



USAID

FROM THE AMERICAN PEOPLE

Office of the General Counsel

UPDATED: January 7, 2009

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 Advisor (RLA) (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 the pages of the newspapers 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 her 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 which 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. You can find a model recusal letter on the "Ethics at USAID" website here: <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 of significance to the matter. It includes direct and active supervision of a subordinate's participation in the matter.

Unlike the rules which were previously discussed, an employee who falls within Procurement Integrity provisions is required to immediately report all employment discussions between herself and the bidder or offeror to the Designated Agency Ethics Official (GC/EA or RLA). This must be reported even if the employee immediately rejects the employment offer. Full disclosure is extremely important. The employee may continue working on the procurement if she unequivocally rejects the offer. If, however, at any time she wishes to pursue employment

discussions with the bidder or offeror, she must immediately disqualify herself from all further personal and substantial participation in the procurement process unless the head of the contracting activity authorizes her 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 her duties. This is a determination that would be made by the supervisor, in consultation with GC/EA or the RLA.

III. POST-EMPLOYMENT RESTRICTIONS

This section contains guidance on what you may do once you leave USAID. The application of these rules is very 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 (PSC's).

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 for all employees. It 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 the Agency. Behind the scenes communication may also be prohibited if the intent is to have the information communicated attributed to the former employee.

If your post-Government career will involve no representation back to the Government, these rules will not apply. 18 U.S.C. §207 only restricts representation; it does not prevent individuals from merely 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 have conversations with and prepare internal work products for your new non-Federal employer which are used as input in communications or appearances that others make 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 U.S. 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 term, but it basically means any involvement in the particular matter on your part that has significance to the matter.

The two-year bar under 18 U.S.C. §207(a)(2) is similar. It applies when you, yourself, had no personal and substantial involvement but an employee you supervised did have such involvement during your last year of Government service. If this is the case, for two years after you leave USAID you may not represent any other person or entity 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 U.S. 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 (SO’s) 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 known.

The one-year bar under 18 U.S.C. §207(c) applies to senior employees. “Senior” employees are defined by the statute as those occupying a position, the rate of basic pay of which is equal to or greater than 86.5% of the rate for level II of the Executive Schedule (**\$153,105 in January 2009**). You should note that the statute changed as of January, 2004, to include more employees in the prohibition. Under the current statutory language, approximately 80% of Senior Executive Service (SES) and the Senior Foreign Service (SFS) are included in the definition of senior employee. “Senior” employees may not represent anyone else before USAID for one year following termination as a senior employee on any matter, regardless of whether they had any personal involvement as an employee. The one-year ban applies to representation before USAID only and does not prohibit representation before other Government agencies, members of Congress, committees, or staffs.

There are certain limited exceptions to the one-year bar. One of these exceptions applies if the former employee is carrying out official duties on behalf of the United States. There are also exceptions which allow a former employee to make a non-representational statement based on the former employee’s own special knowledge or when, under certain specific procedures, the communication is solely to provide scientific or technological information.

Another exception that may be relevant to some former USAID employees allows representation of international organizations in which the United States participates; this exception requires an advance certification by the Secretary of State that such participation is in the interest of the United States. Finally, an exception exists for duties as an employee of an agency or instrumentality of state or local government or certain institutions of higher education or hospitals or medical research organizations. (Unlike the international organization exception, this exception does not require an advance certification.)

As with all the rules, the application of the exceptions can be very technical. If you believe any of these exceptions applies you should discuss your situation with GC/EA or your RLA.

Another one-year bar, under 18 U.S.C. §207(f), prohibits a former senior employee from representing a foreign government or foreign political party before any department or agency or aiding or advising such a foreign entity in making a representational communication. The restriction does not apply to representation of a foreign commercial corporation. It covers both paid and unpaid services. Unlike most of the other proscriptions, it prohibits not just representation, but also "aiding or advising" or "behind the scenes" assistance in connection with a representation.

If you plan to work directly for the U.S. Government, the above rules will not apply. Thus, there is no bar on a former employee working as a Personal Services Contractor (PSC) or as a "While Actually Employed" (WAE) employee. There are other, hybrid, types of employment mechanisms used by USAID. Because the application of the rules to these mechanisms may vary depending on the actual circumstances, you should consult with an attorney from GC/EA or your RLA.

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

You should be aware of how the rules generally impact on certain types of projects and programs at USAID. If you are involved at any level of an Indefinite Quantity Contract (IQC) or a Leader-With-Associate Contract, you should be aware that the main contract is itself the "particular matter." Therefore, you would be prohibited from representing back to the Government on any individual project or task order that falls under the main contract.

If in your position 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 a conflict of interest in your case will be fact specific, and the result 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 on behalf of USAID. Similarly, the nature of any possible restriction on post-employment activities will depend upon the nature of the employee's activity and the nature of the partnership which was developed by the parties. The most important thing is for you to receive guidance from GC/EA or your RLA regarding the facts of your own situation.

B. PROCUREMENT INTEGRITY

The "Procurement Integrity" rules, 41 U.S.C. § 423, 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 which 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 for the Federal agency a decision to:
 - award a contract, subcontract, modification of a contract or subcontract, or 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 for that contractor that are valued in excess of \$10 million;
 - 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, they apply only to contracts, and not to either grants or cooperative agreements (even if over \$10 million). Second, they prohibit receipt of any type of compensation from the contractor, regardless of whether it is for work under the contract with respect to which the former employee took the actions described above. In other words, if you are covered by the statute, you may not work for the contractor at all for the one year period of time. Third, the bar only relates to employment with the contractor itself, and not the subcontractors. Finally, the one year time period is measured from the time you last performed the work described above, rather than from the time you leave the Agency.

IV. CONTACTS AND SERVICES

It should be clear to you by this point that the rules are complicated, and their application can change based on the specific facts of your situation. It should also be clear that your actions can have serious consequences. Fortunately, counsel is available to help you through this minefield. 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, you should first contact your RLA.

Additionally, you may be requested by your potential new employer to provide a letter stating that no apparent ethics conflicts exist. GC/EA can provide you with such a letter following your ethics counseling. GC/EA is also happy to provide assistance and guidance for you on the ethics matters discussed in this summary after you have left USAID and commenced 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 with any questions you may have. We can help you avoid the harsh penalties which you might otherwise incur, and just as important, you may find that the rules are not as onerous as you originally believed, thus freeing you up to pursue a wider range of opportunities.

It is our pleasure to be of assistance to you.

Arnold J. Haiman
Designated Agency Ethics Official

James Peters
Assistant General Counsel, Ethics and
Administration

SAMPLE RECUSAL FORM

DATE

TO: GC/EA, James Peters, Assistant General Counsel for Ethics & Administration

SUBJECT: RECUSAL

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 & 502 regarding the following entities:

[insert name of entities here]

Whenever particular matters arise where I will be personally and substantially involved and in which any of these entities may have a financial interest or may be a party or represent a party, I have arranged to have **[insert name of person or position screening matters]** screen such matters and consult with USAID's Assistant General Counsel for Ethics and Administration. 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 **[insert name of person or position to whom matters are referred]** for action so that I am not involved. I will advise other immediate subordinates of this disqualification as well.

[Signature]

[Typed name and title]

cc:[Immediate superior]

[Person screening matters]

[Person to whom matters are referred]