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The Special Counsel

MEMORANDUM FOR EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Special Counsel Carolyn Lerner
U.S. Office of Special Counsel

SUBJECT: The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements

The Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law on November 27, 2012 (P.L. 112-199). The law strengthens protections for federal employees who disclose evidence of waste, fraud, or abuse. In addition, the WPEA modifies rules on the use of non-disclosure policies, forms, or agreements (NDAs) by government agencies. Agencies should update any NDAs to conform to these new requirements, as detailed below. If you have questions about these changes, please contact Adam Miles at the U.S. Office of Special Counsel at 202-254-3600.[1]

1. Agencies must update existing NDAs to conform to the new notification statement required by the WPEA.

The WPEA amends section 2302(b) of Title 5, making it a prohibited personnel practice to "implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement 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 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."

[1] This memorandum is intended to assist agencies in understanding and implementing the WPEA's requirements, but is not an advisory opinion. Under 5 USC 2302(c), OSC assists agencies in educating the federal workforce about whistleblower rights and protections, and prohibited personnel practices. The WPEA's prohibitions and requirements are subject to interpretation by the Merit Systems Protection Board and the courts, where applicable.

Accordingly, this statement should be incorporated into every non-disclosure policy, form, or agreement used by an agency.[2] While the WPEA does not define a non-disclosure policy, form, or agreement, Standard Form 312 (SF 312) is an example of an NDA. SF 312 restricts disclosure of classified information and states that failure to adhere to the restrictions in the agreement may result in the termination of a security clearance.[3] The Office of the Director of National Intelligence is actively working to update SF 312 to incorporate the WPEA's statement, and will provide further notice to agencies when the revision is complete.

In the case of NDAs in effect before the WPEA's effective date (Dec. 26, 2012), including SF 312, 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. Agencies may cure a non-complying NDA with an email to agency employees, and thereby avoid the need to reissue non-disclosure agreements. Below is a sample email that agencies may choose to issue to employees:

Dear Employee:

The Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law by President Obama on November 27, 2012. The law strengthens the protections for federal employees who disclose evidence of waste, fraud, or abuse. The WPEA also requires that any non-disclosure policy, form, or agreement (NDA) include the statement copied below, and provides that NDAs executed without the language may be enforced as long as agencies give employees notice of the statement. This communication serves as that notice to employees.

As a XXX Department employee, you may have been required to sign an NDA to access classified or other information. You should read this statement as if it were incorporated into any non-disclosure policy, form, or agreement you have signed.

> ***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 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.***

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[2] Please note, section 104 of the WPEA, which makes it a prohibited personnel practice to implement or enforce a non-disclosure agreement without the required statement, does not apply to the Intelligence Community elements listed in section 2302(a)(2)(C)(ii) of title 5. However, section 115 of the WPEA applies government-wide.

[3] 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.

Employees are reminded that reporting evidence of waste, fraud, or abuse involving classified information or classified programs must continue to be made consistent with established rules and procedures designed to protect classified information.

In the case of former employees who are covered by the terms of an NDA, agencies may continue to enforce such agreements if the agency posts the required statement on its web site, as detailed below.

Please also note that the text of WPEA's required statement is different than the text required in a similar provision contained annually in appropriations language. (See P.L. 112-74, Consolidated Appropriations Act, 2012, Section 715, made current through March 27, 2012, through P.L. 112-175).[4] Agencies should take steps to modify any existing NDAs (which may currently contain the text required by appropriations law) to include the WPEA's slightly different statement. Additionally, agencies should provide notice to employees of the modified statement, as discussed above.

2. Agencies should update their web sites by posting the required statement and a list of controlling Executive orders and statutory provisions.

The WPEA further requires:

> "Agencies making use of any nondisclosure policy, form, or agreement shall also post the statement required under section 2302(b)(13) of title 5, United States Code (as added by

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[4] Section 715 of the Consolidated Appropriations Act, 2012, states:

> (a) No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions:
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> "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling." Provided, That notwithstanding the preceding provision of this section, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

this Act) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions."

To comply with this provision, agencies should post the required statement on their web sites. As noted above, in the case of former employees who are covered by the terms of an NDA, agencies may continue to enforce such agreements if the agency posts the required statement on its web site. Accordingly, agencies should post the required statement on a publicly accessible web page, and may also choose to post on an internal web page.

In addition, agencies should post the following list of "Executive orders and statutory provisions," and clarify that these provisions are controlling in the case of any conflict with an agency NDA:

- Executive Order No. 13526;
- Section 7211 of Title 5, United States Code (governing disclosures to Congress);
- Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
- Section 2302(b)(8) of Title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and
- Section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)).