



Management Advisory: EXIM's Nondisclosure Policies, Forms, and Agreements



OIG-O-24-11
September 27, 2024

Office of Inspector General
Export-Import Bank of the United States



Management Advisory Memorandum

To: Courtney Chung
Senior Vice President and Chief Management Officer

James Coughlan
General Counsel

From: Michael T. Ryan
Assistant Inspector General for Special Reviews and Communications

Subject: Management Advisory: EXIM's Nondisclosure Policies, Forms, and Agreements (OIG-O-24-11)

Date: September 27, 2024

Executive Summary

The Office of Inspector General (OIG) for the Export-Import Bank of the United States (EXIM) reviewed EXIM's nondisclosure policies, forms, and agreements. OIG requested that EXIM provide all current nondisclosure agreement (NDA) templates (excluding executed copies). EXIM officials provided five different templates used for various purposes. Based on the templates reviewed, OIG found that three NDA templates included language notifying individuals of their rights to report suspected wrongdoing (hereafter, the anti-gag provision), and two NDA templates did not include such language. OIG issued two recommendations to ensure all EXIM NDA templates include anti-gag language. EXIM's management response is contained in [Attachment A](#). EXIM concurred with both recommendations but objected to what it perceived to be OIG's conclusion that EXIM must include the verbatim anti-gag provision in NDAs with contractors. However, OIG did not draw this conclusion. Rather, OIG did conclude that EXIM should notify contractors of their whistleblower rights using appropriate anti-gag language when executing an NDA, given that such notification would align with express requirements and support contractor whistleblower rights under U.S. law. We consider management's proposed actions to be responsive. The recommendations will be closed upon completion and verification of the proposed actions.

OIG performed this work in response to a congressional request from Senator Charles Grassley, Ranking Member of the Senate Committee on the Budget (see [Attachment B](#)). Senator Grassley's request stated that "federal agencies should encourage their employees to disclose allegations of waste, fraud, and abuse" and asked OIG to "review all nondisclosure policies, forms, agreements, and related documents [...] to ensure the anti-gag provision is included as required by law." To accomplish this review, OIG obtained NDA templates used by EXIM and reviewed those documents for the anti-gag provision. In addition, OIG conducted a legal review

of the provision's applicability to EXIM and obtained additional information to clarify EXIM's use of the documents. OIG's work was completed from May 2024 through September 2024, under the *Quality Standards for Federal Offices of Inspector General*, which requires OIG to follow procedures that ensure the accuracy of the information as well as adhere to the professional standards of independence, due professional care, and quality assurance.¹

Statutorily Required Anti-Gag Provision

Whistleblowers promote government accountability by reporting concerns of waste, fraud, abuse, and misconduct. Beginning in 1988, annual appropriations laws prohibited federal entities, including EXIM, from using appropriated funds to implement or enforce any nondisclosure policy, form, or agreement that obstructed or limited "the right of any individual" to communicate with members of Congress.² The current version of this statutory requirement is found in Public Law 118-47, Division B, Title VII, § 743, which prohibits the use of appropriated funds to implement or enforce agreements in Standard Forms 312 and 4414³ of the Government or "any other" nondisclosure policy, form, or agreement unless they contain the following provision, (i.e., the anti-gag provision):

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.⁴

As required by Public Law 118-47, Division B, Title VII, § 743 (hereafter Section 743), EXIM must include the anti-gag provision in its nondisclosure policies, forms, and agreements.⁵ Including this provision ensures compliance with federal law and that whistleblowers are protected and know their rights.

¹ Council of the Inspectors General on Integrity and Efficiency, [Quality Standards for Federal Offices of Inspector General](#) (August 2012).

² Public Law 100-440, Treasury, Postal Service and General Government Appropriations Act, 1989, §619.

³ Standard Form 312 is a Classified Information Nondisclosure Agreement and Standard Form 4414 is a Sensitive Compartmented Information Nondisclosure Agreement.

⁴ The Whistleblower Protection Enhancement Act of 2012 also requires the anti-gag provision to be included in all employee nondisclosure policies, forms, and agreements; however, this requirement does not apply to EXIM as a wholly owned government corporation. See Public Law 112-199; 5 U.S.C. §2302(b)(13); 5 U.S.C. § 2302(a)(2)(C).

⁵ In his letter, Senator Grassley cited to Public Law 117-328, Consolidated Appropriations Act, 2023, which was the most recent appropriations act at the time of his letter. We cite Public Law 118-47, which is the FY 2024 Consolidated Appropriations Act. Both statutes include Section 743.

EXIM Did Not Consistently Include the Anti-Gag Provision or Other Appropriate Anti-Gag Language

EXIM provided OIG with five NDA templates that it uses for various purposes, such as contractor support and access to classified information. Of these five NDA templates, three included the anti-gag provision and two did not. A summary of OIG’s findings in relation to each template is contained in Table 1, below.

Table 1: Inclusion of Anti-Gag Provision or Language

Title	Anti-gag Provision or Language	In Use, as of August 2024	Signed By
Non-Disclosure Agreement Certification - Conditional Access to Sensitive but Unclassified Information (SBU)	✗	✓	Contractors
Contractor Confidentiality and Non-disclosure Agreement	✓	✓	Contractors
Office of the General Counsel Legal Intern Program Conditional Access to SBU Nondisclosure Agreement ^a	✗	✗	Interns
Source Selection Confidentiality and Nondisclosure Agreement	✓	✓	Federal Employees
Standard Form 312 – Classified Information Nondisclosure Agreement ^b	✓	✓	All

Source: OIG analysis of EXIM-provided information.

^a EXIM provided this agreement in response to a request for “current” templates even though according to EXIM officials, it discontinued use of this form in May 2023.

^b This is a standard government form prescribed by the Office of the Director of National Intelligence. This form must be signed by any individual needing access to classified information and systems.

Applicability of Anti-Gag Requirements

During its review of a draft of this report, EXIM informed OIG that, in its view, Section 743 requires EXIM to include the anti-gag provision in NDAs with federal employees but not in NDAs with federal contractor employees. As stated above, to use appropriated funds to implement or enforce specified Standard Forms and “any other nondisclosure policy, form, or agreement,” Section 743 requires the inclusion of the anti-gag provision in such documents. While Section 743 does not explicitly require the verbatim anti-gag provision to be included in NDAs signed by

contractors, it does not expressly exclude contractor employees from its coverage.⁶ Moreover, contractors have statutory whistleblower rights similar to the rights of federal employees.⁷

In addition, federal law requires EXIM to ensure that contractors, grantees, and other entities conducting work for the Government inform their employees in writing of their whistleblower rights and remedies.⁸ Further, EXIM is prohibited from using appropriated funds for a contract, grant, or cooperative agreement with an entity that requires its employees or contractors to sign internal confidentiality agreements or statements prohibiting or restricting such employees from lawfully reporting waste, fraud, or abuse to a designated law enforcement agency authorized to receive such information.⁹

As demonstrated above, EXIM has a role in ensuring contractors' whistleblower rights are protected and that contractors are appropriately informed of their rights. As such, including the anti-gag provision or similar language in EXIM's NDAs with contractor employees would align with express requirements and support contractor whistleblower rights enshrined in U.S. law.

Inconsistent Application of Anti-Gag Provisions or Language in EXIM's NDAs

OIG requested any policies about the requirements and use of nondisclosure forms from EXIM, and EXIM officials informed OIG that they did not have a documented policy related to NDA requirements. In addition, three different EXIM offices have responsibility for administering and overseeing their own templates.¹⁰ EXIM's distribution of responsibility and lack of policy about the use and verbiage of the NDA templates may have contributed to the inconsistent application of the anti-gag provision in EXIM's NDA templates. For example, while EXIM's Administrative Services Division had an NDA template for contractors that contained the anti-gag provision, the Office of Information Management and Technology did not include any anti-gag language in NDAs signed by their contractor personnel. Additionally, OIG found that while two NDAs included the anti-gag provision, both cited the incorrect statutory authority.¹¹

EXIM's use of nondisclosure forms or agreements without the appropriate anti-gag language may create a chilling effect that discourages whistleblowers from reporting allegations of fraud,

⁶ OIG notes that the Federal Acquisition Regulations at 3.909-1(a) cites to Section 743, for its prohibition on contracting "with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information."

⁷ Federal contractor employees may not be discharged, demoted, or otherwise discriminated against as reprisal for disclosing to certain federal authorities or contractor personnel evidence of gross mismanagement or waste of funds, abuse of authority, or substantial and specific danger relating to public health or safety, or a violation of law, rule, or regulation relating to a federal contract or grant. See 41 U.S.C. §4712(a)(1); 5 U.S.C. §2302(b)(8).

⁸ 41 U.S.C. §4712(d).

⁹ See Public Law 118-47, Division B, Title VII, § 742; Federal Acquisition Regulation §3.909-1(a).

¹⁰ These offices include the Office of General Counsel, the Office of Information Management and Technology, and the Administrative Services Division.

¹¹ Both the Contractor Confidentiality and Non-disclosure Agreement and the Source Selection Confidentiality and Nondisclosure Agreement cite 5 U.S.C. §2302(b)(13), which does not apply to EXIM as a wholly owned Government Corporation.

waste, abuse, and misconduct to OIG, Congress, or the Office of Special Counsel. To that end, OIG notes that it is important for EXIM to ensure it has the documented controls in place so that all current and future nondisclosure policies, forms, and agreements include the anti-gag provision, when required, or similar anti-gag language.

Recommendation 1: EXIM's Office of the Chief Management Officer, in coordination with the Office of General Counsel, should update the Conditional Access to Sensitive but Unclassified Information Nondisclosure Agreement template to include anti-gag language.

Management Response: In its September 25, 2024, response, EXIM concurred with this recommendation.

OIG Reply: OIG considers the recommendation resolved. The recommendation can be closed when OIG receives and accepts documentation that the Conditional Access to Sensitive but Unclassified Information Nondisclosure Agreement template has been updated to include anti-gag language.

Recommendation 2: EXIM's Office of the Chief Management Officer, in coordination with the Office of General Counsel, should review previously signed Conditional Access to Sensitive but Unclassified Information Nondisclosure Agreements and provide written notification to any current contractor staff that the signed agreement does not supersede their whistleblower rights.

Management Response: In its September 25, 2024, response, EXIM concurred with this recommendation.

OIG Reply: OIG considers the recommendation resolved. The recommendation can be closed when OIG receives and accepts documentation that the EXIM has appropriately notified current contractor staff regarding their whistleblower rights.

Consideration 1: EXIM's Office of General Counsel, or another appropriate EXIM office, should consider issuing agency-wide guidance or creating a process, including identifying a process owner, to ensure that all nondisclosure policies, forms, and agreements comply with federal law and include appropriate language informing signers of their whistleblower rights.

Management Response: In its September 25, 2024, response, EXIM stated that it will review the consideration further and evaluate for any potential action.

OIG Reply: The purpose of this consideration is to highlight a potential issue for EXIM management review. OIG appreciates EXIM's commitment to review and evaluate this consideration for potential action.

OIG plans to report back to interested congressional stakeholders about the results of this review within 60 days of the date of this memorandum. Please provide OIG with any updates or changes that EXIM plans to implement, or has made, within that period, so that we may include those efforts in our update.

We appreciate the cooperation and courtesies provided to this office throughout this review. If you have questions, please contact me at 202-565-3963 or at michael.ryan@exim.gov.

ATTACHMENT A: MANAGEMENT RESPONSE



Helping American Businesses Win the Future

DATE: September 24, 2024

TO: Michael T. Ryan, Assistant Inspector General for Special Reviews and Communications, Office of Inspector General

THROUGH: Ravi Singh, Acting Senior Vice President & Chief Financial Officer **RAVI SINGH**
Digitally signed by RAVI SINGH
Date: 2024.09.26 18:01:50 -04'00'

FROM: Courtney Chung, Senior Vice President and Chief Management Officer **COURTNEY CHUNG**
Digitally signed by COURTNEY CHUNG
Date: 2024.09.26 16:18:50 -04'00'

Jim Coughlan, Senior Vice President and General Counsel **James Coughlan**
Digitally signed by James Coughlan
Date: 2024.09.26 08:58:34 -04'00'

SUBJECT: EXIM Management Response to the draft *Management Advisory: EXIM's Nondisclosure Policies, Forms, and Agreements (OIG-O-24-11)*.

Dear Mr. Ryan,

Thank you for providing the Export-Import Bank of the United States ("EXIM" or "EXIM Bank") management with the Office of Inspector General's ("OIG") draft report for *Management Advisory: EXIM's Nondisclosure Policies, Forms, and Agreements (OIG-O-24-11)*, dated September 5, 2024 (the "Report"). EXIM's leadership and management continue to fully support the OIG's work, which we believe complements and enhances EXIM's efforts to continually improve its processes. EXIM Bank is proud of the strong and cooperative relationship it has with the OIG and shares the OIG's commitment to improving EXIM's policies, procedures, and operations.

EXIM Bank appreciates the OIG's review of EXIM's nondisclosure policies, forms, and agreements and acknowledges the importance of consistently including all relevant laws and regulations in each document. Your recommendations will serve as a guiding framework for implementing necessary measures to ensure compliance with all laws, including the law requiring the anti-gag provision in nondisclosure agreements. EXIM also appreciates including the item for consideration in the report. EXIM will review it further and evaluate it for any potential action.

EXIM respectfully objects to the OIG's interpretation of Public Law 118-47, Division B, Title VII, § 743 ("Section 743") as set forth in its "Revised Draft OIG Management Advisory Nondisclosure Policies Forms and Agreements 09-20-2024." Section 743 explicitly requires NDAs with federal employees to include the anti-gag provision. However, under a plain reading of the appropriations law, this requirement does not extend to employees of federal contractors, who are protected under other laws, such as 41 U.S.C. §4712(d) (Enhancement of contractor protection from reprisal for disclosure of certain information), and the OIG has not provided any authority explicitly supporting its position that Congress intended to apply the anti-gag provision to contractor employees.

Notwithstanding the preceding, EXIM supports OIG's work in furtherance of whistleblower protections and is committed to fully supporting the rights of individuals to report waste, fraud, and abuse, under applicable law or regulation to the appropriate authorities. As explained below, EXIM is taking steps to improve its administration of NDAs that will, in some cases, exceed what is required under current law.

OIG made two recommendations. EXIM concurs with the two recommendations and will move forward with implementing these recommendations.

Recommendation 1: EXIM's Office of the Chief Management Officer, in coordination with the Office of General Counsel, should update the Conditional Access to Sensitive but Unclassified Information Nondisclosure Agreement template to include anti-gag language.

Management response: EXIM concurs with this recommendation. EXIM's Office of the Chief Management Officer, in coordination with the Office of General Counsel, will review all templates to ensure the appropriate language regarding individuals' rights to whistleblower protection is included.

Recommendation 2: EXIM's Office of the Chief Management Officer, in coordination with the Office of General Counsel, should review previously signed Conditional Access to Sensitive but Unclassified Information Nondisclosure Agreements and provide written notification to any current contractor staff that the signed agreement does not supersede their whistleblower rights.

Management response: EXIM concurs with this recommendation. EXIM's Office of the Chief Management Officer, in coordination with the Office of General Counsel, will provide written notification to any current contractor staff that any previously signed Conditional Access to Sensitive but Unclassified Information Nondisclosure Agreement does not supersede their whistleblower rights.

CC:

The Honorable Reta Jo Lewis, President and Chair of the Board of Directors
Brad Belzak, Senior Vice President and Chief of Staff
Hazeen Y. Ashby, Deputy Chief of Staff and White House Liaison
Larry Decker, Senior Advisor to the President and Chair of the Board of Directors
Kenneth Tinsley, Senior Vice President and Chief Risk Officer
Courtney Chung, Senior Vice President and Chief Management Officer
Howard Spira, Senior Vice President and Chief Information Officer
Michelle Arias, Chief Human Capital Officer
James Coughlan, Senior Vice President and General Counsel
Michaela Smith, Director of Audit and Internal Controls Programs

ATTACHMENT B: REQUEST FROM SENATOR CHARLES GRASSLEY



March 11, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Parisa Salehi
Inspector General
Export-Import Bank of the United States

Dear Inspector General Salehi:

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_doj_oig_tigta_-_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.