

TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION



Actions Need to Be Taken to Improve Compliance With the Anti-Gag Provision Requirements

January 27, 2025

Report Number: 2025-IE-R009

HIGHLIGHTS: Actions Need to Be Taken to Improve Compliance With the Anti-Gag Provision Requirements

Final Evaluation Report Issued on January 27, 2025

Report Number 2025-IE-R009

Why TIGTA Did This Evaluation

This evaluation was initiated after TIGTA received a congressional request to assess whether the IRS complied with the Whistleblower Protection Enhancement Act of 2012 (WPEA) by including the required anti-gag provision in its Non-Disclosure Agreements (NDA) and related documentation as required by law. The anti-gag provision informs employees that their rights and obligations to report wrongdoing to Congress, the Inspectors General, or the Office of Special Counsel supersedes an NDA.

Impact on Tax Administration

The IRS estimates that approximately 500 to 1,000 IRS employees and 6,000 contractors, sign an NDA each year. Without anti-gag provisions in the NDAs, employees, and contractors might be reluctant or discouraged to report on fraud, waste, and abuse activities, which would cause reputational harm for the agency.

In addition, the WPEA Prohibited Personnel Practices states that the NDA policy, form, or agreement must include the anti-gag provision before the policy, form, or agreement can be enforced. Because NDAs in use by the IRS at the time of our review did not contain anti-gag provisions, they may not be enforceable.

What TIGTA Found

We found that the IRS has guidance that references whistleblower protections and addresses prohibited practices of retaliation against whistleblowers. However, specific reference to the anti-gag provision was not included in its NDAs, policies, or whistleblower protections training. Specifically:

- During our evaluation, we reviewed 22 NDAs signed from August 2018 to April 2024 and found that 5 contained a partial reference to the anti-gag provision, but 17 did not contain any reference to the anti-gag provision.
- Some existing internal guidance referenced NDAs and whistleblower protections. However, we did not see evidence of a dedicated NDA policy that required the anti-gag provision be included.
- The NDA and whistleblower guidance was not easily accessible for employees to find on the IRS intranet site.
- Training for new hires and annual briefings for all employees, managers, and contractors, mentioned the Whistleblower Protection Act of 1989, and addressed the prohibited practices of retaliating against whistleblowers. Although not required, they did not contain the anti-gag provision.

As a result of our evaluation, in July 2024, IRS officials updated the NDA form template for contractors with staff-like access and non-procurement employees involved in procurement activities to include the required anti-gag provision. The IRS also updated its Expert Witness NDA form template in October 2024.

What TIGTA Recommended

We made four recommendations. Specifically, the IRS should: 1) ensure that NDAs, policies, forms, and other guidance documents include the required anti-gag provision; 2) create a dedicated section for NDAs in internal guidance that contains the anti-gag provision; 3) include information about the anti-gag provision in training programs covering whistleblower protections (*e.g.*, new employee orientation, contractor training); and 4) add a link to TIGTA's Whistleblower Protections webpage on its internal webpage and pertinent information to the Employee Resource page on its internal webpage to ensure employee awareness of the whistleblower protections as it relates to the anti-gag provision.

IRS management agreed with our recommendations. During the evaluation, the IRS updated its NDA template for contractors with staff-like access, non-procurement employees involved in procurement activities, and expert witnesses to include the required anti-gag provision. The IRS also developed updates to the Fiscal Year 2025 mandatory Prohibited Personnel Practices and Whistleblower training, and the updates are under final legal review.



TREASURY INSPECTOR GENERAL

for Tax Administration

DATE: January 27, 2025

MEMORANDUM FOR: COMMISSIONER OF INTERNAL REVENUE

FROM: Nancy LaManna 
Deputy Inspector General for Inspections and Evaluations

SUBJECT: Final Evaluation Report – Actions Need to Be Taken to Improve Compliance With the Anti-Gag Provision Requirements (Evaluation No.: IE-24-038)

This report presents the results of our review to assess the Internal Revenue Service's (IRS) "Anti-Gag" policies and procedures and determine if required language is included in Non-Disclosure Agreements (NDA) and related documentation as required by law. This evaluation was initiated after we received a congressional request to assess whether the IRS complied with the Whistleblower Protection Enhancement Act of 2012 by including the required anti-gag provision in its NDAs and related documentation.¹ It also addresses the major management and performance challenge of *Protection of Taxpayer Data* and *IRS Resources*.

Management's complete response to the draft report is included as Appendix II. If you have any questions, please contact me or Kent Sagara, Director, Inspections and Evaluations.

¹ Prohibited Personnel Practices (5 USC § 2302(b)(13)).

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Background

The federal government provides its employees with certain constitutional and statutory "free speech" rights in response to court decisions and legislation. For example, the *Whistleblower Protection Enhancement Act of 2012* (WPEA) strengthened anti-retaliation protections for federal employees who disclose evidence of fraud, waste, and/or abuse.² The WPEA also states that:

- Federal agencies' non-disclosure policies, forms, or Non-Disclosure Agreements (NDAs) must include certain language. An NDA is a binding contract that is intended to protect information considered to be proprietary or confidential. These agreements, policies, and forms must include the anti-gag provision notifying the signatory employees that they retain their rights to report wrongdoing to Congress, the Inspectors General, or the Office of Special Counsel (OSC).³ Specifically, the anti-gag provision prohibits an agency from using a non-disclosure policy, form, or agreement to prevent a potential whistleblower from bringing instances of waste, fraud, or abuse to light.
- Federal agencies are to advise employees that their statutory right to blow the whistle supersedes the terms and conditions of any NDA or policy.
- NDA policies, forms, and/or agreements must include the anti-gag provision before the policy, form, or agreement can be enforced.

In March 2024, we received a congressional request to review the Internal Revenue Service's (IRS's) NDAs, policies, forms, and related documents to ensure that the anti-gag provision is included. Figure 1 is the anti-gag provision that must be included in all NDAs, policies, forms, and related documents.

Figure 1: Anti-Gag Language Required

"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."

Source: Excerpt from the WPEA.

² Prohibited Personnel Practices (5 USC § 2302(b)(13)).

³ The OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.

Results of Review

Our evaluation identified that the IRS has guidance that references whistleblower protections and addresses prohibited practices of retaliation against whistleblowers. However, specific reference to the anti-gag provision was not included in its NDAs, policies, or whistleblower protections training. Specifically, we found the following:

- Each year, the IRS estimated nearly 7,000 NDAs are signed by IRS employees and contractors. Our review of 22 NDAs signed from August 2018 to April 2024, identified 17 as not containing the required anti-gag provision, with the remaining 5 NDAs only having a partial reference to the anti-gag provision. As a result, the nearly 7,000 NDAs signed each year by IRS employees and contractors, may not be enforceable.
- Some existing internal guidance referenced the NDAs and whistleblower protections. However, we did not see evidence of a dedicated NDA policy that required the anti-gag provision be included.
- The NDA and whistleblower guidance was not easily accessible for employees to find on the IRS intranet site.
- Training for new hires and annual briefings for all employees, managers, and contractors mentioned the WPEA and addressed the prohibited practices of retaliating against whistleblowers. Although not required, the training did not contain the anti-gag provision.

As a result of our evaluation, IRS officials updated the NDA form template in July 2024 for contractors with staff-like access and non-procurement employees involved in procurement activities to include the required anti-gag provision. The IRS also updated its Expert Witness NDA form template in October 2024.

Improved Compliance With Anti-Gag Provision Requirements Is Needed

Our evaluation identified that the IRS is not in full compliance with the WPEA anti-gag provision. Specifically, the IRS did not always include the required anti-gag provision in its NDAs, policies, and forms. However, recently the IRS referenced the anti-gag provision in some of its communications with staff. For instance,

- The IRS Commissioner sent an email message to all employees in July 2023, informing employees about their rights to report wrongdoing and whistleblower protections including notifying employees of the specifics of the anti-gag provision.
- The IRS and National Treasury Employees Union's 2022 National Agreement included the anti-gag provision, which discussed protections against prohibited personnel practices.⁴ However, the 2022 National Agreement is not an all-employee agreement because this agreement is between the union and the IRS. For example, management

⁴ The National Treasury Employees Union is the nation's largest independent federal employee union, representing employees in thirty-four departments and agencies, including tens of thousands of IRS workers. This Union and the IRS negotiate term contracts that protect workplace rights, improve working conditions, and enable employees to serve taxpayers more effectively and further the agency's mission. The current contract is a six-year period covering 2023 – 2028.

officials, employees in the Criminal Investigation and the Office of the Chief Counsel, and temporary employees are not covered by this agreement.

NDA's did not always contain the required anti-gag provision

IRS officials stated that each year approximately 500 to 1,000 IRS employees and 6,000 contractors sign an NDA. The IRS clarified that only those contractors who are given staff-like access, including expert witnesses, and non-procurement employees who perform procurement-related activities (*i.e.*, employees on technical evaluation teams, who have access to confidential information like potential trade secrets) are required to sign NDAs. IRS officials noted that it is not a general practice for IRS employees to sign an NDA, even in personnel matters, because certain statutes (*e.g.*, 26 U.S.C. § 6103), already impose obligations on current and former employees not to disclose sensitive or confidential data they accessed during tax administration work.⁵

IRS officials further stated that employees within its Office of the Chief Procurement Officer do not sign NDAs because they are charged with receiving and safeguarding procurement-related information as a core component of their duties. Additionally, these procurement employees receive related training and have a legal obligation to protect this information per the Procurement Integrity Act (41 U.S.C. §§ 2101 to 2107) and other laws.

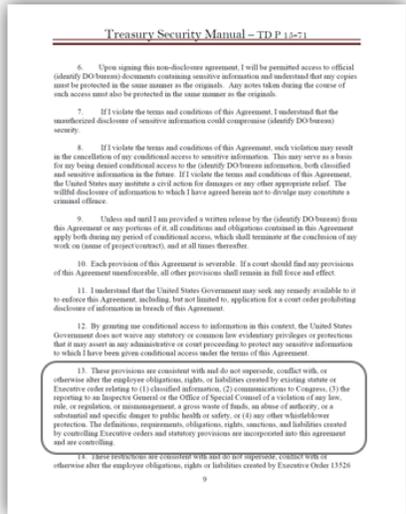
During our evaluation, we reviewed 22 NDAs signed by contractors and IRS employees from August 2018 to April 2024 and found that none contained the complete anti-gag provision language as required. Specifically, our review identified:

- 17 where there was no reference to the anti-gag provision.
- 5 that had partial reference to the anti-gag provision.

In July 2024, in response to the results of our review of a sample of NDAs, the IRS updated its NDA form template for contractors with staff-like access and non-procurement employees involved in procurement activities to include the required anti-gag provision language. The IRS also updated its Expert Witness NDA form template in October 2024. Figure 2 is an example of an NDA with the addition of the anti-gag provision.

⁵ 26 USC 6103, *Confidentiality and disclosure of returns and return information*, states that returns and return information shall be confidential, and except as authorized: (1) no officer or employee of the United States, (2) no officer or employee of any State, any local law enforcement agency receiving information, any local child support enforcement agency, or any local agency administering a program who has or had access to returns or return information under this section or section 6104(c), and (3) no other person (or officer or employee thereof) who has or had access to returns or return information shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

Figure 2: Updated NDA with the Anti-Gag Provision



“ 13. 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.”

Source: Updated NDA provided by the IRS Office of the Chief Counsel.

The IRS does not have a dedicated policy on NDAs

In addition, our review of internal IRS guidance found that although NDAs are mentioned, there was no language outlining when an NDA is required, how to put the NDA in place, nor did it contain the anti-gag provision. For example, we searched internal guidance for relevant information using various terms, including but not limited to: “nondisclosure,” “non-disclosure,” “agreement,” “provision,” “whistleblower,” and “protections” but found that the NDA references were not specific to the anti-gag provision required language.

We also found that the IRS does not prominently display information regarding whistleblower protections on its intranet site. For example, there were references to information that helps uncover tax noncompliance and provides awards to whistleblowers; however, it does not relate to whistleblower protections for personnel matters.

As mentioned previously, the WPEA requires any NDA policy, form, or agreement to include the anti-gag provision before the policy, form, or agreement can be enforced. Federal law requires agency heads, in consultation with the OSC, to ensure that agency employees are informed of the rights and remedies available to them under civil service and whistleblower protection laws. Policies and procedures are the primary and official compilation of instructions to staff that relate to administration and operation of the IRS and should also serve to inform staff of their rights and protections, as well as reporting channels where violations of rights and protections have occurred.

The Deputy Commissioner should:

Recommendation 1: Ensure that NDAs, policies, forms, and other guidance documents include the required anti-gag provision.

Management’s Response: The IRS agreed with this recommendation. During this evaluation, the IRS updated its NDA form templates to include the required anti-gag provisions. In July 2024, it updated the NDA template for contractors with staff-like

access and for non-procurement employees involved in procurement activities, and in October 2024, it updated the NDA template for expert witnesses. The IRS will monitor this corrective action as part of its internal management system of controls.

Recommendation 2: Create a dedicated section for NDAs in its internal guidance that contains the required anti-gag provision.

Management's Response: The IRS agreed with this recommendation. The IRS will develop a dedicated section for NDAs in its internal guidance that contains the anti-gag provision, in coordination with IRS Offices (*e.g.*, Procurement, Privacy, and Human Capital). The IRS will monitor this corrective action as part of its internal management system of controls.

The Anti-Gag Provision Should Be Included in Applicable IRS Training

Our evaluation determined that the IRS training for new hires and annual refresher briefings for managers, employees, and contractors, mentioned the Whistleblower Protection Act of 1989 (WPA) and addressed the prohibited practices of retaliation against whistleblowers. Although not required, they do not include references to the anti-gag provision.⁶ Specifically, our review of the training and refresher briefings identified that some included a link to the *No FEAR Act* training.⁷ The information provided via this link includes references to the WPA and retaliation against whistleblowers but does not reference the anti-gag provision. However, the inclusion of the link to the *No FEAR Act* training is inconsistent. For example, the annual contractor refresher briefing does not include this link.

IRS management stated that it is currently developing and updating the training and briefing materials in consultation with the OSC. Management also noted that in various other employee messages, including in prior versions of employee training materials, IRS employees have been plainly reminded of their rights, and in some cases, responsibilities, to report potential fraud, waste, or abuse, if not necessarily in the precise language set forth in the anti-gag provision.

The Deputy Commissioner should:

Recommendation 3: Include information about the anti-gag provision in training programs covering WPEA protections (*e.g.*, new employee orientation and contractor training).

Management's Response: The IRS agreed with this recommendation. The IRS will include information about the anti-gag provision in mandatory training programs covering WPEA protections (*e.g.*, new employee orientation and contractor training). During this evaluation, the IRS developed updates to the Fiscal Year 2025 mandatory Prohibited Personnel Practices and Whistleblower training, and the updates are under final legal review. The IRS will monitor this corrective action as part of its internal management system of controls.

⁶ The WPA outlines several categories of lawful disclosures and protected conduct at 5 U.S.C. §2302(b)(8)-(9).

⁷ Congress passed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), which prohibits the practice or toleration of unlawful discrimination or retaliation in the federal government.

Recommendation 4: Consider adding a link to the Treasury Inspector General for Tax Administration's (TIGTA's) Whistleblower Protections webpage and ensure that the IRS internal webpage, Employee Resources includes pertinent information to bring employee awareness of the WPEA protections as it relates to the anti-gag provision.

Management's Response: The IRS agreed with this recommendation. The IRS will evaluate the addition of a link to TIGTA's Whistleblower Protections webpage for IRS employees and ensure that its internal Employee Resources webpages include pertinent information and guidance to enhance awareness of the WPEA protections related to the anti-gag provision. The IRS will monitor this corrective action as part of its internal management system of controls.

Appendix I

Detailed Objective, Scope, and Methodology

The overall objective of this evaluation was to assess the IRS's "Anti-Gag" policies and procedures and determine if required language is included in NDAs and related documentation as required by law. To accomplish our objective, we:

- Identified the applicable federal, Department of the Treasury, and IRS guidance related to the NDA anti-gag provision.
- Assessed whether the IRS complies with the requirements of the anti-gag provision.
- Evaluated the IRS's process to ensure employees are aware of their whistleblower rights and non-disclosure protections.

Performance of This Review

This review was performed with information obtained from the IRS National Headquarters in Washington, D.C., in the Office of the Chief Counsel during the period March through September 2024. We conducted this evaluation in accordance with the Council of the Inspectors General for Integrity and Efficiency Quality Standards for Inspection and Evaluation. Those standards require that the work adheres to the professional standards of independence, due professional care, and quality assurance and followed procedures to ensure accuracy of the information presented. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions.

Major contributors to the report were Kent Sagara, Director; Jeff Stieritz, Supervisory Evaluator; and Yzalida Hiley, Senior Evaluator.

Appendix II

Management's Response to the Draft Report



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

January 8, 2025

MEMORANDUM FOR NANCY LAMANNA
ACTING DEPUTY INSPECTOR GENERAL FOR INSPECTIONS
AND EVALUATIONS

FROM: Michael S. Wetklow
Chief Risk Officer

Michael S. Wetklow
Digitally signed by
Michael S. Wetklow
Date: 2025.01.08
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SUBJECT: Draft Evaluation Report – Actions Need to Be Taken to Improve
Compliance With the Anti-Gag Provision Requirements
(Evaluation No.: IE-24-038)

Thank you for the opportunity to review and comment on the subject draft audit report, which assesses the IRS anti-gag policies and procedures and evaluates whether required language is included in Non-Disclosure Agreements and related documentation. We appreciate your recognition of our references to anti-gag provisions in our documentation and training, and we appreciate your identifying areas where we can improve our notification of whistleblower protections and whistleblower rights.

Attached are our comments and proposed actions to your recommendations. If you have any questions, please contact me, or Kevin M. O'Brien, Director, Enterprise Audit Management.

Attachment

Recommendations

RECOMMENDATION 1:

The Deputy Commissioner should ensure that NDAs, policies, forms, and other guidance documents include the required anti-gag provision.

CORRECTIVE ACTION:

We agree with the recommendation. We will ensure that all IRS NDAs, policies, forms, and other guidance documents include the anti-gag provision.

ACTIONS COMPLETED:

During this audit, the IRS updated its NDA form templates to include the required anti-gag provisions. On July 12, 2024, we updated the NDA template for contractors with staff-like access and for non-procurement employees involved in procurement activities, and on October 24, 2024, we updated the NDA template for expert witnesses.

IMPLEMENTATION DATE:

March 31, 2025

RESPONSIBLE OFFICIAL:

Chief Human Capital Officer

CORRECTIVE ACTION MONITORING PLAN:

IRS will monitor this corrective action as part of our internal management system of controls.

RECOMMENDATION 2:

The Deputy Commissioner should create a dedicated section for NDAs in internal guidance that contains the required anti-gag provision.

CORRECTIVE ACTION:

We agree with the recommendation. We will develop a dedicated section for NDAs in internal guidance that contains the anti-gag provision, in coordination with IRS Offices (e.g., Procurement, Privacy, and Human Capital).

IMPLEMENTATION DATE:

March 31, 2025

RESPONSIBLE OFFICIAL:

Chief Human Capital Officer

CORRECTIVE ACTION MONITORING PLAN:

IRS will monitor this corrective action as part of our internal management system of controls.

RECOMMENDATION 3:

The Deputy Commissioner should include information about the anti-gag provision in training programs covering WPEA protections (e.g., new employee orientation and contractor training).

CORRECTIVE ACTION:

We agree with the recommendation. We will include information about the anti-gag provision in mandatory training programs covering WPEA protections (e.g., new employee orientation and contractor training).

ACTIONS COMPLETED:

During this audit, the IRS developed updates to the FY25 mandatory Prohibited Personnel Practices and Whistleblower training, and the updates are under final legal review.

IMPLEMENTATION DATE:

March 31, 2025

RESPONSIBLE OFFICIAL:

Chief Human Capital Officer in coordination with the Chief Procurement Officer

CORRECTIVE ACTION MONITORING PLAN:

IRS will monitor this corrective action as part of our internal management system of controls.

RECOMMENDATION 4:

The Deputy Commissioner should consider adding a link to TIGTA's Whistleblower Protections webpage and ensure IRS internal webpage, Employee Resources, includes pertinent information to bring employee awareness of the WPEA protections as it relates to the anti-gag provision.

CORRECTIVE ACTION:

We agree with the recommendation. We will evaluate the addition of a link to TIGTA's Whistleblower Protections webpage for IRS employees and ensure that IRS internal Employee Resources webpages include pertinent information and guidance to enhance awareness of the WPEA protections related to the anti-gag provision.

IMPLEMENTATION DATE:

March 31, 2025

RESPONSIBLE OFFICIAL:

Chief Human Capital Officer

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CORRECTIVE ACTION MONITORING PLAN:

IRS will monitor this corrective action as part of our internal management system of controls.

Appendix III

Abbreviations

IRS	Internal Revenue Service
NDA	Non-Disclosure Agreement
OSC	Office of Special Counsel
TIGTA	Treasury Inspector General for Tax Administration
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012



**To report fraud, waste, or abuse,
contact our hotline on the web at
<https://www.tigta.gov/reportcrime-misconduct>.**

**To make suggestions to improve IRS policies, processes, or systems
affecting taxpayers, contact us at www.tigta.gov/form/suggestions.**

Information you provide is confidential, and you may remain anonymous.