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ADS Chapter 155 Privileges, Immunities, and Tax Exemptions

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Functional Series 100 – Agency Organization and Legal Affairs
 ADS 155 – Privileges, Immunities, and Tax Exemptions
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This is a new ADS chapter.

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ADS 155 – Privileges, Immunities, and Tax Exemptions

155.1 OVERVIEW

Effective Date: 10/25/2004

This chapter establishes the policy directives and required procedures for privileges and immunities of USAID personnel, and tax exemptions for USAID personnel and USAID funds.

155.2 PRIMARY RESPONSIBILITIES

Effective Date: 10/25/2004

- a. The **Office of the General Counsel (GC)** is responsible for maintaining this chapter. The Office of the General Counsel and Regional Legal Advisors (RLAs) provide advice on implementing USAID tax policy and privileges and immunities. They also advise Agency officials on the substance, negotiation, and execution of international agreements.
- b. **Missions** are responsible for working with the U.S. Embassy, the Department of State, and host government officials to ensure that USAID personnel are notified to the host government with the appropriate privileges and immunities.
- c. **Contracting and Agreement Officers** are responsible for inserting the appropriate tax reporting clause in contracts, grants, and other agreements.
- d. The **Bureau for Management, Office of the Chief Financial Officer, Cash Management and Payments Division (M/CFO/CMP) and Missions** are responsible for collecting the reports on unreimbursed VAT or custom duties (“foreign taxes”). M/CFO/CMP provides the amounts collected centrally in Washington to Mission Controllers for inclusion in the Embassy Interim and Final reports. The Missions are responsible for designating the office responsible for receiving reports for coordinating with the Embassy on the Embassy Report.
- e. **Contracting Officer’s Representatives (CORs)** are responsible for ensuring that contractors and other recipients submit the required tax reports to the Embassy, Mission, or M/CFO.

155.3 POLICY DIRECTIVES AND REQUIRED PROCEDURES

155.3.1 Privileges and Immunities

155.3.1.1 Direct-Hire Employees – Comparable Rank

Effective Date: 10/25/2004

USAID/Department of State policy is that direct-hire USAID Mission employees are to have privileges and immunities “comparable in rank” to those accorded to Embassy personnel. This policy was sent to the field by State Cable 154772, dated July 9, 2004.

- a. **Professional Employees.** Under “comparable rank,” professional direct-hire employees are to be notified by the U.S. Embassy to the host government with the privileges and immunities of diplomatic agents under the Vienna Convention. Most USAID Missions have only professional staff, i.e., Senior Foreign Service (SFS) Officers, Foreign Service Officers (FSOs), and SFS/FSO career candidates, serving as Program Officers, Executive Officers, General Development Officers, Legal Officers, Controllers, Agriculture, Health and Population, Democracy, Food for Peace, and other specialized officers and in other professional positions. Diplomatic agents have full criminal and civil immunity for both personal and official acts.
- b. **Non-professional Employees.** Non-professional USAID Mission direct-hire employees are to be notified with the privileges and immunities of administrative and technical (“A & T”) staff under the Vienna Convention. Individuals with A and T status have full criminal immunity and immunity from civil liability for official acts. They are not immune from civil liability for personal acts.
- c. **Notification of Mission Professional Employees under USAID Bilaterals.** In many countries USAID has a framework bilateral (see [ADS 349](#), International Agreements) or other arrangement that permits professional employees to be notified to the host government as diplomatic agents without the need to go through State's formal diplomatic title approval process. USAID Mission employees usually are notified as "equivalent to" a particular secretarial or attaché title. USAID's primary concern is ensuring that all its professional direct-hire employees have the same privileges and protections accorded diplomatic agents under the Vienna Convention and under host country practice. Even where alternative arrangements permit USAID Mission professional staff officials to be notified as "equivalent to" a particular diplomatic title, an actual diplomatic title still may be necessary to accomplish certain purposes. For example, in some countries the host government will only issue tax-exemption cards or diplomatic license plates to persons having actual diplomatic title. The Mission and Embassy should make every effort to eliminate any disparity in treatment, including seeking the approval of State's Title and Rank Officer (STATE/OHR/CDA/T&R) for specific diplomatic titles if necessary.
- d. **Notification of USAID Mission Professional Employees under the Vienna Convention.** In countries where there is no bilateral provision or other mechanism that permits appropriate notification, USAID direct-hire employees are notified as diplomatic agents under the Vienna Convention. This requires

approval of specific diplomatic titles by STATE/OHR/CDA/T&R. The specific secretarial or attaché title depends on custom, usage, local conditions, and status as a commissioned or noncommissioned officer. Generally, commissioned personnel – which include SFS Officers and FSOs (or SFS/FSO career candidates) of class 1 or 2 – are notified as First Secretary. FSO or FSO career candidates of class 3 or 4 are notified as Second Secretary. FSO or FSO career candidates of class 5 or 6 are notified as Third Secretary. Other direct-hire employees at Class 4 or above are notified as Attaché, with those below Class 4 as Assistant Attaché. See [3 FAH-1 H-2436](#) for more guidance on the appropriate title.

[3 FAH-1 H-2435.2\(b\)](#) permits a title to be issued whenever a denial of title would impair the effective performance of the person's duties and of the diplomatic functions of the foreign service post. STATE/OHR/CDA/T&R considers 3 FAH-1 H-2435.2 (b) to have been met for USAID Mission direct-hire employees without the need for any further justification from the Chief of Mission. This is based on recognition of the role of USAID personnel serving overseas in furthering U.S. foreign policy goals and the increasing security threat posed to such personnel. See [ADS 435](#), Commissions, Titles, and Rank, for USAID procedures for requesting diplomatic titles.

- e. **Regional USAID employees.** USAID Mission direct-hire employees serving in regional positions (i.e., Regional Contracting Officers, Regional Legal Advisors, etc.) may be notified as members of the diplomatic staff of the USAID Mission in each country that the individual covers as part of the employee's regional duties. The host government of the residing country must first concur in multiple accreditation prior to requesting accreditation from the countries of regional responsibility. In countries where USAID has a framework bilateral or other arrangement that permits them to be notified at the appropriate level, USAID Mission employees may be notified without a title, unless a title is needed for other purposes. Please consult with USAID Regional Legal Advisors on whether the bilateral permits notification.

155.3.1.2 Personal Services Contract (PSC) Employees

Effective Date: 10/25/2004

U.S. citizen and third country national PSC employees are notified to the host government as A & T personnel, unless the USAID bilateral or other arrangement provides for notification with diplomatic agent status.

The Director General of Department of State in State Cable 232440, dated December 7, 2000, approved notification of USAID PSCs. Therefore, PSCs no longer have to be individually approved by the Director General of the Department of State under 2 FAM 221.2 and can be notified in the same way as USAID direct-hire employees are notified. The Director General's approval was based on PSCs meeting the four requirements in 2 FAM 221.2, outlined below.

- a. The first requirement is that accreditation of such personnel is necessary to overcome significant barriers to entry or residence in the receiving state, or that security concerns warrant accreditation as evidenced by the work performed or the level of the security clearance. The Director General's approval was based on a request by USAID, which cited security concerns and entry barriers faced by PSCs to the same extent as USAID's direct-hire employees. Moreover, most USAID's PSCs have security clearances. Therefore, posts may rely on the Director General's approval and need not address this requirement in deciding whether or not to notify a particular USAID PSC.
- b. The second requirement is that the individual is assigned to and working out of the Mission and performing diplomatic and consular support functions. This is the same requirement that a post applies in determining whether to notify USAID direct-hire employees. In deciding whether or not to notify a particular USAID PSC, the post should apply the same analysis and procedures as it does to USAID's direct-hire foreign service employees.
- c. The third requirement is that the individual's employment relationship, particularly the contract provisions, provide adequate departmental and Chief-of-Mission control over the individual, including a particular right of withdrawal of the individual from the host country. USAID acquisition regulations require that all PSCs' contracts have a "contractor-Mission relationship" clause. That mandatory clause meets this requirement and posts do not need to address this requirement in deciding whether or not to notify a particular USAID PSC.
- d. The fourth requirement is that the projected length of stay of the individual is equal to or greater than the minimum length of stay for which diplomatic or consular personnel are accredited. A PSC contract of a year or more typically meets this requirement.

155.3.1.3 Employees of USAID-Financed Contractors and Grantees

Effective Date: 10/25/2004

In some countries, the USAID bilateral or other arrangements provide for privileges and immunities of USAID-financed contractors and grantees, e.g., Republic of South Africa. Contact the RLA for guidance. In addition, 2 FAM 221 provides that contractor personnel can be notified with the approval of the Director General.

155.3.1.4 Host Country Nationals and Permanent Residents

Effective Date: 10/25/2004

USAID employees who are local nationals or permanent residents of the host state are generally not notified to the host government.

155.3.2 Tax Exemptions

Effective Date: 10/25/2004

- a. **General Policy.** USAID has a long-standing policy that USAID assistance should be exempt from host government taxes and custom duties.
- b. **Pub. L 480.** This general tax policy does not apply to Pub. L. 480, Title II commodities. 22 CFR Part 211 requires a tax and custom exemption for Pub. L. 480, Title II commodities to be used in direct distribution programs. Title II commodities that are to be monetized do not require an exemption. For tax guidance regarding Title II commodities, refer to the relevant Framework Bilateral and other agreements and arrangement with the host government, and see 22 CFR 211.
- c. **Implementation.** This policy is not self-executing. USAID must negotiate exemptions with the host government. USAID implements this policy by negotiating tax exemption clauses in Framework Bilaterals, Strategic Objective Grant Agreements (SOAGs), Limited Scope Grant Agreements (LSGAs), and other agreements and arrangements with the host government. See [ADS 349](#), International Agreements, and [ADS 350](#), Grants to Foreign Governments, for model tax exemption clauses.

Because USAID has only the exemptions it negotiates with the host government, the agreement(s) or other arrangements with the host government are what govern, not this general policy. The extent and application of tax exemptions vary from country to country and can vary from agreement to agreement in a particular country. Missions and others should consult with the Regional Legal Advisor or GC on what exemptions apply in a particular country or in a particular situation.

- d. **Tracking USAID assistance.** Tax exemptions follow the USAID funding and, therefore, USAID attempts to negotiate exemptions for the following USAID-financed categories:
 - 1. An activity, contract, grant, or other implementing agreement financed by USAID;
 - 2. A transaction or supplies, equipment, materials, property, or other goods (collectively "goods") financed under a. above;
 - 3. A non-national contractor, grantee, or other individual or organization carrying out activities financed by USAID; and
 - 4. A non-national employee of such organizations.

There is one notable exemption to this general policy: USAID does not normally seek exemption from taxes paid by nationals of the host government. The term "national" includes citizens or residents and organizations established under the laws of the host government.

- e. **Types of Taxes.** The general tax policy applies to the following types of taxes, grouped into three exemptions:
 - a. **Exemption 1.** Customs duties, tariffs, import taxes, or other levies on the importation, use, and re-exportation of goods or personal belongings and effects (including personally owned automobiles) for the personal use of non-national individuals or their family members. Exemption 1 includes, but is not limited to, all charges based on the value of such imported goods, but does not include service charges directly related to services performed to transfer goods or cargo.
 - b. **Exemption 2.** Taxes on the income, profits, or property of non-national organizations of any type; national employees of national and non-national organizations, and non-national individual contractors and grantees. Exemption 2 includes income and social security taxes of all types and all taxes on the property, personal or real, owned by such non-national organizations or persons.
 - c. **Exemption 3.** Taxes levied on the last transaction for the purchase of goods or services financed by USAID, including sales taxes, value-added taxes (VAT), or taxes on purchases or rentals of real or personal property. The term "last transaction" refers to the last transaction by which the goods or services were purchased for use in the activities financed by USAID.

155.3.3 **Legislation on Foreign Taxes and Custom Duties**

Effective Date: 10/25/2004

The [Department of State Section 579 Implementation - Taxation of U.S. Foreign Assistance](#) contains the USAID-specific policies and procedures for the implementation of the State Department Guidance entitled "Section 579 Implementation (Taxation of U.S. Foreign Assistance) – Guidance Text". Section 579 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2003 (FY 2003 FOAA), (Division E, Pub. L. 108-7), as amended by section 506 of the FY 2004 FOAA (Pub. L. 108-199), requires certain steps aimed at preventing countries from imposing taxes (defined as VAT or customs duties only) on U.S. foreign assistance programs, or requires countries to reimburse the program if taxes are assessed.

155.4 **MANDATORY REFERENCES**

155.4.1 External Mandatory References

Effective Date: 10/25/2004

- a. [2 FAM 221, Diplomatic Immunities](#)
- b. [3 FAH-1 H-2435, Criteria For Other Titles in Organizational or Functional Positions](#)
- c. [3 FAH-1 H-2436, Grant and Use of Diplomatic and Consular Titles](#)

155.4.2 Internal Mandatory References

Effective Date: 10/25/2004

- a. [ADS 155maa, State Cable 232440, December 7, 2000](#)
- b. [ADS 155mab, State Cable 154772, July 9, 2004](#)
- c. [ADS 302mac, Department of State Section 579 Implementation - Taxation of U.S. Foreign Assistance](#)
- d. [ADS 349, International Agreements](#)
- e. [ADS 350, Grants to Foreign Governments](#)
- f. [ADS 435, Commissions, Titles, and Rank](#)

155.5 ADDITIONAL HELP

Effective Date: 10/25/2004

There are no Additional Help documents for this chapter.

155.6 DEFINITIONS

Effective Date: 10/25/2004

The terms and definitions listed below have been incorporated into the ADS Glossary. See the [ADS Glossary](#) for all ADS terms and definitions.

notify

The act by which the U.S. Embassy gives formal notice to the host government that the named individual is part of the U.S. Government presence in that country and that the individual has specific listed privileges and immunities. (Chapter 155)

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