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Summary Checklist of the Legal Requirements for Obligating Funds into a Development Objective Assistance Agreement

A Mandatory Reference for ADS Chapter 201

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SUMMARY CHECKLIST OF LEGAL REQUIREMENTS FOR OBLIGATING FUNDS INTO A DEVELOPMENT OBJECTIVE ASSISTANCE AGREEMENT

Funds appropriated to the U.S. Agency for International Development (USAID) are subject to numerous legal requirements that the Agency must meet prior to obligation and/or expenditure, including obligation into a Development Objective Agreement (DOAG). DOAGs are grant agreements with a recipient government, although in most cases, the parties to the DOAG agree that USAID may sub-obligate and disburse funds directly to third-party grantees and contractors. Missions might properly address some legal requirements at a sub-obligation stage if they initially obligate funding into a DOAG.

DOAGs incorporate key conditions and requirements for both parties, and can serve as a way to obligate funds at the level of Development Objectives (DOs), which provides Missions with a degree of adaptability to respond to changing circumstances without necessarily having to de-obligate funds. Consideration of legal requirements and constraints should occur throughout the design of *Country Development Cooperation Strategies* (CDCSs), projects, and activities. Consultation with the cognizant Resident Legal Officer (RLO) or the Office of the General Counsel (GC) must occur early in the design process to facilitate the resolution of any legal issues prior to the obligation stage.

The following summary checklist is designed to assist USAID’s staff in ensuring that Missions obligate and expend funds in DOAGs in accordance with all legal requirements. While the checklist identifies key legal requirements that Missions must address and document prior to the obligation and/or sub-obligation stage, it does not identify all potentially applicable legal requirements, which will be context- and country-specific. Missions and USAID’s Operating Units (OUs) in Washington should work with their RLO or GC contacts to assure compliance with all applicable requirements, including by establishing clearly at what stage in planning and implementation they should address them.

Legal Requirement*	Action at Obligation	Action at Sub-Obligation (if applicable)
1. Fiscal Year Statutory Checklists (both)*: <ul style="list-style-type: none"> ● Country-Level Statutory Review; and ● Activity-Level Statutory Review. 	Complete and document compliance unless exception/deferral approved by GC/RLO.	Document compliance with any deferred checklist items. RLO/GC to determine if a new activity checklist is required.
2. Congressional Notification (CN) and/or Special Notification	Ensure clearance of the draft CN by	New activities must fall within scope of the CN

	<p>the Office of Budget and Resource-Management and the Bureau for Legislative and Public Affairs (LPA); the Office of Foreign Assistance at the U.S. Department of State; and the Office of Management and Budget; ensure delivery of the CN to the Congressional Committees of jurisdiction and track Congressional concurrence.</p>	<p>and/or special notification.</p>
<p>3. Availability of Funds</p> <p>See Automated Directives System (ADS) Chapter 601</p>	<p>Ensure compliance.</p>	<p>Ensure compliance.</p>
<p>4. Adequate planning under Section 611(a) of the Foreign Assistance Act (FAA), as amended, including an illustrative budget that provides a reasonably firm estimate of the cost to the U.S. Government (USG)</p> <p>See ADS Chapter 201.</p>	<p>Document compliance.</p>	<p>Ensure the completion of adequate planning. At sub-obligation stage, adequate planning will generally be met through the regular processes of planning and acquisition and assistance (A&A).</p>
<p>5. Risk-Based Assessment (RBA) for Terrorism Financing *</p>	<p>Determine whether to carry out or defer to sub-obligation. level with GC/RLO approval</p>	<p>Carry out as required.</p>

6. Valid and Binding Obligation by an authorized official	Ensure compliance for the DOAG.	Ensure compliance for each implementing mechanism (such as a contract, grant, cooperative agreement).
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* While the Statutory Checklists and RBA are not, strictly speaking, legal requirements, they are tools designed to ensure compliance with legal requirements and thus included here.

Documentation: While CDCSs contain a thorough analysis of constraints and opportunities and a robust development hypothesis, they often do not identify specific or illustrative activities or reasonably firm cost-estimates for them, nor do they explain how Missions will address binding constraints. Thus, Missions should document how they are addressing additional considerations in some place before obligation through such approaches as the following:

- Sufficient detail in the CDCS;
- Approval of project and/or activity approval documents ([Project Design Document \(PDD\) Approval Memorandum](#) and [Activity Approval Memorandum \(AAM\)](#), respectively) with the relevant information before obligation into a DOAG (keeping in mind that projects are optional);
- Sufficient detail in the annual Operational Plan (OP) submitted to the the Director of the Office of Foreign Assistance (or similar document, such as the Country Operational Plan for the President’s Emergency Plan for AIDS Relief or the Malaria Operational Plan for the President’s Malaria Initiative), together with underlying technical and cost analyses; or
- An action memorandum for the DOAG obligation to address additional considerations.

According to [ADS 201.3.2.13](#), Missions have the option to establish Development Objective (DO) teams in addition to Project Teams to manage the connections between interrelated projects under a Development Objective in their CDCSs. Some DO Teams, particularly those with highly focused programs and minimal staff, might rely heavily on documents from their files—such as the *Integrated Country Strategy* and OPs, Results Frameworks under a CDCS, detailed budget estimates, A&A requests, Inter-Agency Agreements, and related documentation—to satisfy pre-obligation requirements. One difficulty with this approach is that a Mission might not address all of the pre-obligation and project- or activity-planning requirements on the record. To address this problem, this reference provides Missions with a concise checklist of pre-obligation legal and policy requirements to confirm to the obligating official that they have prepared the required documentation, and to specify where to find it.

Some Missions also use specific clearance requirements and clearance sheets to help ensure they meet all requirements before the approval of activities and subsequent obligations. Clearances by specified officers (such as the Program Officer, Controller, RLO, Contracting Officer, Mission Environmental Officer, and other members of the DO Team) confirm to the obligating and approving officials (and for the record) that the Mission has met pre-obligation and project- or activity-planning requirements and that obligating instruments contain all necessary clauses consistent with law, regulation, and policy, including requirements for counterpart funding. Such clearances may accompany a DOAG or other project- and activity-approval documents (PDDs and AAMs).

The following provides additional detail for each legal or policy requirement on the checklist:

1. Statutory Checklists: The statutory checklists are designed to ensure compliance with country- and activity-level prohibitions and restrictions. USAID, as an Agency, must manage our programs and operations in compliance with applicable legal restrictions (statutory and regulatory). Obligations and sub-obligations of funds must be for activities conducted consistent with applicable restrictions, or for which special authority, such as “notwithstanding” authority, allows the Agency to conduct an activity even though applicable restrictions would otherwise prevent it.

Most legal prohibitions and restrictions on the use of funds apply based on the Fiscal Year for which Congress appropriated the funds and remain applicable to those funds until they are expended, sometimes years later. Additionally, funds which are obligated, de-obligated, and then are available for re-obligation retain their original Fiscal Year identification and the Agency must use them in accordance with the terms and conditions of the Appropriations Act that first appropriated them. Consequently, if the Agency wishes to use funds originally appropriated in different Fiscal Years to fund an activity, the relevant Operating Unit(s) (OU) must complete checklists for each Fiscal Year of funding. Additionally, some legal restrictions might affect prior-year funding once triggered. For example, an Appropriations Act could restrict an activity funded “by this Act or any other Act,” in which case funds still available from prior Fiscal Years would also be subject to the restriction(s).

Congress expresses legal restrictions on appropriations in a variety of ways, such as limiting or prohibiting assistance to a particular country or a category of countries (such as those that are in arrears in repayment of debt to the U.S. Government)—or more narrowly, to the government or central government of a country or countries—or in terms of a particular type of assistance (such as police assistance).

Missions and Washington OUs should use two types of checklists to assist in compliance with country restrictions: The Country-Level Statutory Review (Country Checklist) and the Activity-Level Statutory Review (Activity Checklist). Each checklist

summarizes various legal restrictions and provides a simple way to confirm and document that USAID-funded programs comply with the restrictions applicable to funding appropriated for a particular Fiscal Year. GC updates both checklist templates annually to reflect changes in legal restrictions, and they are available from GC or RLOs (see [USAID Statutory Checklists](#)). The responsible Mission or Washington OU must retain completed checklists in their official project and/or activity files (and, for the latter, in USAID's Agency Secure Image Storage and Tracking System [[ASIST](#)]).

These checklists do not contain the entire universe of legal restrictions that might be applicable in every instance. GC and RLOs advise as to whether legal restrictions affect particular countries or activities, and whether the Agency may exercise particular waiver authorities, based on facts provided by Missions or Washington OUs.

Missions should review compliance with legal requirements at the earliest stages of planning and authorizing a DOAG, and at the subsequent stage of sub-obligating funds into implementing mechanisms. Missions or Washington OUs should consider, in consultation with the RLO or GC Point of Contact, how best to ensure that legal review of proposed activities takes place at the appropriate time to be meaningful.

2. Congressional Notification (CN): USAID generally must notify Congress 15 days in advance regarding the use of the relevant funds, and the Agency may not obligate without resolving any outstanding Congressional objection to, or hold on, the CN submitted (see [Section 634A](#) of the [FAA](#), as amended, and provisions of the annual [Foreign Operations Appropriations Act](#) for the relevant Fiscal Year(s)). See also annual [guidance](#) on CNs issued by LPA. In general, except in cases in which a separate CN is required, USAID notifies its programs through the annual Congressional Budget Justification (CBJ). The CBJ notification is sufficient if the Administration makes no subsequent, significant shifts in programming, and if there are no applicable requirements for special notifications. If there are any significant shifts or special-notification requirements applicable to the proposed activity or country, then the Agency must complete a CN prior to obligating funds and commencing the activity. In some situations when obligating into a DOAG, post-obligation changes in program plans could result in a subsequent need for a special CN after obligation, which the Agency must complete prior to sub-obligation. Note that certain appropriation accounts have unique legal authorities or requirements on which the RLO or GC contact should advise.

3. Funds Availability: Funds must be available before actual obligation and their availability formally documented. See the Federal Anti-Deficiency Act – [Section 1341\(a\)\(1\) of Title 31 of the United States Code \(U.S.C.\)](#); and [Section 634A](#) of the [FAA](#), as amended; and the annual [Foreign Operations Appropriations Act](#) (see [ADS 634](#) for more information).

4. [Section 611\(a\) of the FAA, As Amended, Pre-obligation Adequate Planning:](#) Section 611(a) of the FAA requires adequate planning prior to obligating funds. It states, "No agreement or grant which constitutes an obligation of the [USG] [for assistance] in excess of \$500,000...shall be made if the agreement or grant... requires

substantive technical or financial planning, until engineering, financial, and other plans necessary to carry out such assistance, and a reasonably firm estimate of the cost to the United States Government of providing such assistance, have been completed;...”

The amount and type of planning depends on the type and purpose of the assistance—capital activities generally require the most. However, some pre-obligation planning is required for even broad, non-capital activities. The requirement includes both technical and financial planning. When obligating directly into an implementing mechanism (such as a contract, grant, or cooperative agreement), the Agency generally completes “adequate planning” through our normal planning and A&A processes. However, Missions must pay particular attention to ensuring they conduct adequate planning \prior to obligating funding into a DOAG.

Approaches for Meeting the Requirements of Section 611(a) of the FAA, As Amended, When Obligating into a DOAG: Recognizing that the final judgment of what is needed to meet the requirements of Section 611(a) of the FAA is case-specific, the following are the minimum requirements:

1. An analysis of constraints and explanation of the development hypothesis required for *Country Development Cooperation Strategies* (CDCSs);
2. The identification of specific activities, or the identification of criteria and procedures for selecting activities, together with illustrative activities;
3. The identification of binding (critical) constraints to achieving the purpose of the obligation, together with an explanation of how the OU reasonably expects to address such constraints:
 - a. Reviews of the assumptions in the Results Framework and Logic Model for CDCSs, proposed conditions precedent (CPs) and covenants, the policy environment, and statutory checklists are particularly likely to identify these critical constraints, and OUs should review them before obligation.
 - b. Where certain activities are the key to achievement of the purpose (DO) of the obligation, the OU must address the binding constraints for these activities.
 - c. For other activities, it might be possible to substitute alternative activities if binding constraints emerge during the process of designing projects and activities, but not every one of the issues identified in these reviews reaches the critical level of needing to be addressed pre-obligation; and

4. A reasonably firm estimate of the cost of accomplishing the specified or illustrative activities based on actual cost analyses, not merely the amount of available funds.

OUs can meet the requirements of Section 611(a) of the FA, as amended, for conducting “adequate planning” before obligation by adopting various approaches:

- OUs can plan all the specific activities for the overall DO before obligating funds into a DOAG;
- OUs can base obligation on criteria and procedures for selecting activities, together with illustrative activities and associated illustrative budgets; and
- OUs can conduct full planning for specific activities for which they are obligating the first tranche of funding immediately, and meet the requirements for adequate planning for each subsequent incremental obligation at the time they obligate the additional funds.

5. Risk-Based Assessments (RBAs) for Terrorism Financing: In 2008, the U.S. Department of State established a requirement that Federal Departments and Agencies prepare RBAs prior to spending foreign-assistance funds on an activity. These RBAs are a means to minimize the risk that any foreign-assistance funds finance terrorist activity and build on legal requirements and processes already in place. USAID’s OUs may prepare RBAs for single activities or groups of activities, and their formats vary across Bureaus. For additional guidance and information, consult with your Bureau’s Program Office.

6. **Section 1501 of Title 31 of the U.S.C., Binding Obligation:** To ensure that DOAGs create valid, legally binding obligations, Missions must meet the following requirements:

a. **Specificity:** The DOAG must contain sufficient specificity of what it will fund. DOAGs that reflect the requirements of Section 611(a) of the FAA, as amended, for “adequate planning” (discussed below) would typically meet the “specificity” requirement.

b. **Concurrence with USAID Sub-Obligations:** If, after obligating funds in a DOAG, USAID intends to then itself provide them to third parties (*i.e.*, by sub-obligation) for certain uses (*e.g.*, A&A awards), the partner government must concur in some manner. The partner government can provide this concurrence by whomever it indicates for this purpose, and in whatever form and level of generality/detail it deems satisfactory. For instance, the partner government could communicate its concurrence by signing a DOAG that contains a program description and illustrative activities in an Annex, through a subsequent Implementation Letter that approves a list of activities that USAID will fund, or otherwise.

c. **Objective Conditions:** Conditions or reservations in the DOAG on USAID’s obligation to disburse funds, whether as formal CPs or otherwise, must be objective and outside

USAID's control and not pursuant to "agreement by the partner government and USAID" on what needs to be done. For instance, a CP for disbursement that requires the partner government's submission of an environmental remediation plan "in form and substance satisfactory to USAID," might be sufficiently objective, while a statement that "USAID and the partner government will agree on the activities to be implemented" might raise a question as to whether it constitutes an inappropriate "agreement to agree."

d. Obligation by an Authorized Official: An authorized official must execute the obligation. For information as to which officials are authorized to obligate funds, see [ADS 103](#) and any other applicable Mission or Bureau Delegations of Authority.

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