



USAID
FROM THE AMERICAN PEOPLE

Office of the General Counsel

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EMPLOYMENT SEARCH AND POST-EMPLOYMENT GUIDANCE

I. INTRODUCTION

In the ethics training sessions you have attended throughout your Government career, you have been exposed to the general rules regarding conflicts of interest and other ethics matters. Like many others, until you actually begin to contemplate leaving Government service you may not have considered the actual application of the rules to your post-Government career. You may only generally be aware of how the rules regulate what you may and may not do. There are provisions that apply while you are still a Government employee and others that will apply once you have commenced your post-Government career.

This handout is intended to be a summary of the key employment search and post-employment laws and regulations applicable to employees throughout the Executive branch. It is written with the sometimes unique issues involving USAID employees in mind. You may find that the rules are not as restrictive as you had thought; on the other hand, you may find that some provisions are counter-intuitive. In any case, the rules are complicated, and therefore this guidance should not substitute for receiving individualized guidance from an attorney in the Office of the General Counsel, Ethics and Administration (GC/EA) (for those employees in Washington) or from your Regional Legal Officer (RLO) (for those employees overseas).

What is most important is that you carefully consider your particular situation in light of the rules and that you not under-emphasize their impact on your future plans. The restrictions discussed in this guidance carry criminal penalties for violation, and newspaper articles regularly describe former Government officials who have run afoul of the rules. You should also be aware that violations of the rules carry serious implications for the outside entities (including the individual hiring officials) with whom you negotiate for employment or for whom you become employed.

II. EMPLOYMENT SEARCH RESTRICTIONS

The first thing you must be aware of as you begin your job-hunting are the employment search rules. These rules govern your behavior while you are still a Government employee. The rules are based on the concept that a conflict of interest exists when an employee is negotiating for a job at the same time he is undertaking official duties involving that same outside party.

Specifically, 18 U.S.C. § 208 (a *criminal* statute) and the Standards of Conduct, 5 C.F.R. § 2635.601, prohibit a Federal employee from participating “personally and substantially” on official matters that will have a “direct and predictable” effect on the financial interests of an entity with whom the employee is negotiating or has any arrangement with concerning future employment. Once he begins seeking employment with a particular employer, the employee

must immediately recuse himself from issuing decisions, approvals, disapprovals, recommendations, or the rendering of advice in any matter regarding the potential non-Federal employer. In other words, the employee may have no duties whatsoever that impact on the potential employer, including the direct and active supervision of his subordinate's participation in these matters.

Employees are considered to be “seeking employment” once they submit a resume or job proposal, or if they have not unilaterally rejected an unsolicited job offer from an outside employer. The search for outside employment is considered active until one or both sides definitively reject the potential employment or, in the case of the unsolicited offer the employee has made to a potential employer, two months have lapsed without communication between the employee and potential employer (in other words, a resume or application to which there has been no response). To be a valid rejection, the employee must definitively state that he is not interested in employment. A comment such as, “Keep me in mind for the future,” is not a definitive rejection.

Please be aware that these regulations do not prohibit job-search contact with outside employers that do business with USAID. They only require that if such contact occurs and negotiations begin, the employee must recuse himself from all official involvement in USAID matters affecting the potential future employer.

A recusal is nothing more than a determination that one will undertake no further duties with regard to the potential employer. Employees who, even theoretically, may have some duties that involve the potential employer should formalize this arrangement by filing a written recusal. This recusal alerts supervisors, subordinates, and others who may deal with the employee on matters involving the potential employer that the employee is disqualified from participation. There is no need for a recusal to state the reason for the disqualification. A sample recusal form is attached and can also be found on the intranet at: <http://inside.usaid.gov/A/GC/EA/employment.html>.

There are additional rules for certain employees who are involved in the procurement process. These are the “Procurement Integrity” rules found at 41 U.S.C. § 423. The job search provisions of these rules apply to employees participating “personally and substantially” in a Federal *contract* valued at \$100,000 or more. “Personally and substantially” in this context means active and significant involvement in activities directly related to the procurement. The key question is whether the employee’s involvement is significant to the matter, including the direct and active supervision of a subordinate’s participation in the matter.

Unlike the rules that were previously discussed, an employee who falls under the Procurement Integrity restrictions is *required* to immediately report in writing all employment discussions between himself and the bidder or offeror to the Designated Agency Ethics Official (DAEO), by sending an e-mail to ProcurementIntegrityNotice@usaid.gov, as well as his supervisor. The employee must report in writing even if he immediately rejects the employment offer. Full disclosure is extremely important. The employee may continue working on the procurement if he unequivocally rejects the offer. If, however, at any time he wishes to pursue employment discussions with the bidder or offeror, he must immediately disqualify himself from

all further personal and substantial participation in the procurement process unless the head of the contracting activity authorizes his participation. An employee, however, may be required to terminate employment discussions if it is determined that those discussions would interfere substantially with the employee's ability to perform his duties. The employee's supervisor makes this determination, in consultation with GC/EA or the RLO.

Employees who are required to file a Form 278 financial disclosure also have an additional reporting requirement. Any Form 278 filer who has reached an agreement or is in negotiations for post-USAID employment with any non-governmental entity must, within three business days after making the agreement or initiating negotiations, submit to the DAEO a signed statement that identifies (a) the name(s) of the entity or entities and (b) the date negotiations or an agreement commenced. A sample notification form can be found on the intranet at: <http://inside.usaid.gov/A/GC/EA/employment.html>. Please send the form, as a PDF scanned with your signature, to 278EmploymentNotice@usaid.gov and retain the original in your records. This notification will only go to the DAEO, will be handled as Sensitive but Unclassified (SBU), and will not be subject to release under FOIA

A "negotiation" begins when an employee enters into a discussion or communication with another person, or such person's agent or intermediary, which is mutually conducted with a view toward reaching an agreement regarding possible employment or compensation with that person. An employee can be in a "negotiation" even if the discussion has not yet touched upon specific terms and conditions of employment in a specific position. If you file a notification form, then you should also consider whether you will need to complete the bottom portion of the form in order to recuse yourself from undertaking any further duties with regard to the potential employer, based upon the standard discussed above.

III. POST-EMPLOYMENT RESTRICTIONS

This section contains guidance on what you may do once you leave USAID. The application of these rules is dependent upon your grade, your specific duties while employed at USAID, who your new employer is, and the duties that you foresee in your post-USAID career. These rules apply to all direct-hire employees and Personal Services Contractors (PSCs). Please note that this guidance addresses only the ethics restrictions that might apply to you as a former USAID employee; it does not address any potential Organizational Conflicts of Interest under Part 9 of the Federal Acquisition Regulations.

A. 18 U.S.C. § 207

The principal post-employment conflict of interest statute is 18 U.S.C. § 207. It contains a "permanent bar" and a "two-year bar" that are applicable to all employees. The statute also contains a "one-year bar" that is applicable to certain senior employees. The key concept in all of these provisions is "representation" back to the U.S. Government or USAID.

"Representing" is defined as a communication or appearance with the intent to influence a Federal department, agency, or court on a particular matter. Prohibited communications include telephone calls, letters, or meetings with Federal personnel. As an example, a position as

chief of party will *always* require representation back to USAID (or other agency). Behind-the-scenes communications may also be prohibited if the communications are intended to be attributed to the former employee.

If your post-Government career will involve no representation back to the Government, then these rules will not apply. 18 U.S.C. § 207 only restricts representation; it does not prevent individuals from working for private firms, even on grants and contracts and other matters in which they participated or for which they had official responsibility. You may provide input (*i.e.*, conversations with work colleagues and preparation of internal work product) that is used as input into communications or appearances that your new non-Federal employer makes before a Federal entity. However, if, like many former USAID employees, you plan to work in a position that will bring you into contact with Government officials, you must be familiar with the following rules.

The permanent bar under 18 U.S.C. § 207(a)(1) prohibits you from representing any other person or entity before any Government department, agency, or court on any particular matter involving specific parties in which the United States is a party or has a direct and substantial interest, and in which you participated personally and substantially as a Government employee. “Personal and substantial” involvement is a legal phrase that essentially covers any particular matter in which you played a significant role.

The two-year bar under 18 U.S.C. § 207(a)(2) is similar. It applies to particular matters where, even though you may have had no personal and substantial involvement, an employee you supervised did have such involvement during your last year of Government service. In this case, for two years after you leave USAID, you may not represent back to the Government on any particular matter in which your subordinate was involved in your last year.

The permanent and two-year bars are focused on “particular matters involving specific parties.” These restrictions are aimed at discrete transactions with identifiable parties, in which US departments or agencies are involved. Examples would be contracts, grants, cooperative agreements, claims, litigation, investigations, or negotiations. The restrictions are not aimed at involvement in broad policy issues directed to a large and diverse group of individuals or entities. The key is whether specific contractors or grantees have been identified at the time of your participation. So, for example, the development of a mission’s Strategic Objectives (SOs) would not be a “particular matter” – this is a policy matter. Additionally, participation in drafting a Statement of Work (SOW) that resulted in a procurement action would not be considered a particular matter unless specific parties were contemplated or known.

The statute and its implementing regulations provide detailed definitions and examples for the terms “representing,” “personal and substantial” involvement, and “particular matter.” When you speak with a GC/EA attorney or your RLO, you will receive guidance that is specific to your particular situation.

The one-year bar under 18 U.S.C. § 207(c) applies to senior employees. “Senior” employees include (1) certain high-ranking positions identified by statute, and (2) positions paid at a rate of basic pay greater than **\$164,004.00** (86.5% of the rate for level II of the Executive

Schedule - \$189,600). Under the current statutory language, approximately 80% of Senior Executive Service (SES) and Senior Foreign Service (SFS) employees are included in the definition of senior employee. “Senior” employees may not represent anyone before USAID for one year after leaving USAID on any matter, regardless of whether they had any personal involvement as an employee. The one-year ban applies to representation back to USAID only, and does not prohibit representation before other Government agencies, members of Congress, committees, or staffs.

Former senior employees are also prohibited, for one year, from representing a foreign government or foreign political party before any U.S. Government department or agency or aiding or advising such a foreign entity in making a representational communication. This restriction, which covers both paid and unpaid services, does not apply to representation of a foreign commercial corporation. You should be aware that, in contrast to the discussion of “representation” above, this restriction also prohibits “behind the scenes” assistance to a foreign entity in connection with a representation.

There are certain limited exceptions to the one-year bar for former senior employees. One exception permits a former senior employee to make a non-representational and uncompensated statement to USAID based on the former employee’s own special knowledge. Another allows a former senior employee to represent back to USAID as part of his official duties on behalf of a state or local governments, an accredited institution of higher education, or a hospital or medical research organization.

Other exceptions apply more broadly. One exception applicable to all former employees allows representation back to USAID if the former employee is carrying out official duties on behalf of the United States. Another allows representation back to the Government on behalf of an international organization in which the United States participates. However, this exception requires an advance certification by the Secretary of State that such participation is in the interest of the United States. A former employee may also, under specific procedures, to make communications solely to provide scientific or technological information. The application of the exceptions can be very technical. If you believe that any of these exceptions apply to you, then please discuss your situation with a GC/EA attorney or your RLO.

If you leave USAID to work directly for the U.S. Government (or as a PSC or a “While Actually Employed” (WAE) employee) the above rules will not apply. However, there are other, hybrid types of employment mechanisms used by USAID and other agencies. Because the application of the rules to these mechanisms may vary depending on your circumstances, you should consult with a GC/EA attorney or your RLO.

The statute and its implementing regulations provide detailed definitions for the terms “representing,” “personal and substantial” involvement, and “particular matter.” When you speak with a GC/EA attorney or your RLO, you will receive guidance that is specific to your own particular situation.

You should also be aware of how the rules impact certain types of projects and programs at USAID. If you are involved at the “umbrella” level with an Indefinite Quantity Contract

(IQC) or a Leader with Associates (LWA) agreement, you should know that the entirety of the contract or agreement will most likely be considered a “particular matter” in analyzing the restrictions that would apply to you. As such, you generally will be prohibited from representing back to the Government on the umbrella agreement or any individual task order or associate award that falls under that agreement. However, if your involvement is limited solely to a particular task order or associate award, the prohibition on representing back to the Government may be limited to that specific task order or associate award, depending on the specific facts of your situation and after consultation with GC/EA or the RLO.

If you are participating in alliance building with the private sector through the Global Development Alliance (GDA), you are subject to the same job-seeking and post-employment restrictions as other employees. As with other employees, the analysis of whether a conflict of interest exists in your case will be fact specific, and the results could vary widely. For example, an alliance developed on a parallel funding model (*i.e.*, when USAID and our partners make one another aware of our needs), in which there is a coordinated effort toward reaching a common goal but each partner establishes a separate funding mechanism, would probably not be deemed a “particular matter” for purposes of 18 U.S.C. § 207. On the other hand, in a situation in which a USAID project officer is helping put together an alliance with a single firm or small group of GDA firms to help commercialize an otherwise non-commercially viable product, the USAID employee would be prohibited from seeking employment with those firms unless he recused himself from further interaction with these firms. Similarly, any restrictions on post-employment activities will depend upon the nature of the USAID employee’s responsibilities and the nature of the partnership that was developed. You should speak with a GC/EA attorney or your RLO to receive guidance on your particular situation.

B. PROCUREMENT INTEGRITY

The “Procurement Integrity” rules (41 U.S.C. § 423, implemented at FAR 3.104) apply to your post-USAID career as well as during the employment search process discussed above. Under these rules, you may not accept compensation from a contractor as an employee, officer, director, or consultant of that contractor within a period of one year after you:

- served, at the time of selection of the contractor, as the procuring contracting officer, chief of a financial or technical evaluation panel, or, though not generally used in USAID, the source selection authority or member of the source selection board in a procurement in which that contractor was selected for award of a contract in excess of \$10 million. (The fact that you served on a technical evaluation panel that reviews proposals for technical merit for awards in excess of \$10 million is not enough to bring you under the coverage of the legislation. You must have served as the chief of the technical or financial evaluation panel.);
- served as program manager (*e.g.*, SO Team Leader, CTO or COTR, manager of an activity not covered by an SO, or equivalent position), deputy program manager, or administrative contracting officer for a contract in excess of \$10 million awarded to the contractor; or
- personally made a decision to:

- award a contract or subcontract, modify a contract or subcontract, or issue a task order or delivery order in excess of \$10 million to that contractor;
- establish overhead or other rates applicable to a contract or contracts valued in excess of \$10 million for that contractor;
- approve issuance of a contract payment or payments in excess of \$10 million to that contractor; or
- pay or settle a claim in excess of \$10 million with that contractor.

Please be aware that these Procurement Integrity provisions differ from the 18 U.S.C. § 207 post-employment rules in several respects. First, the Procurement Integrity provisions apply only to contracts, and not grants or cooperative agreements (even if they have a value in excess of \$10 million). Second, they prohibit receipt of any type of compensation from the contractor, regardless of your potential responsibilities with that contractor. In other words, if you are covered by the statute, you may not work for the contractor at all for one year after you last performed the work described above (which may be prior to the date you leave USAID). Finally, the bar applies only to employment with the contractor, and not any subcontractors.

IV. CONTACTS AND SERVICES

By this point, it should be clear to you that the rules are complicated, and that their application can change based on the specific facts of your situation. It should also be clear that your actions can have serious consequences. Agency counsel is available to help you navigate these legal restrictions. If you are assigned to USAID/W, please call (202) 712-0900 to arrange to speak with an ethics attorney in GC/EA. We are able to quickly provide you with the guidance you need. If you are assigned overseas, then you should first contact your RLO.

As you negotiate post-USAID employment, you may be requested by your potential new employer to provide a letter stating that no apparent ethics conflicts prohibit your future employment. GC/EA can provide you with such a letter following ethics counseling. GC/EA is also happy to provide assistance and guidance for you on the ethics matters discussed above after you have left USAID and started your new career.

Your ethics team here at USAID is committed to helping you in your career transition. We can best do that if you come to us early in the process (and even before the process begins) with any questions you may have. We can provide guidance to set ethical parameters for your employment search and help you avoid the harsh penalties which you might otherwise incur. You may find that the rules discussed above, as applied to your specific circumstances, are not as onerous as you originally believed, freeing you up to pursue a wider range of opportunities.

It is our pleasure to be of assistance to you.

John N. Ohlweiler
Assistant General Counsel
Designated Agency Ethics Official

RECUSAL STATEMENT

TO: John N. Ohlweiler, Designated Agency Ethics Official (DAEO) and Assistant General Counsel for Ethics and Administration (GC/EA)

SUBJECT: USAID Employee Recusal

Name of Employee	
Agency/Office	
Title	

In order to avoid even the appearance of a conflict of financial interest or bias in the performance of my official duties, until further notice I hereby recuse myself as prescribed by 18 U.S.C. § 208 and 5 C.F.R. §§ 2635.402 & 2635.502 regarding the following entities:

Name(s) of Non-Federal Entity or Entities	
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I hereby recuse myself from personal and substantial involvement in any particular matters in which any of these entities has a financial interest or may be a party or represent a party.

I hereby designate _____ to screen such matters and consult with USAID’s Assistant General Counsel for Ethics and Administration regarding such matters. Unless the Assistant General Counsel determines that either (1) this legal disqualification does not apply, or (2) a waiver is available, the matter will be referred to _____ for action so that I am not involved. I will advise other immediate subordinates of this disqualification.

Employee Signature	Date Submitted

CC: _____, Immediate supervisor
_____, Person screening matters
_____, Person to whom matters are referred

Submit this Recusal Statement to recusal@usaid.gov, with a copy to the Regional Legal Officer (if applicable). If you have any questions about this Recusal Statement, then please contact a GC/EA attorney or your RLO.