

June 24, 2014

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Rogers and Ranking Member Lowey:

We write to express our strong support for restoration of the “anti-gag” appropriations rider that served as an effective resource for accountability from FY 1988 through FY 2013, when it was removed in the most recent appropriations law. Through leadership by Senators Grassley and Levin, this provision was enacted initially to prevent liability from an open-ended pseudo classification that would have canceled disclosures of “classifiable” information. It was included in SF 189 and SF 312, nondisclosure agreements required as a prerequisite for security clearances. All employees with clearances had to receive advance approval before communicating classifiable information, or else they could lose their clearances and be held criminally liable for an unauthorized disclosure. Unfortunately, “classifiable” meant any information that “could have been” or “should have been” classified, which meant a system of blanket prior restraint.

The anti-gag rider bans federal spending to implement or enforce nondisclosure agreements (NDAs) that do not conform to its requirements. It has worked effectively through incorporating by reference the language of federal whistleblower laws and those protecting congressional communications into every federally-funded NDA for government workers or contractors. It also had a supremacy of law provision that invalidated NDA language contradicting the protected free speech channels.

While not widely publicized, for whistleblowers and the good government groups backing them, the anti-gag rider has served as one of the most effective resources in law to prevent retaliation, or lead to early resolution of related litigation. It was so successful that, after renewed advocacy by Senator Grassley, it was codified as a cornerstone of the Whistleblower Protection Enhancement Act of 2012. For that reason, it may have appeared that the spending rider was superfluous and no longer necessary.

In reality, the anti-gag rider still should be playing a uniquely invaluable role, because its disappearance has created vacuums when and where accountability is needed most. Its restoration could have a particularly significant impact in four areas:

* Intelligence community whistleblowers: The WPEA did not include any protections for Intelligence Community (IC) employees. Neither does Presidential Policy Directive 19 creating Executive protection, or recently-passed Senate legislation amending the Intelligence Authorization Act to create statutory IC whistleblower rights. This leaves those reforms vulnerable to cancelation through contradictory agency nondisclosure forms, policies or agreements. Restoration of the anti-gag rider is necessary for these newly-enacted or imminent whistleblower rights to trump inevitable agency efforts to neutralize them.

* Contractors: The WPEA reiterates protection for contractors, but there is no enforcement authority under the law for contractor employees. As a result, the WPEA statutory language has been of no more than symbolic significance.

* Judicial oversight: The WPEA only provides for appellate judicial review, and does not yet permit access to court for whistleblowers seeking relief. The anti-gag rider allows them to seek a temporary restraining order or preliminary injunction from district court, a significant advantage over sometimes politicized administrative processes for enforcement of rights.

* Accountability and deterrence: The appropriations rider ban on federal spending for non-conforming NDAs is enforced through salary cut-off under the Anti-Deficit Act. In practice, this has been the most effective deterrent to informally convince federal officials to honor its requirements, working successfully in countless instances.

The anti-gag statute was enacted and reaffirmed from 1987-2012 and then codified into statute, because it has worked. Unfortunately, the Whistleblower Protection Enhancement Act was not a complete substitute. We urge you to eliminate this accountability vacuum through restoration of the anti-gag statute in the FY 2015 Financial Services and General Government Appropriations Bill. In the past, some of the signatories below have on general principle expressed concerns about policy riders on appropriations bills; nonetheless, in this case they believe restoring the rider language would be relevant to fiscal responsibility by establishing more effective oversight toward the appropriations contained in the underlying legislation.

Sincerely,

Government Accountability Project
Liberty Coalition
National Taxpayers Union
Project On Government Oversight
Public Citizen
Taxpayers Protection Alliance
Union of Concerned Scientists, Center for Science and Democracy