



September 27, 2024

MEMORANDUM REPORT

TO: Alice Maroni
Chief Management Officer

Karen Morris
General Counsel

FROM: John Seger
Assistant Inspector General for Audits, Evaluations, and Inspections

SUBJECT: Evaluation of PBGC's Inclusion of Anti-Gag Provision in Required Agreements (Report No. EVAL-2024-13)

This memorandum report presents the results of our evaluation of the Pension Benefit Guaranty Corporation's (PBGC or the Corporation) non-disclosure policies, forms, and agreements. The objective of this evaluation was to determine whether PBGC included "anti-gag" language in all non-disclosure policies, forms, agreements, and related documents as required by the Consolidated Appropriations Act of 2023 (Pub. L. No. 117-328). We conducted our work in accordance with the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency. (See, Appendix I.)

We appreciate the cooperation you and your staff extended to the Office of Inspector General (OIG) during this project. We thank you for your receptiveness to our recommendations and your commitment to reducing risk and improving the effectiveness and efficiency of PBGC's programs and operations.

This report contains public information and will be posted in its entirety on our website and provided to the PBGC Board of Directors and Congress in accordance with the Inspector General Act.

Summary

We reviewed six documents that require the anti-gag language. We found four settlement agreements contained the required anti-gag language. However, two Technical Evaluation Panel (TEP) certification templates did not include the required anti-gag language. This occurred because PBGC does not have a policy to guide PBGC

staff in identifying when a non-disclosure form, agreement, or related documents require the anti-gag language.

Background

On March 11, 2024, Senator Charles Grassley sent a letter to federal Offices of Inspector General, stating "federal agencies continue to implement non-disclosure policies and similar agreements without the inclusion of the 'anti-gag' provision as required by law." Senator Grassley noted that the anti-gag provision "has been included in almost every appropriations bill since 1988 and was codified in the Whistleblower Protection Enhancement Act," and requested PBGC OIG review Corporation non-disclosure policies, forms, agreements, and related documents to ensure the anti-gag provision was included.¹

Details

Finding: Not All Non-Disclosure Documents Included Anti-Gag Language

The Consolidated Appropriations Act mandates that:

(a) no government funds appropriated can be used to implement or enforce any non-disclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "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.

We identified the Procurement Department's (PD's) TEP certification templates and the Office of General Counsel's (OGC's) *Confidential Settlement Agreements and Release*

¹ An "anti-gag" provision is contained in section (b)(13) of the Whistleblower Enhancement Act. 5 U.S.C. 2302(b)(13). However, section (b)(13) does not apply to PBGC because it is a government corporation. Nonetheless, the appropriation law, Pub. L. No. 117-328, Title VII, Sec. 743, applies government-wide to "departments, agencies, and corporations." Thus, PBGC is subject to the anti-gag provision of appropriations law.

of Claims as requiring the anti-gag language. PBGC provided two TEP Certification templates and four signed Confidential Settlement Agreement and Release of Claims.

TEP Certification Templates

TEP certifications are administered by the PD, which is responsible for the acquisition of all goods and services used by the PBGC to accomplish its mission. To prevent disclosure of procurement source selection information, PD requires PBGC employees with access to such information to sign the Conflict of Interest (COI) Certification and Federal Procurement Integrity Act (FPIA) Certification.

The COI template includes standards of conduct regarding conflicts of interest and safeguarding confidential information. Employees signing this document acknowledge that the information they receive will be given only to persons specifically granted access to the source selection information and may not be further divulged without specific prior written approval from an authorized individual. In the event of the unauthorized release of procurement information, they must immediately notify the contracting officer and an agency ethics counselor.

The FPIA Certification template requires personnel to acknowledge that during any federal agency procurement of products or services, they understand and certify that they will observe certain rules of conduct. One of those rules of conduct, Part C, requires employees to "not discuss or disclose proposal evaluation or source selection matters with or to any unauthorized individuals, including government personnel, without specific prior approval from the proper authority."

We reviewed the two TEP certification templates and found that neither included the required anti-gag language. As such, the certifications can restrict employees from disclosing source selection information which might include disclosures of wrongdoing, such as: nepotism, unauthorized preferences or advantages, procurement mismanagement, a gross waste of funds, or an abuse of authority.

Confidential Settlement Agreement and Release of Claims

Confidential Settlement Agreements and Release of Claims are administered by the General Law and Operations Department, which represents PBGC in employment litigation matters. This agreement identifies the terms and conditions of a settlement between PBGC and an employment applicant, employee, or former employee on a certain issue, such as an employee complaint. Settlement agreements may include non-

disclosure provisions, such as confidentiality clauses that restrict or prevent a person who benefits from the settlement from disclosing information about it.

Confidential settlement agreements normally include a confidentiality clause that “only restricts disclosure of the terms and conditions of the settlement.” A settlement agreement, however, with a broader confidentiality clause (i.e., a clause with non-disclosure extending beyond the terms and conditions of settlement) must include the statement.

We reviewed four signed *Confidential Settlement Agreements and Release of Claims* (executed from October 1, 2022, through May 31, 2024) and found that, in each, PBGC complied with appropriations law by including the required anti-gag language.

Anti-Gag Guidance

According to the *Government Accountability Office Green Book*, “Internal Control” comprises the plans, methods, policies, and procedures used to fulfill the strategic plan, goals, and objectives of the entity. Accordingly, management, with oversight from the oversight body, defines the organization's expectations of ethical values in the standards of conduct. Management may consider using policies to communicate the standards of conduct to the organization.

OGC told us PBGC does not have any policy regarding the inclusion of anti-gag language in non-disclosure policies, forms and agreements. We also reviewed PBGC's Directive System, Directive Number GA 05-01 given to us by the Corporate Controls and Reviews Department, for Corporation guidance regarding where to include anti-gag language. We confirmed that PBGC's Directives System, which is used to issue policies, instructions and procedures throughout the Corporation, does not include instruction about the required anti-gag language.

Conclusion

We reviewed six documents that require the anti-gag language. We found four settlement agreements contained the required anti-gag language. However, two Technical Evaluation Panel (TEP) certification templates did not include the required anti-gag language. This occurred because PBGC does not have a policy to guide PBGC staff in identifying which non-disclosure forms, agreements, and related documents require the anti-gag language. When the agreements lack the required language, federal employees may be unclear on their disclosure rights 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 to proper government entities.

Recommendations

We recommend the Office of General Counsel:

1. Develop and implement an anti-gag policy that assigns oversight roles and responsibilities, provides guidance to PBGC personnel on legal requirements, and describes how to identify non-disclosure forms and agreements that require the inclusion of the anti-gag provision.

Resolved. Management concurs with this recommendation. OGC agreed that the PBGC should communicate anti-gag provisions through the development of an anti-gag policy. Therefore, OGC will develop a directive which assigns oversight roles and responsibilities, provides guidance to PBGC personnel on legal requirements and identifying non-disclosure forms and agreements that require inclusion of the anti-gag provisions. OGC's goal is to complete the planned action by April 30, 2025.

Closure of this recommendation will occur when the Corporation provides our office with its anti-gag policy, and we review for compliance with our recommendation.

2. In the case of a non-disclosure form or agreement that does not contain the required anti-gag statement, PBGC should give notice of the statement to the employee signatory to the form or agreement.

Resolved. Management concurs with this recommendation. OGC agreed that if a non-disclosure form or agreement does not contain the required anti-gag statement, PBGC should give notice of the statement to the employee signatory on the form or agreement. OGC will send a communication to all current employees notifying them of the anti-gag statement and their rights to disclose violation of any law, rule, or regulations or mismanagement, gross waste of funds, abuse or authority, or substantial and specific danger to public health or safety to proper government entities. OGC's goal is to complete the planned action by October 31, 2024.

Closure of this recommendation will occur when the Corporation submits evidence that all current employees received notification of their anti-gag rights.

We recommend that the Office of Management Administration:

3. Ensure that the Procurement Department Technical Evaluation Panel templates are updated to include the anti-gag provision as required by the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743).

Resolved. Management concurred with this recommendation. OMA agreed that the Procurement Department Technical Evaluation Panel templates require the anti-gag provision. Therefore, OMA will ensure the Procurement Department, in consultation with OGC, updates the Conflict of Interest/Procurement Integrity Pledge Template to include the anti-gag provision as required by the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743). OMA's goal is to complete the planned action by October 1, 2024.

Closure of this recommendation will occur when the Corporation submits evidence that the Procurement Department Technical Evaluation Panel updated templates to include the required language.

cc: Ann Orr, Acting PBGC Director
Damon McClure, Director, Procurement Department
Paul Chalmers, Deputy General Counsel
Lisa Carter, Director, CCRD
Latrece Wade, Risk Management Officer
Department of Labor Board staff
Department of Treasury Board staff
Department of Commerce Board staff
House committee staff (Education and Workforce, Ways and Means, HOCR)
Senate committee staff (HELP, Finance, HSGAC)

Appendix I: Objective, Scope, Methodology, and Standards

Objective

Our objective was to determine if PBGC included “anti-gag” language in all nondisclosure policies, forms, agreements, and related documents as required by the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743).

Scope

Our engagement scope was October 1, 2022, through May 31, 2024, and included non-disclosure policies, procedures, forms, and other non-disclosure agreements and other related documents. We identified two document types that OIG would review during the engagement and requested any others that the PBGC may have identified. The documents given to us by PBGC to review included the following:

1. Four Confidential Settlement Agreements and Release of Claims executed from October 1, 2022, through May 31, 2024.
2. Two Procurement Department templates for Technical Evaluation Panel (TEP) forms that PBGC employees are required to sign when they are tasked to participate on a TEP for acquisition source selection. The two TEP forms reviewed included the Conflict of Interest (COI) Certification and Federal Procurement Integrity Act Certification.

We conducted our work from June 2024 through August 2024 remotely.

Methodology

To assess PBGC’s compliance with the Appropriations Act, we:

- Obtained a comprehensive understanding of the anti-gag provision mandated in the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743), and applicable guidance provided in the U.S. Office of Special Counsel’s memorandum, *Subject Non-Disclosure Policies, Forms, or Agreements*, dated February 1, 2018.
- Analyzed four *Confidential Settlement Agreements and Release of Claims* and two TEP forms to determine if the PBGC included the anti-gag provisions as required per the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743).

- Interviewed and corresponded with key PBGC personnel from Corporate Controls and Reviews Department (CCRD), General Law and Operations Department (GLOD), and Procurement Department (PD).
- Obtained PBGC OIG Chief Counsel's guidance and opinions.
- Reviewed prior audits and evaluations related to this engagement's evaluation objective.

Applicable Professional Standards

We conducted the review under the authority of the Inspector General Act of 1978, as amended, and in accordance with the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency. Those standards require that we plan and perform the engagement to obtain sufficient and appropriate evidence to provide a reasonable basis for our conclusions and observations based on our objective. We believe that the evidence obtained here provided a reasonable basis for our conclusions and observations based on our evaluation objective.

Appendix II: Management Response



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September 23, 2024

TO: John Seger
 Assistant Inspector General for Audits, Evaluations, and Inspections

FROM: Karen Morris **KAREN MORRIS** Digitally signed by KAREN MORRIS
 General Counsel Date: 2024.09.23 10:26:11 -04'00'

Alice Maroni **ALICE MARONI** Digitally signed by ALICE MARONI
 Chief Management Officer Date: 2024.09.23 10:09:57 -04'00'

SUBJECT: Response to OIG's Draft Report, Evaluation of PBGC's Inclusion of Anti-Gag Provision in Required Agreements (Project No. EV-24-182)

Thank you for the opportunity to comment on the Office of Inspector General's (OIG) draft report, received September 11, 2024, relating to your Evaluation of PBGC's Inclusion of Anti-Gag Provision in Required Agreements. Your office's work on this is sincerely appreciated.

PBGC management met with the representatives from the OIG on August 20, 2024, to discuss the findings and recommendations. The dialogue was both informative and insightful and PBGC is grateful for the opportunity to respond to the recommendations suggested by the OIG.

Management concurs with the report's findings and recommendations. In the attachment to this report, you will find our specific responses to each recommendation included in the report, as well as our planned corrective actions and scheduled completion dates. Addressing these recommendations in a timely manner is an important priority for PBGC.

Attachment

cc: Ann Orr, Acting Director
 Paul Chalmers, Deputy General Counsel
 Damon McClure, Director, Procurement Department
 Lisa Carter, Director, Corporate Controls and Reviews Department
 Latreece Wade, Risk Management Officer

Our comments on the specific recommendations in the draft report are as follows:

- 1. Develop and implement an anti-gag policy that assigns oversight roles and responsibilities, provides guidance to PBGC personnel on legal requirements, and describes how to identify non-disclosure forms and agreements that require the inclusion of the anti-gag provision. (OIG Control Number 2024-13-01-OGC)**

PBGC Response: Management concurs with this recommendation. The Office of General Counsel (OGC) will develop a directive which assigns oversight roles and responsibilities, provides guidance to PBGC personnel on legal requirements and identifying non-disclosure forms and agreements that require inclusion of the anti-gag provisions.

Scheduled Completion Date: April 30, 2025

- 2. In the case of a non-disclosure form or agreement that does not contain the required anti-gag statement, PBGC should give notice of the statement to the employee signatory to the form or agreement. (OIG Control Number 2024-13-02-OGC)**

PBGC Response: Management concurs with this recommendation. The Office of General Counsel (OGC) will send a communication to all current employees notifying them of the anti-gag statement and their rights to disclose violation of any law, rule, or regulations or mismanagement, gross waste of funds, abuse or authority, or substantial and specific danger to public health or safety to proper government entities.

Scheduled Completion Date: October 31, 2024

- 3. Ensure that the Procurement Department Technical Evaluation Panel templates are updated to include the anti-gag provision as required by the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743). (OIG Control Number 2024-13-03-OMA)**

PBGC Response: Management concurs with this recommendation. The Office of Management and Administration (OMA) will ensure the Procurement Department, in consultation with OGC, updates the Conflict of Interest/Procurement Integrity Pledge Template to include the anti-gag provision as required by the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328, Title VII, Sec. 743).

Scheduled Completion Date: October 1, 2024

Appendix III: Acronyms

Acronym	Meaning
CCRD	Corporate Controls and Reviews Department
COI	Conflict of Interest
FPIA	Federal Procurement Integrity Act
GLOD	General Law and Operations Department
IG	Inspector General
OSC	Office of Special Counsel
OGC	Office of General Council
PD	Procurement Department
PBGC	Pension Benefit Guaranty Corporation
TEP	Technical Evaluation Panel

Appendix IV: Staff Acknowledgements

PBGC OIG Contact

John Seger 202-229-3315 or
seger.john@pbgc.gov

Staff Acknowledgements

In addition to the contact above, David Reynolds, Audit Manager and Anita Paul, Senior Auditor made key contributions to this report.

Appendix V: Feedback

Please send your comments, suggestions, and feedback to: OIGFeedback@pbgc.gov and include your name, contact information, and the report number. You may also mail comments to us:

Office of Inspector General
Pension Benefit Guaranty Corporation
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If you want to discuss this report or your comments with a member of the Office of Inspector General staff, please contact our office at (202) 326-4030.