

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**

**Office of Government Ethics**

October 4, 2021

Advisory Opinion

**Seeking or Negotiating Employment**

District government employees, like all members of society, are entitled to search the marketplace for future employment. In conducting their search for post-District employment, employees must continue to adhere to the ethics rules, including avoiding conduct that creates an actual conflict of interest, or appearance of a conflict, with their duties as a District government employee.

Pursuant to D.C. Official Code § 1–1162.19(a-1)(1), the Director of Government Ethics issues this *sua sponte* advisory opinion, to provide guidance on maintaining ethical standards while seeking or negotiating for future employment. This advisory opinion addresses seeking and negotiating for employment and the recusal obligation that is necessary to avoid a violation of the ethics rules, or the appearance of a violation.

**Applicable Standards**

**A. Conflicts of Interest**

Section 223 of the Ethics Act, D.C. Official Code § 1–1162.23(a) (hereinafter the “Conflicts of Interest statute”), prohibits employees for engaging in official conduct that would affect their financial interest or the financial interests of a person closely affiliated with the employee.<sup>1</sup> The statute provides:

No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows

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<sup>1</sup> See also Rule I of the District of Columbia Council Code of Official Conduct, Period 24, which contains the same language as the Conflicts of Interest statute.

is likely to have a direct and predictable effect on the employee’s financial interests or the financial interests of a *person closely affiliated with the employee*.<sup>2</sup>

The phrase “*person closely affiliated with the employee*” refers to a spouse, dependent child, general partner, a member of the employee’s household, or an affiliated organization.<sup>3</sup> An “affiliated organization” includes “*a person with whom the employee is negotiating for or has an arrangement concerning prospective employment*.”<sup>4</sup>

The underlying purpose of the Conflicts of Interest statute is to prevent employees from using their official position for their own personal benefit. In the context of seeking or negotiating for future employment, the financial interests of the prospective employer whom the employee is negotiating with or has entered into an arrangement for employment with are generally imputed to the employee with respect to any given particular matter.<sup>5</sup> A particular matter refers to “only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons, [such as] a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.”<sup>6</sup> District government employees and public officials face criminal prosecution for engaging in conduct that violates the financial conflict of interest rule.<sup>7</sup>

## **B. Impartiality & Conflicting Outside Activities**

In addition to the Conflicts of Interest statute, provisions in the District Personnel Manual and the Council Code of Conduct also govern employees who are seeking or negotiating for employment. The District Personnel Manual (“DPM”), found at Chapter 18 of Title 6B of the District of Columbia Municipal Regulations is a part of the Code of Conduct which sets forth ethics standards for employees who serve within the executive branch, independent boards and commissions, and Advisory Neighborhood Commissions.<sup>8</sup> Pursuant to DPM § 1800.3(j), employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with their official government duties and responsibilities. Council Code of Conduct Rule II (hereafter referred to as “Council Rule II”) states that no employee shall engage in outside employment or private activity that conflicts or would appear to conflict with the fair, impartial,

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<sup>2</sup> D.C. Official Code § 1–1162.23(a) (*emphasis added*).

<sup>3</sup> D.C. Official Code § 1–1161.01(43) (*emphasis added*).

<sup>4</sup> *Id.* at (3)(B) (*emphasis added*).

<sup>5</sup> 5 C.F.R. § 2635.402(b)(2)(v).

<sup>6</sup> 5 C.F.R. § 2635.402(b)(3) (also stating that the term includes a matter such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons, but does not include broad policy options that are directed to the interests of a large and diverse group of persons).

<sup>7</sup> See D.C. Official Code § 1–1162.21(b)(1) which provides that violations that substantially threaten public trust shall result in a fine up to \$5000 or imprisonment for not more than one year, but not both. See also 18 U.S.C. § 208(a) (applicable to individuals serving as an officer or employee of the District of Columbia.).

<sup>8</sup> See D.C. Official Code § 1–1161.01(7) (defining the Code of Conduct); see also 6B DCMR § 1800.1, *et seq.* (asserting applicability and establishing ethical obligations).

and objective performance of the employee's official duties and responsibilities or with the efficient operation of the Council.<sup>9</sup> These ethics provisions govern employees who are seeking employment or engaging in outside activities with a person or entity whose financial interests could be affected, or could appear to be affected, by the performance or nonperformance of the their official duties. Analogous to the Conflicts of Interest statute, these provisions prohibit employees from participating in matters that would financially benefit a person with whom the employee is seeking or negotiating for employment.

### **Seeking or Negotiating for Employment**<sup>10</sup>

#### **A. Seeking Employment**

For most individuals, seeking employment is usually the first step in the employment process. An employee has begun seeking employment if he or she has, directly or indirectly: (a) engaged in negotiations for employment with any person; (b) made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person; or (c) made a response, other than a rejection, to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment.<sup>11</sup> Therefore, seeking employment includes bilateral employment negotiations, a unilateral expression of interest in employment by an employee, or a response, other than a rejection, to a unilateral expression of interest by a potential employer.<sup>12</sup> An employee is no longer seeking employment when the employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; *or* a reasonable amount of time has passed since the employee's submission of an unsolicited resume or employment proposal, without any indication of interest in employment discussions from the prospective employer.<sup>13</sup>

While there is no specific language that an employee must use when rejecting an unsolicited employment overture or proposal, the employee must provide a firm response that clearly indicates

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<sup>9</sup> Council Code of Conduct Period 24, Rule II. Outside Activities. *See also* Rule 202(a) of the Council's Rules of Organization and Procedure which requires Council members and staff to avoid both actual and perceived conflicts of interest and preferential treatment. Rule 202(a) is not a part of the Code of Conduct.

<sup>10</sup> The ethics rules explained in this advisory opinion apply even if the seeking or negotiating that is conducted through a third party such as an agent or headhunter.

<sup>11</sup> 5 C.F.R. § 2635.603(b)(1) (asserting that an employee has not begun seeking employment when simply requesting a job application).

<sup>12</sup> *See* United States Office of Government Ethics Advisory Opinion, Seeking Employment (DO-04-029), September 20, 2004, available at: [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/0315DDD503D2CDF8852585BA005BED30/\\$FILE/do-04-029\\_.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/0315DDD503D2CDF8852585BA005BED30/$FILE/do-04-029_.pdf?open).

<sup>13</sup> *See* 5 C.F.R. § 2635.603(b)(2) (providing the same the definition for no longer seeking employment but stating that an employee is no longer seeking employment when two months have passed after the employee's dispatch of an unsolicited resume) (*emphasis added*).

the employee's intent to terminate the discussions.<sup>14</sup> “A response that defers a potential employment discussion until the foreseeable future does not constitute a rejection of an unsolicited employment overture, proposal, or resume, nor rejection of a prospective employment possibility.”<sup>15</sup>

## **B. Negotiating Employment**

Negotiating for employment requires more than merely sending a resume to a private entity for future employment.<sup>16</sup> The term *negotiation* is defined as a “discussion or communication with another person, or such persons agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person.”<sup>17</sup> Negotiation includes the discussion of terms and conditions of employment after an offer has been made and the employee is considering accepting the offer.<sup>18</sup> Examples of negotiations include discussions concerning qualifications, salary, schedule, benefits, office location, and job duties, etc. Because “seeking employment” includes engaging in employment negotiations, an employee who negotiates is both seeking and negotiating for employment.

An arrangement concerning prospective employment arises when the employee and prospective employer reach an agreement on the terms and conditions of employment and an offer has been made and accepted.<sup>19</sup>

### **Recusal Requirement**

A conflict of interest becomes problematic when an employee uses their position to enhance their personal financial interests or their personal financial interests impair their judgment in conducting their official duties.<sup>20</sup> The Conflicts of Interest statute prohibits employees from using their official title or personally and substantially participating in a particular matter, through decision, approval or otherwise, in a manner that the employee knows is likely to have a direct and predictable effect on their financial interests or the financial interests of a person with whom the employee is *negotiating or has an arrangement concerning prospective employment*.<sup>21</sup> To avoid

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<sup>14</sup> *Id.*

<sup>15</sup> 5 C.F.R. § 2635.603(b)(3).

<sup>16</sup> *See supra* footnote 15, U.S. House of Representatives, Committee on Ethics Memorandum, page 3.

<sup>17</sup> 5 C.F.R. § 2635.603(b)(1)(i)(*emphasis added*); *see also* United States House of Representatives, Committee on Ethics, “Negotiations for Future Employment and Restrictions on Post-Employment for House Staff,” December 22, 2016, available at <https://ethics.house.gov/sites/ethics.house.gov/files/House%20Staff%20Post%20Employment.pdf> (defining negotiations as a communication between two parties with a view toward reaching an agreement and in which there is active interest on both sides).

<sup>18</sup> *See* United States Senate, Select Committee of Ethics, “Senior Staff Employment Negotiations and Arrangements,” February 4, 2008, available at [https://www.ethics.senate.gov/public/\\_cache/files/6ae155cb-bf86-40ec-8c02-deebcd0ea1e5/senior-staff-employment-negotiations.pdf](https://www.ethics.senate.gov/public/_cache/files/6ae155cb-bf86-40ec-8c02-deebcd0ea1e5/senior-staff-employment-negotiations.pdf).

<sup>19</sup> *See supra* footnote 16, U.S. Senate, Select Committee of Ethics Memorandum.

<sup>20</sup> *See* U.S. House of Representatives, Committee on Ethics Memorandum, page 4.

<sup>21</sup> D.C. Official Code § 1-1162.23(a)(*emphasis added*).

a conflict of interest, or the appearance of a conflict, an employee must recuse from participating in a particular matter if their participation will likely have a direct and predictable effect on the financial interests of a prospective employer. On the other hand, an employee has no obligation to recuse if the prospective employer's financial interests are not directly and predictably affected by the employee's personal and substantial participation in a particular matter.

Recusal may be required even before an employee begins negotiations or enters into an arrangement concerning prospective employment. Unlike the Conflicts of Interest statute, which requires recusal once an employee is negotiating or has an arrangement concerning employment, DPM § 1800.3(j) and Council Rule II apply to the conduct of seeking employment, which includes communications and actions that may fall short of negotiations. Both provisions prohibit engaging in outside employment or activities that conflict with an employee's official duties and responsibilities or, in the case of Council Rule II, conflict with the efficient operation of the Council. An employment opportunity conflicts or appears to conflict with an employee's official government duties and responsibilities when a prospective employer has a particular matter with the employee's office to which the employee is participating or has responsibility over. Accordingly, employees must either refrain from seeking employment with a person or entity if there is the potential for the employee to affect that person's financial interests through the performance of their official duties or enter a recusal.

When an employee has interests in employment with a person or entity whose financial interests maybe affected by the performance of his or her official duties, the employee must recuse from participating in any matters involving that person or entity before beginning the process of seeking employment. If, by some chance, a particular matter involving a prospective employer arises after an employee has begun seeking employment with that entity, the employee must recuse from participating in the particular matter. Likewise, if an employee is presented with an employment offer from a person who has a particular matter before his office, and the employee does not refuse the offer, the employee must recuse from participating in the particular matter.

### **Recusal Accomplished**

Recusal is accomplished by filing a written recusal and not participating in agency decisions that involve a prospective employer.<sup>22</sup> Once an employee becomes aware of the need to recuse from participation in a particular matter, he or she must: (1) make full disclosure of the financial interest; (2) prepare a written statement describing the matter and the nature of the potential conflict of interest; and (3) deliver the statement to the employee's supervisor and to the Board of Ethics and

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<sup>22</sup> 5 C.F.R § 2635.604(a)(1).

Government Accountability (hereafter referred to as “the Board”).<sup>23</sup> The employee’s supervisor must reassign the matter to another employee who does not have a conflict of interest.

An elected official who recuses from participating in a matter must: (1) make full disclosure of the financial interest, (2) prepare a written statement describing the matter and the nature of the potential conflict of interest, and (3) deliver the statement to: in the case of a member of the Council, the Council Chairman; or for an elected official other than a member of the Council, the Board.<sup>24</sup>

### **Waivers**

Under the Conflict of Interest statute, an employee, other than an elected official, who is prohibited from participating personally and substantially in a particular matter, may apply for a waiver.<sup>25</sup> The employee must: (1) advise their supervisor and the Board of the nature and circumstances of the particular matter; (2) make a full disclosure of the financial interest; and (3) receive, in advance, a written determination made by both the supervisor and the Board that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee; or another legally cognizable basis for waiver exists.

### **Illustrative Examples**

#### **Example 1**

An employee of the Office of the Chief Technology Officer sends his resume to ABC Tech Company for an IT Analyst vacancy. The employee receives a standard, automated confirmation of receipt. ABC Tech Company is a private entity that provides technical assistance to several federal government agencies.

The employee is seeking employment because he has made an unsolicited communication with a prospective employer. Because ABC Tech Company does not have any particular matters before the employee’s agency, he does not have to file a recusal.

#### **Example 2**

An employee who works for the Department of Health is responsible for conducting compliance visits to a grantee’s facility. While at the grantee’s headquarters, the compliance supervisor tells the employee that his division is thinking about hiring a senior

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<sup>23</sup> See D.C. Official Code § 1-1162.23(c)(2) which describes the recusal process under conflicts of interests when an employee is negotiating or has an arrangement concerning prospective employment; however, the same recusal process should be used for conflicts that arise as a result of seeking employment under DPM 1800.3(j); *see also* Council Code of Conduct Rule I (c)(1)(describing the recusal process for employees who are not Council members).

<sup>24</sup> D.C. Official Code § 1-1162.23(c)(1); *see also* Council Code of Conduct Rule I (d)(1).

<sup>25</sup> *Id.* at § 1-1162.23(b).

compliance specialist and asks whether the employee might be interested in leaving the District government. The employee asks what kind of work would be involved.

The employee has begun seeking employment because he made a response other than a rejection to the communication regarding possible employment with the grantee. Because the grantee has a particular matter with the employee's agency and the employee is responsible for ensuring the grantee's compliance, there is a conflict between the employee's duties and responsibilities to the District and his interest in prospective employment with the grantee. Therefore, the employee is prohibited from participating in any particular matter concerning the grantee and must file a written recusal as described in D.C. Official Code 1-1162.23(c)(2).<sup>26</sup>

### **Example 3**

The employee and grantee in the previous example have a meeting to discuss the duties of the vacancy and the employee's qualifications for the position. They also discuss ways the employee could remedy one of the missing qualifications and the employee indicates a willingness to obtain the proper qualifications. They do not discuss salary and benefits.

The employee is seeking or negotiating for employment because he engaged in a discussion with a view toward reaching an agreement regarding possible employment. As stated in the previous example, the employee is prohibited from participating in any particular matter involving the Grantee and must file a written recusal.

### **Example 4**

An employee of the Office of Contracting and Procurement lists his job duties and employment experience on the profile of his LinkedIn account. The employee has not targeted at a specific prospective employer.

The employee has not begun seeking employment because the posting of a profile or resume is not an unsolicited communication with any prospective employer.<sup>27</sup>

### **Example 5**

The employee in the previous example receives notification that a prospective employer has viewed his resume. The employee does not contact the prospective employer.

The employee is not seeking employment because the prospective employer has not made an unsolicited communication for potential employment.<sup>28</sup>

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<sup>26</sup> 5 C.F.R § 2635.603(b) Illustrative Examples.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

**Example 6**

An employee of the Department of Employment Services is complimented on her work by the President of Qualified Resources, who asks her to call if she is ever interested in leaving District government service. The employee explains to the President that she is very happy with her job at DOES and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government.

The employee has rejected the unsolicited employment overture and has not begun seeking employment.<sup>29</sup>

**Example 7**

Instead of making the previous statements to the President, the employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting Qualified Resources' funding but would like to discuss employment when the project is completed.

Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment. The employee should recuse from participating in the Quality Resources matter.<sup>30</sup>

**Example 8**

While assessing a residential property, an employee of the Department of Consumer and Regulatory Affairs is approached by a general contractor who offers him \$40.00 an hour to work for his company. The employee states that he would not leave his current job for less than \$45.00 per hour.

The employee is negotiating for employment and must recuse from performing any further inspections on properties which that general contractor is involved.

These examples are meant to be illustrative only and certainly are not exhaustive. Moreover, the analysis for determining whether an employee must file a written recusal because of a conflict of interest or conflicting prospective employment is entirely fact-driven, and small details can make a big difference. Accordingly, notwithstanding the guidance provided herein, employees should continue to request safe-harbor advice from this Office when considering whether to seek or negotiate for employment.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*





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