including the address of the website on which the language required under § 115(a)(2) are posted: http://www.usda.gov/wps/portal/usda/usdalusdahome?navid=POLICY_LINK.

However, Questions 1-3 were not even addressed, which precluded an examination of the Department's compliance with § 115(a)(1). **Final grade: C-.**

Commerce: No response has been received to date, despite six follow-up emails from Senator Grassley's staff. **Final grade: F.**

Defense: The Department of Defense's response was received on June 7, 2013, two weeks past the requested deadline. The Department responded to Questions 1-3 by acknowledging that "it would take months . . . to gather [all responsive documents]" and by providing, in their stead, four nondisclosure forms which are most widely-used at the Department.

Of the four forms, only Standard Form 312 included the statement required by § 115(a)(1) of the WPEA. The "Budget Preparation Non-disclosure Agreement" and both versions of the "Non-disclosure agreement under Procurement Integrity Act" did not contain the statutorily-defined statement despite the clear language of the § 115(a)(1) that requires it in "any . . . nondisclosure policy, form, or agreement of the Government . . . ."

The Department responded to Question 4 by providing the address of the website on which the required statement, Executive Orders, and other controlling statutory provisions are posted:

http://www.dodig.mil/programs/whistleblower/NonDisclosure.html. This response demonstrated the Department's compliance with § 115(a)(2). **Final grade: C+.**

Education: The Department of Education's response was received on July 17, 2013, nearly two months past the requested deadline. The Department failed to respond to Question 4 and did not explain any efforts it had taken to post on its website the language required by § 115(a)(2) of the WPEA. In addition, upon examination on March 12, 2014, this mandatory posting was nowhere to be found on the Department's website.

In response to Questions 1-3, the Department provided two examples of its non-disclosure agreements (NDAs) pertaining to classified, sensitive, or confidential information and two examples of guidance documents pertaining to the Anti-Lobbying Act. Setting aside the question of whether the Anti-Lobbying Act documents qualify as a "nondisclosure policy, form, or agreement" for the purposes of § 115(a)(1) of the WPEA, the two NDAs relating to classified, sensitive, or confidential information did not contain the notification statement required under § 115(a)(1). **Final grade: D+.**

Energy: The Department of Energy did not respond to Senator Grassley's letter until August 2, 2013, more than two months past the requested deadline. The Department fully responded to Question 4 by providing the address of the website on which the language required by § 115(a)(2) are posted: http://energy.gov/whistleblower-protection-and-nondisclosure-agreements.

In addition, the Department explained actions taken to notify agency heads and employees of the WPEA's requirements. In addressing Question 2, the Department provided a copy of guidance issued to the Department's procurement officials containing sample NDAs which contained the statement required by § 115(a)(1) of the WPEA.

However, the Department failed to respond to Questions 1 and 3, which precluded an examination of whether § 115(a)(1) had been fully implemented. **Final grade: C-.**

HHS: The Department of Health and Human Services' response was received on July 18, 2013, nearly two months past the requested deadline. HHS did not produce any of the documents requested in Questions 1-3, stating instead that all NDA forms were being updated to comply with the WPEA. Regarding Question 4, HHS noted that it had posted on its website the text recommended by the Office of Special Counsel and had sent an email to employees advising them of WPEA's implications to NDAs. Significantly, however, the posting required by § 115(a)(2) of the WPEA was nowhere to be found on the HHS website. **Final grade: D-.**

DHS: The Department of Homeland Security's response was not received until January 16, 2014, more than seven months past the requested deadline. However, DHS is the only Department that responded to all questions, including requests for documents. Of the eleven forms produced by DHS as documents potentially responsive to Questions 1-3, Standard Form 312 (revised July 2013) and entitled, "Classified Information Nondisclosure Agreement," did contain the statement required by § 115(a)(1) of the WPEA.

However, in DHS's response to Question 4, despite its assertion that the Department "has made efforts to post whistleblower protection information on . . . the public-facing DHS.gov," the posting required by § 115(a)(2) of the WPEA was found nowhere on the Department's website.

Consequently, in accordance with § 115(a)(3) of the WPEA, the following NDAs which predate the enactment of the WPEA are enforceable if and only if the employee against whom the NDA is being enforced has received individual notice of the anti-gag statement defined in § 115(a)(1):

- "Department of Homeland Security Non-Disclosure Agreement" (DHS Form11000-6)
- "National Vessel Monitoring System (N-VMS) Data Nondisclosure Agreement" (CG_4100N)
- "Sensitive Compartmented Information Nondisclosure Agreement" (Form 4414(3))
- "Department of Homeland Security Inadvertent Disclosure Statement" (DHS Form 11031(3))

Final grade: C+.

HUD: The Department of Housing and Urban Development's response was received on July 17, 2013, nearly two months past the requested deadline. HUD failed to respond to Questions 1-3, which precluded an examination of the Department's compliance with § 115(a)(1). Regarding Question 4, HUD noted the creation of a Whistleblower Protection Ombudsman and the HUD Inspector General's operation of a confidential hotline. However, HUD did not state that it had satisfied § 115(a)(2)'s posting requirement. Rather, the webpage cited in HUD's letter – http://www.hudoig.gov/fraud-prevention/whistleblower-protection/ – linked to another page – http://www.hudoig.gov/node/1670 – that contained the anti-gag statement and statutory provisions. However, the controlling Executive Orders required by § 115(a)(2) of the WPEA were not posted. **Final grade: C-.**

Interior: No response has been received to date, despite five follow-up emails from Senator Grassley's staff. **Final grade: F.**

Justice: No response has been received to date, despite three follow-up emails from Senator Grassley's staff and two additional letters from Senator Grassley, including a public letter about the matter to the Justice Department's Inspector General. Significantly, Senator Grassley's latter letters inquired about FBI forms provided to his office that are still in use, yet fail to include the required anti-gag language.[9] **Final grade: F.**

[9] *E.g.* Senator Chuck Grassley to Attorney General Holder, November 22, 2013, http://www.grassley.senate.gov/judiciary/upload/Whistleblowers-11-22-13-Grassley-to-Holder-non-disclosure-agreements-at-FBI.pdf, accessed March 14, 2014.

Labor: The Department of Labor's response was received on August 9, 2013, more than two months past the deadline. The Department fully responded to Question 4, by providing a link to the website which demonstrates the Department's compliance with § 115(a)(2) of the WPEA: http://www.dol.gov/compliance/laws/comp-whistleblower-nda.htm. In addition, the Department explained that it issued guidance to all agency heads and sent an email to all employees apprising them of the WPEA. However, Questions 1 through 3 were not addressed, which precluded an examination of the Department's compliance with § 115(a)(1). **Final grade: C-.**

State: The State Department did not respond to Senator Grassley's letter until July 25, 2013, two months past the requested deadline. The Department fully responded to Question 4 by (1) citing the date of the most recent notice that was sent to employees advising them that the Department's NDAs are to be "read in tandem" with employee rights under the WPEA and (2) noting that the provisions required by § 115(a)(2) are posted in hard copy and online. On March 12, 2014, the Department's latter assertion was confirmed through an examination of http://www.state.gov/s/ocr/205593.htm.

In addition, the Department responded to Questions 1 and 3 by affirming that none of its guidance documents concerning communications with Congress contain non-disclosure or non-disparagement provisions or purport or limit current or former employees' ability to communicate directly with Congress. While this reply is sufficient for responding to Question 3, the reply does not fully respond to Question 1, which requested "All forms, policies, or agreements which *mention* communications with Congress used within the last five years, *including* those with either non-disclosure or non-disparagement provisions." (emphases added).

Similarly, the Department responded to Question 2 by noting that it is undertaking efforts to ensure that all future forms, policies, and agreements effectuated at the Department will comply with the WPEA. However, no actual NDA bearing the § 115(a)(1) language was produced, indicating that § 115(a)(1) was not fully implemented eight months following the WPEA's enactment. **Final grade: C+.**

Transportation: The Department of Transportation's response was received on October 10, 2013, more than four months past the requested deadline. The Department did not produce the documents requested in Questions 1-3. The Department did explain that it had provided notice to all employees regarding the anti-gag provision of the WPEA, which would presumably render enforceable against those employees NDAs in effect before the WPEA's enactment. However, the failure to produce any documents precluded an examination of the Department's compliance with § 115(a)(1) with respect to NDAs issued after the WPEA's enactment.

In response to Question 4, the Department provided a link to its Policy Statement on Whistleblowing and stated that it is in the process of preparing the posting of the required statement and list of Executive Orders and statutory provisions. When examined on March 12, 2014, the posting required by § 115(a)(2) was found on http://www.dot.gov/whistleblower. **Final grade: C-.**

Treasury: The Department of Treasury's response was received on July 31, 2013, more than two months past the requested deadline. Treasury responded to Question 4 by providing a copy

of the anti-gag provision that is posted on its website as a standalone PDF-document[10] and not as part of the Whistleblower Protection page where the posting would be accessible to those whom the statute is meant to reach.[11] Specifically, Treasury's current posting – while technically accessible on the Department's website – is difficult to find for those employees who do not know to search for the posting using "whistleblower protection enhancement act" as keywords.

A better practice is demonstrated by the Treasury Inspector General for Tax Administration (TIGTA), who posted the language on http://www.treasury.gov/tigta/contact_whistle.shtml.

In response to Question 3, Treasury noted that it is not aware of any responsive documents in its possession. In response to Question 2, Treasury provided a copy of an addendum it circulated in a global email to its employees which incorporates the § 115(a)(1) provision to the forms used in its security clearance process. Treasury did not produce the documents requested in Question 1.

Taken together, the addendum provided in response to Question 2 and the website posting referenced in its response to Question 4 demonstrated the Department's compliance with §§ 115(a)(1)–(3). Significantly, the Department of Treasury is the only Department whose full compliance with § 115(a) was documented. **Final grade: B+.**

Veterans Affairs: The Department of Veterans Affairs responded on October 7, 2013, nearly five months past the requested deadline.[12] In reply to Questions 1-3, the Department responded by stating that, as a general practice, VA does not require its employees to sign non-disclosure agreements. The Department explained that there are two exceptions to this general practice. Specifically, VA noted that employees who either participate in the acquisition process or who have access to classified information are asked to sign NDAs.

The Department provided the following documents as examples of NDAs used in each scenario: (1) Certificate for Personnel Participating in an Acquisition Concerning Non-Disclosure of Conflicts of Interest and (2) Standard Form 312: Classified Information Nondisclosure Agreement. Of the two documents, only the latter contained the language mandated by Section 115(a)(1) of the WPEA. The former document contained only some of the required language –

[10] U.S. Department of the Treasury, "Notice to all former and current Treasury employees who have or have had access to classified information and signed an SF-312 / SF-4414 (a non-disclosure agreement)," http://www.treasury.gov/SitePolicies/SiteAssets/Pages/site-policy/Notice%20Regarding%20Non-disclosure%20Agreements%20Pursuant%20to%20the%20WPEA.pdf, accessed March 14, 2014.

[11] U.S. Department of the Treasury, "Whistleblower Protection," http://www.treasury.gov/about/organizational-structure/ig/Pages/New%20Employee%20Orientation/Whistleblower-Protection.aspx, accessed March 14, 2014.

[12] After receiving no reply from VA for two months, a follow-up email was sent to the Department on July 2, 2013. No responses were received despite another follow-up email which was sent on August 20, 2013. After four months of no reply, a third follow-up email was sent to the Department on September 25, 2013. On October 7, 2013, the Department transmitted its response to a staff member who had left the committee by then. However, the Department did not transmit its reply to the Committee email address designated for incoming correspondence, as instructed by Committee staff. Consequently, fourth and fifth follow-up emails seeking a response from the Department were sent on November 13, 2013 and on February 20, 2014. VA did not respond to either of these follow-up emails to indicate that it had replied in October, nor did VA provide a copy of its reply.

including references to "disclosures to Congress" – but did not include other required language, such as a reference to disclosures to the Inspector General.

Finally, in response to Question 4, VA stated that it "will post the WPEA 'anti-gag' language on its Website, as required by section 115(a)(2) of the WPEA." When examined on April 2, 2014, however, that statutorily mandated language was not found on the VA's website. Language similar to the text enumerated in Section 115(a)(1) of the WPEA and whose posting is required by Section 115(a)(2) was found in a memorandum entitled "Protection from Reprisal for Whistleblowing." This standalone PDF document predates the WPEA and is accessible at http://www.diversity.va.gov/policy/files/Whistleblower_Memo.pdf.

Final grade: C+.

V. Conclusion

To date, based on the responses provided by the Executive Departments to Senator Grassley's May 10, 2013 letter, only the Department of Treasury documented its implementation of Section 115(a) of the Whistleblower Protection Enhancement Act of 2012. Nine other departments documented partial implementation of Section 115. Two departments demonstrated in their responses their failure to implement Section 115(a)(1) and their failure to implement Section 115(a)(2); however, these departments either explained that implementation is underway or otherwise indicated a willingness to comply with Section 115(a) of the WPEA by responding to Senator Grassley's letter. Finally, three departments demonstrated a complete disregard for questions about their implementation of Section 115(a) of the WPEA by failing to provide any response to Senator Grassley's May 10, 2013 letter.

These results are summarized as follows:

Fully compliant with § 115(a)	Partially-compliant with § 115(a)	Compliant with neither § 115(a) (1), nor § 115(a) (1) (2), but preparing or willing to comply	Complete disregard for questions about § 115(a) compliance
Treasury	Agriculture	Education	Commerce
	Defense	Health and Human Services	Interior
	Energy		Justice
	Homeland Security		
	Housing and Urban Development		

	Labor		
	State		
	Transportation		
	Veterans Affairs		