OFFICE OF GENERAL COUNSEL

WASHINGTON, D.C. 20460

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FOR CAREER EMPLOYEES – NON-SUPERVISORY GS
(STILL AT EPA OR ON ADMINISTRATIVE LEAVE)

# Leaving Federal Service
# Ethics Considerations (including post-employment)

While working at EPA, you are subject to the *Standards of Ethical Conduct for Employees of the Executive Branch*, the federal conflict of interest statutes, the EPA supplemental ethics regulations, the Ethics in Government Act, and the Emoluments Clause of the U.S. Constitution. But upon separation from federal service, you will be bound by a different requirement, the criminal post-employment statute.

This document provides an overview of the most important ethics rules that apply to you as you consider transitioning from government service. Understanding these obligations will help you avoid ethical pitfalls. Even after you leave EPA, we remain your ethics officials for post-employment questions. You can reach us at ethics@epa.gov.

If you are still working at EPA, then you are subject to both of the following sections. If you are on administrative leave and not currently performing any EPA duties, then you may skip the next section and go directly to "Things You Need to Know After You Leave Federal Service."

## THINGS YOU NEED TO KNOW *BEFORE* YOU LEAVE GOVERNMENT SERVICE

**1. <u>Seeking employment</u> –** While you still work at EPA, you have ethical obligations once you begin to "seek employment" with a non-federal entity. You may not participate in a "particular matter" having a direct and predictable effect on the financial interests of any person or entity with whom you are seeking or negotiating for employment or with whom you have an agreement for future employment. *See generally*, 5 C.F.R. Part 2635, Subpart F, and 18 U.S.C. § 208.

***"Seeking employment" <u>begins</u>** when you:*

- directly or indirectly make an unsolicited communication regarding possible employment with any person or entity;
- engage in negotiations with a view toward reaching an agreement regarding possible employment;
- receive a response to a job application or employment proposal indicating an interest in employment discussions; or

- make a response, other than rejection, to an unsolicited communication from any person regarding possible employment with that person.

***"Seeking employment" ends*** when:

- you or the prospective employer affirmatively reject the possibility of employment and all discussions of possible employment end; or
- two months have elapsed since you sent an unsolicited resume or employment proposal, and you have not received an interest in employment discussions.

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| *Example 1*: A State Environmental Agency in your home state contacts you by phone to ask if you are interested in a position beginning in the next calendar year. You are currently working on an enforcement action involving the State but are interested in returning to the area at the beginning of the year. You agree to send them your resume for the open position.<br><br>Because you did not affirmatively reject the offer on the call and have sent them your resume for an open position, *you are "seeking employment"* and must immediately disqualify yourself from participating in the pending enforcement action until 1) either you or the State affirmatively rejects the possibility of employment, or 2) you leave the EPA to take the position, whichever is *later*. |
| *Example 2: Deferring employment discussions.* With three months remaining in this Administration, you give a speech to a trade association and afterwards, someone says, "hey, have you been thinking about what you're going to do when this Administration is over? My company would be very interested in someone like you for a senior advisor position that we have open." You say that you aren't considering any future employment prospects until after January 20, so please contact you after that date.<br><br>This response will be considered an *affirmative rejection* of an offer of future employment and, therefore, you *are not "seeking employment."* |
| *Example 3:* But let's say instead that you know your region is working on a regulation affecting the financial interests of the company as a member of a discrete industry sector, and they reach out to you for possible post-employment discussions. You respond by saying you cannot discuss future employment while you are working on the regulation, but you would like to discuss employment with the company when the regulation is final.<br><br>Because you have merely deferred employment discussions until the foreseeable future, you have begun "seeking employment" under the ethics regulations and now you may not work on the regulation that affect the company's financial interests. It's not sufficient that you said you won't talk to them until after the regulation is issued; you did not affirmatively reject the possibility of future employment. |

**2. Negotiating for future employment --** You have a financial interest in any entity with which you begin employment "negotiations" -- which means a two-way communication made either personally or through an intermediary such as a headhunter -- with a view towards reaching an agreement regarding future employment or compensation. The financial conflict of interest law requires you to recuse yourself from participating in a government matter affecting the entity's

financial interests until either party affirmatively rejects the possibility of future employment or you leave the Agency. *See* 18 U.S.C. § 208(a).

**3. Procurement integrity requirements** -- If you are participating in an ongoing procurement in excess of $150,000, procurement integrity regulations require that you notify your supervisor and the Ethics Office in writing if you make or receive a contact for future employment with a competing contractor, regardless of whether you or the other party affirmatively rejects the possibility of future employment. If you do not affirmatively reject the possibility of future employment, you must disqualify yourself from further participation in the procurement until either party affirmatively rejects the possibility of future employment and the Contracting Officer approves your continued participation. *See* 41 U.S.C. § 2103.

**4. Gifts relating to *bona fide* employment negotiations** - You may accept gifts that are customarily provided by a prospective employer in connection with bona fide employment discussions (e.g., travel, lodging, and meals). If the prospective employer has matters that may be affected by your official duties, you must first disqualify yourself from EPA matters affecting the financial interests of the prospective employer.

**5. Post-employment training –** To meet your separation checklist obligations, take the online post-employment course Leaving Federal Service. You will NOT need to contact EPA Ethics for confirmation that you've met your ethics obligations because you do not file a public financial disclosure report.

**THINGS YOU NEED TO KNOW**
***AFTER* YOU LEAVE GOVERNMENT SERVICE**

**1. Criminal post-employment restrictions** – -- The relevant criminal post-employment law is 18 U.S.C. § 207, and the implementing regulations are found at 5 C.F.R. Part 2641.

**a) Permanent Bar, 18 U.S.C. § 207(a)(1)**

You may not, on behalf of a third party, appear before or communicate with an officer or employee of the United States with the intent to influence that person on a "particular matter involving specific parties" in which you participated personally and substantially while a government employee. The criminal provision does not prohibit providing "behind the scenes" assistance. (If you are an attorney, your state bar rules may also prohibit "behind the scenes" assistance, but we do not provide opinions on your bar obligations; more information below).

A *"particular matter involving specific parties"* includes an investigation, application, request for a ruling or determination, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. The term *does not include* a rulemaking or other particular matter of general applicability or other general policy matters.

*"Personal"* participation means that you participated directly in the matter and includes the direction or control over a subordinate employee's participation. Your participation is *"substantial"* if, at the time of your involvement, it was of significance to the matter. This includes decision-making,

reviewing, or recommending action to be taken. It does not include merely ministerial acts relating to the matter.

**Common exceptions to the post-employment restrictions:**

- Acting on behalf of the US government - if you are re-employed by the United States or called as a witness by Congress, then the post-employment restrictions do not apply. However, working for a government contractor is not covered by this exception to the extent that you are making appearances before or communications with the government with the intent to influence government action on the same particular matters involving specific parties that you personally worked on, or otherwise restricted by law.

- Acting as an elected official - if you are carrying out your official duties as an *elected official* of a state or local government, the post-employment restrictions do not apply.

- Employee of a Tribe – if you are an employee or an elected or appointed official of a tribal organization or inter-tribal consortium, you may represent the tribe back to the United States provided that you consult with EPA Ethics in advance and submit adequate notice to the EPA Administrator and the Ethics Office.

- Providing testimony - you may give testimony under oath or make statements required to be made under penalty of perjury. Unless expert opinion testimony is given pursuant to court order, or you are called as a witness by the United States, you may not provide such expert testimony on a matter on behalf of any other person except the United States or Congress if the activity is one covered by the permanent restrictions at 18 U.S.C. § 207(a)(1).

- International organizations - the post-employment restrictions shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

**b) One-Year Bar (Trade or Treaty Negotiations), 18 U.S.C. § 207(b)**

For one year after leaving federal service, you may not knowingly represent, aid, or advise on the basis of covered information, any other person (except the United States) concerning any ongoing trade or treaty negotiation in which you participated personally and substantially as an employee during your last year of federal service.

**c) Compensation bar for matters affecting the government, 18 U.S.C. § 203**

After you separate from EPA, a new employer may not compensate you for any covered representational services that were provided at a time when you were a federal employee. This restriction also applies even if you were on administrative leave: you may not accept nor may the new employer pay you a share of the profits or fees related to any representational services provided while you are still an EPA employee, even if you didn't provide those services yourself.

*"Representational services"* means communications to or appearances before federal entities (not just EPA) with the intent to influence the government on behalf of a third party. Common examples are

legal and consulting services where you may share in profits or fees related to those representations once you leave federal service.

> *Example*: You are a former EPA attorney who is now an equity sharing partner at Dewey, Cheatham and Howe, a prominent law firm with an extensive federal practice. As a former federal employee, your compensation plan, to include any bonus or partnership share, may not include any of the firm's profits that come from its covered representational services before the federal government during your federal tenure.

**2. <u>Additional post-employment restrictions for Procurement Officials</u>**

**a) Procurement integrity provisions relating to contracts in excess of $10 million:**

- Officials with a major role in a federal procurement in excess of $10 million **may not accept compensation from the winning contractor** as an employee, officer, director, or consultant within one year after serving as: the procurement contracting officer; the source selection authority; a member of the source selection board; or the chief of the financial or technical evaluation panel of a contract involving payment or claims of over $10 million.[1]
- This restriction also applies to former officials who have personally made the federal agency decision to: award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order to that contractor; establish overhead or other rates applicable to one or more contracts for that contractor that are valued in excess of $10 million; approve issuance of one or more contract payments in excess of $10 million; or pay or settle a claim in excess of $10 million with that contractor. *See* 41 U.S.C. § 2104 and 48 C.F.R. § 3.104.

Your new employer may ask you to contact the EPA Ethics Office for written advice about your post-employment restrictions. This type of documentation is called a "safe harbor" letter that you can request of EPA Ethics. To do so, complete this template and send it to ethics@epa.gov.

**b) Non-disclosure of procurement-sensitive information**: As a former employee, you may not knowingly disclose contractor bid or proposal information or source selection information before the award of a federal agency procurement contract. *See* 41 U.S.C. § 2102.

**3. <u>Additional Post-Employment Guidance for Officials involved in Grants</u>**

If you were involved in any grant competition activities while at EPA, then you should review the post-employment implications under EPA's Grants Competition Conflicts of Interest and Competitive Advantage policies. While not strictly statutory or regulatory prohibitions, these policies ensure that EPA can preserve the integrity of its competitions. Applicants competing for EPA awards cannot have an unfair competitive advantage or even the appearance of an unfair advantage. If you were involved in certain grant activities, including but not limited to the development, review, and preparation of solicitations, then you, your family members, or your new employer may be constrained in competing for grants under the solicitations in which you participated. For more information about grants

[1] There is a limited exception for accepting compensation from a different division of the company that produces different products and services.

conflicts of interest and competitive advantage policies, contact the Grants Competition Advocate at GrantsCompetition@epa.gov.

**4. A Special Note for Attorneys**

Attorneys are reminded to consult their state bar rules or seek advice from state bar counsel even if you did not work as an attorney for EPA. These rules may differ from the federal criminal post-employment rules. For example, although the federal post-employment laws permit "behind the scenes" work for a new employer on matters you worked on or on which you supervised others, the American Bar Association (ABA) restricts such communications. ABA Model Rule 1.11(a) permits a former government employee to represent a client in connection with a matter in which the lawyer participated personally and substantially as a "public officer or employee" only if the lawyer first obtains consent from the appropriate government agency.

By contrast, the DC Bar is even more restrictive than the ABA. DC Bar rule 1.11(a) prohibits the former employee from accepting employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Under this rule, there is no waiver possibility, and the former government lawyer is not permitted even to provide "behind the scenes" work. EPA Ethics does not provide guidance on state bar rules.

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**Conclusion:** This document provides a summary of the major ethics rules that apply to you when you are seeking or negotiating for employment and for post-employment. *It is not a substitute for tailored ethics advice and is not an ethics opinion.* We strongly recommend that you schedule a meeting with the Ethics Office to receive an opinion on your specific facts and circumstances. Although the advice we provide you is not subject to privilege, when you seek advice from an ethics official, we remind you to provide all the relevant facts and follow our guidance in good faith, the ethics opinion may be a mitigating factor in any prosecution should you violate the criminal provisions.

Please contact us at ethics@epa.gov. Even after you leave EPA, we are here to answer your post-employment questions.