TITLE 42: A REVIEW OF SPECIAL HIRING AUTHORITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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C O N T E N T S

WITNESSES

SUBMITTED MATERIAL

[1] Mr. Goldenkoff and Mr. Cramer submitted a joint statement for the record.

TITLE 42: A REVIEW OF SPECIAL HIRING AUTHORITIES

FRIDAY, SEPTEMBER 14, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HEALTH,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in room 2123, Rayburn House Office Building, Hon. Joseph R. Pitts (chairman of the subcommittee), presiding.

Members present: Representatives Pitts, Burgess, Shimkus, Gingrey, Latta, McMorris Rodgers, Barton, Pallone, and Schakowsky.

Staff present: Brenda Destro, Professional Staff Member, Health; Debbee Keller, Press Secretary; Katie Novaria, Legislative Clerk; Krista Rosenthall, Counsel to Chairman Emeritus; Alan Slobodin, Deputy Chief Counsel, Oversight; Heidi Stirrup, Health Policy Coordinator; Alli Corr, Democratic Policy Analyst; Ruth Katz, Democratic Chief Public Health Counsel; and Anne Morris Reid, Democratic Professional Staff Member.

OPENING STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. PITTS. The time of 10 o'clock having arrived, the subcommittee will come to order.

The chair recognizes himself for 5 minutes for an opening statement.

Title 42 of the Public Health Service Act provides authority to appoint and set pay for difficult-to-fill, critical scientific and medical positions in the Public Health Service. The Department of Health and Human Services uses this authority, which allows them to pay individuals above the salary limits of other government employees, to attract and retain topnotch scientists and researchers who might otherwise go into academia or the private sector.

Clearly, the Secretary needs some flexibility to attract and retain the best and brightest in science and medicine, but these authorities should be limited and transparent.

Laws passed by Congress and regulations promulgated since the 1930s and 1940s show that the program was intended for special use when there was no other way to hire needed experts; it was never intended to be used as an alternative compensation program. Yet, in 2010, almost 7,000 employees at HHS were appointed using

Title 42 authority, a 25 percent increase over 5 years. Some of those annual salaries have reached levels higher than $350,000.

HHS has recently moved to lower the caps on these salaries, yet the Secretary of HHS can still approve pay levels higher than the caps, which may give her more hiring and compensation authority than anyone else in the Federal Government.

In 2005, the Environmental Protection Agency began hiring experts using the Title 42 authority, once again, to fill critical science positions. Now, 15 of the 17 positions at the EPA are paid at or above Executive Level 4.

The extensive use of Title 42 and the unprecedented authority of the Secretary to compensate some experts at extraordinarily high rates led the committee to ask the GAO to analyze the laws that govern Title 42 and audit its use at HHS and the EPA. Today, we have asked GAO to share the results of that study.

Congressman Joe Barton has introduced H.R. 6214, the HHS Employee Compensation Reform Act of 2012, which makes simple, commonsense changes to the use of Title 42 authorities. It limits the use of Title 42 authority to HHS; caps the number of Title 42 hires to 5 percent of the total number of employees at HHS; ensures that compensation may not exceed 150 percent of Executive Level 1; allows up to 50 employees to be paid without regard to compensation limitation if the Secretary determines the position is vital; and requires a report to Congress 6 months after enactment. I commend Mr. Barton for his work on this issue.

And I would like, at this time, to yield the remainder of my time to Dr. Burgess.

[The prepared statement of Mr. Pitts follows:]

Opening Statement of the Honorable Joe Pitts
Subcommittee on Health
Hearing on "Title 42 – A Review of Special Hiring Authorities"
September 14, 2012
(As Prepared for Delivery)

Title 42 of the Public Health Service Act provides authority to appoint and set pay for difficult to fill, critical scientific and medical positions in the Public Health Service.

The Department of Health and Human Services (HHS) uses this authority, which allows them to pay individuals above the salary limits of other government employees, to attract and retain top-notch scientists and researchers who might otherwise go into academia or the private sector.

Clearly, the Secretary needs some flexibility to attract and retain the best and brightest in science and medicine. But, these authorities should be limited and transparent.

Laws passed by Congress and regulations promulgated since the 30s and 40s show that the program was intended for special use when there was no other way to hire needed experts. It was never intended to be used as an alternative compensation program. Yet, in 2010, almost 7,000 employees at HHS were appointed using Title 42 authority, a 25 percent increase over five years.

Some of those annual salaries have reached levels higher than $350,000. HHS has recently moved to lower the caps on these salaries. Yet, the Secretary of HHS can still approve pay levels higher than the caps, which may give her more hiring and compensation authority than anyone else in the federal government.

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OPENING STATEMENT OF HON. MICHAEL C. BURGESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BURGESS. Thank you, Mr. Chairman.

Title 42 is a special hiring provision that Congress explicitly gave to HHS through the Public Health Services to allow HHS to attract the best and brightest. Many of these men and women hired under Title 42 could easily be making three or four times what they make working in the public sector but have chosen to dedicate their work to government service. Because of the salary constraints under normal Title 5 hiring practices, HHS's hands were tied as to what it could offer to leaders of these fields to attract them to HHS.

This program began with noble purposes and continues to be an important recruitment tool for HHS, the agency that Congress intended to be using it. It should come as no surprise that the minute other Federal agencies heard of this higher salary structure, they came to Congress asking for authority to pay themselves more. It would be one thing if these agencies had come to this committee, the authorizing committee, which wrote the Title 42 statute to begin with. Instead, the EPA did an end run around Energy and Commerce and went directly to Appropriations asking for the authority.

Every member of this committee should be shocked and outraged that an agency under our jurisdiction chose to ignore our authority as the authorizing committee for such hires. This is a congressional jurisdictional issue if there ever was one. Not only did the EPA do the end run for years, but in oversight hearing after oversight hearing they would refuse to give us information as to their hiring practices. It is a precedent that has been set, and what is to stop every Federal agency, every Federal bureaucracy from doing the same thing?

I introduced earlier this Congress H.R. 2791, the Health and Human Services Hiree Clarification Act, which codifies this committee's clear intent that Title 42 is only to be used by officials at HHS—not EPA, not Department of Labor, and not the Park Service. I am happy to see that Mr. Barton has included language from this legislation in his bill, as well. If other agencies believe so strongly that they need a special hiring authority, come to the authorizers, justify their request, and do it as regular order dictates.

This hearing is long overdue. I thank the chairman for the consideration. I will yield back balance of my time.

Mr. PITTS. The chair thanks the gentleman and recognizes the ranking member, Mr. Pallone, for 5 minutes for an opening statement.

Mr. PALLONE. Thank you, Mr. Chairman.

I wanted to ask unanimous consent to include in the record the statement of our ranking member, Henry Waxman.

Mr. PITTS. Without objection, so ordered.

[The prepared statement of Mr. Waxman appears at the conclusion of the hearing.]

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Today, we are here to discuss a special hiring authority available to the Department of Health and Human Services which is informally known as Title 42. The statute was created nearly 70 years ago to help the government recruit and retain the best and the brightest individuals in medicine, science, and other important fields.

While we all wish it would be the case, a sense of civic duty is not always enough. This is something that I can certainly sympathize with, as I am sure many Members of Congress can, too. Young people want to come and dedicate their lives to public service, but sometimes the salary of Congress simply does not compete with the private sector. And that is why the House Administration created the Student Loan Repayment Program, which serves as an incentive to recruit and retain bright, young professionals to work for us in Congress.

But, today, we will specifically hear from GAO about the recent studies that shed light on improvements that can be made to the Title 42 process. In fact, HHS even recognized the need to examine their hiring practice on their own prior to GAO, and they started an internal review back in 2010. They also currently implement a number of changes in response to this study and support its recommendations.

But I just wanted to say to my colleagues, let's tread carefully during this discussion. We must not react negatively simply for politics' sake. It is good to be concerned, and it is certainly fair for this committee to maintain its oversight responsibilities, but this statute has been used by Democrats and Republicans alike, and it is critical to the quality and caliber of the work of the Department.

If we were to somehow restrict HHS's good work that has come about because of Title 42, we could be doing serious harm to the research in this country, both in terms of our ability to respond to public health emergencies like H1N1 and to drive toward the scientific breakthroughs like sequencing the human genome.

The agencies listed in the GAO report are devoted to enhancing health, lengthening life, and reducing the burdens of illness and disability, as well as protecting all Americans from significant risks, whether these risks are from illness, the environment, or bioterrorism.

NIH, as we know, is the premier biomedical research institute in the world. CDC, also an agency listed in the report, is globally renowned as a leader in disease prevention and health equity. Without dedicated funding of these agencies and top talent within their ranks, the U.S. would not be the leader in the biomedical and pharmaceutical industry, the global leader in disease prevention and public health, or a leader in the fight against devastating diseases such as cancer, obesity, and HIV.

Now, using NIH as an example, NIH is the driving force behind the biomedical research that has advanced and continues to improve the health of Americans and grow the U.S. Economy. Thanks in large part to NIH research, Americans are living longer, living healthier, and suffering less from morbidity and mortality of count-

less diseases when compared to the past. Not only has the general health of the Nation been improved, but these gains have added an estimated $3.2 trillion annually to the U.S. economy since 1970.

Yet it seems that we continue to ask NIH and CDC to do more with less. In the current climate, we are doing well if the budgets of these agencies just stay the same. Our reliance on their service has grown as new public health and environmental threats emerge and the burden of disease grows.

NIH employs nearly 19,300 civil servants in its workforce. Of those who are hired under Title 42, 44 percent are researchers and clinicians, and less than 2 percent of all NIH employees are paid above the general Federal schedule.

Meanwhile, the American Academy of Medical Colleges releases an annual report which describes compensation for professionals in the medical and research fields. And consider that an associate professor in radiology can make $430,000, while a department chair can make over $650,000 per year, a professor in plastic surgery can make over $650,000, and the department chief, more than $800,000.

HHS's current policy caps compensation at $275,000 unless an exception is approved by the Secretary. And a recent CBO report found that Federal workers with a professional degree or doctorate, which is currently a requirement for Title 42, earned about 23 percent less than their counterparts in the private sector.

I just think it is important to keep in mind the types of people we would be affecting if we restrict Title 42. Let me mention Dr. Fauci, director of the National Institute of Allergy and Infectious Disease at NIH. He is the recipient of the Presidential Medal of Freedom, has been fighting a battle against HIV and AIDS since the epidemic began. He is recognized around the world as one of the greatest scientific minds of our generation. In 2003, there was an Institute for Scientific Information study that showed that over the 20-year period from 1983 to 2002, Dr. Fauci was the 13th most cited scientist among 2.5 million to 3 million authors in all disciplines and that he was the 10th most cited HIV–AIDS researcher in the period 1996 to 2006. And he is compensated under Title 42.

So I am just pointing out that we really have to be careful what we do here. I look forward to the discussion. I welcome our witnesses. I thank the Department, you know, for their input on this. But I do think we have to watch what we do, because I am concerned that we do not want to lose the best and the brightest.

Thank you, Mr. Chairman.

Mr. PITTS. The chair thanks the gentleman and now recognizes the chair emeritus of the full committee, Mr. Barton, 5 minutes foran opening statement.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Chairman Pitts. And I want to thank you and your staff and Dr. Burgess and his staff and Chairman Upton and his staff and my staff for working so diligently on this issue.

The ranking member, my good friend from New Jersey, Mr. Pallone's opening statement I thought was very good. He didn't

state it, but he said that this might be about politics. Well, it is not. We have been investigating this for 3 years. You know, it is to Chairman Upton's credit and Chairman Pitts' credit that we finally have a full hearing just on this, unfortunately on a day when we have a bill on the floor that a lot of our members are engaged with concerning Solyndra.

But this is an important issue. We do want the best and the brightest, as Congressman Pallone just said, those that could find revolutionary cures for some of the dreaded diseases that we have been fighting so long. We want those scientists to work for the Health and Human Services and the National Institutes of Health. That is why Congress originally passed this legislation a number of years ago, to give special hiring authority so that we could get in those exceptional cases the best and the brightest.

The bill that I have introduced doesn't eliminate that. It still allows a large number of exemptions to hire those very special people.

What has happened, though, Mr. Chairman, is that what was a well-intentioned piece of legislation 70 years ago has been used as a loophole to create an alternative pay scale. This special hiring authority that we commonly call Title 42 has become commonplace. It is almost an alternative pay scale, not just a special pay scale. Nearly 25 percent—25 percent—one out of four, of NIH employees are hired under Title 42.

Mr. Pallone alluded to the director of NIH, who is an exceptional individual and is worth a lot more than we are paying him. But he is one of 6,500, you know? That is the problem. Not that we hired these extremely exceptional people under Title 42; it is that we hire thousands of people who are very competent, very qualified, but I doubt that they are all as exceptional as Dr. Fauci is.

Ten percent of all HHS employees—10 percent of all HHS employees are hired under Title 42. Believe it or not, even the Environmental Protection Agency is now using Title 42 to hire I think somewhere in the neighborhood of 25 people. That is just not acceptable, Mr. Chairman, in a time when we have budget deficits of over a trillion dollars every year.

Title 42 was not created to create an alternative pay scale. It was not created to inflate unnecessarily government salaries. Legislation, in my opinion, is needed to rein this in.

H.R. 6214 is not a draconian, slash-and-burn piece of legislation. It does limit the use of the provision of Title 42 to HHS; that means the EPA can't use it. I think that is common sense. It would cap the number of hires under this authority to 5 percent. Now, 5 percent is hardly, you know, earth-shattering. That is still, at 60,000 people, 5 percent is 3,000 people. So surely within that 3,000-person cap we can get the best and the brightest if we need to.

It would ensure that compensation under Title 42 does not exceed 150 percent of the Executive Level 1 pay scale under Section 5312, Title 5 of the regular government employee compensation scale.

It would allow, no matter what the general pay scale is, up to 50 people, at the discretion of the Secretary of HHS, to be paid without regard to compensation limit—up to 50. So if we get an Al-

bert Einstein or if we get somebody who literally has the cure for cancer, if the Secretary wants to pay that individual, I don't know, a million dollars, this piece of legislation would allow that to happen, but only up to 50 employees.

The bill also would require an annual report to the Congress detailing the use of Title 42 and an enumeration of those that were receiving Title 42 compensation.

So, Mr. Chairman, this is an issue that the subcommittee has been looking at for a number of years. It is an issue that I requested a GAO report on several years ago, which we are about to get the executive summary given to us. And hopefully this is a bill that, on a bipartisan basis, in the very near future we can move in some shape, form, or fashion.

I will say this—I know my time has expired. If there are tweaks to the bill and our minority friends want to change some of it, I am open to it, and I would expect that Mr. Pitts and Mr. Upton also would be. And we encourage our NIH and HHS officials to work with us to perfect this bill.

And, with that, I yield back.

Mr. PITTS. The chair thanks the gentleman.

Now, standing in for the ranking member of the full committee, the gentlelady from Illinois, Ms. Schakowsky, is recognized for 5 minutes.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

In order to improve our Nation's health and wellbeing and to stay competitive in the global marketplace, it is pretty clear to me that our government needs to recruit top talent in research and development. Title 42 has allowed us to bring in our Nation's top scientists to apply their expertise to discoveries that improve health and save lives. It is vital that our Federal agencies have the authority to recruit and retain vital scientific talent.

The Department of Health and Human Services, and in particular NIH, has cited difficulties in recruiting and retaining top individuals in medicine, science, and other critical fields. As a result, our government has made an effort to bridge skill gaps that threaten our agencies' ability to meet their missions.

Even prior to this report—and I want to underscore that—even prior to this report, HHS has been diligently working on improving its Title 42 hiring process. HHS recently implemented a policy that capped annual base salaries, clarified the definition of scientific positions for the purpose of Title 42 hiring, and use of a streamlined recruitment process to ensure that all other hiring authorities have been exhausted before Title 42 was used.

I am also pleased that NIH has heeded GAO's recommendations and is working to incorporate them into their Title 42 changes.

While I agree that it is important in our oversight role to ensure that NIH does not abuse this authority, an ill-advised effort to statutorily cap all pay under Title 42 or to cap HHS's ability to use Title 42, such as in H.R. 6214, would have a detrimental effect on critical government research.

Our Nation's top scientists could make significantly more in comparable private-sector jobs. When they agree to apply their skills and expertise to the public sphere, the American people benefit from their work. Congress must ensure that our government's esteemed research institutions are able to attract top talent, and, to do so, Title 42 funding should not be subject to an arbitrary cap.

I look forward to hearing the testimony from our witnesses concerning how HHS can build upon their work to modify its Title 42 policy, to work with my colleagues across the aisle to make sure that there are no abuses of this authority, and to ensure that the appropriate use and documentation of this important authority is available to us.

And I thank you, Mr. Chairman. And I yield back.

Mr. PITTS. The chair thanks the gentlelady.

All the other opening statements of the Members will be made a part of the record.

I would like to introduce today's witnesses.

Mr. Robert Goldenkoff is the director of strategic issues for the Government Accountability Office.

Welcome.

Mr. Robert Cramer is the managing associate general counsel, also with the Government Accountability Office.

Your written statements will be made part of the record. Thank you both for being here today.

And, Mr. Goldenkoff, you are now recognized for 5 minutes for a summary of your testimony.

STATEMENT OF ROBERT GOLDENKOFF, DIRECTOR, STRATEGIC ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE; ROBERT CRAMER, MANAGING ASSOCIATE GENERAL COUNSEL, GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF ROBERT GOLDENKOFF

Mr. GOLDENKOFF. Thank you.

Chairman Pitts, Ranking Member Pallone, members of the subcommittee, thank you for the opportunity to be here today to discuss Title 42, a special hiring authority used exclusively by the Department of Health and Human Services and the Environmental Protection Agency to help them overcome difficulties in recruiting and retaining individuals in medicine, science, engineering, and other fields.

The two agencies use the higher salaries and other flexibilities available under Title 42 to make them more competitive in the labor market for individuals in these highly specialized fields and more agile in meeting their mission requirements.

Joining me today is Robert Cramer, GAO's managing associate general counsel. As requested, our remarks will focus first on the extent to which HHS and EPA have used Title 42 to appoint and set pay for employees since January 2006; and, second, whether those appointments followed applicable internal controls. We were also asked to determine whether there were any statutory pay caps for individuals appointed under Title 42.

Overall, HHS's use of Title 42 has increased from 5,361 positions in 2006 to 6,697 positions in 2010, an increase of around 25 per-

cent. HHS officials attributed this increase in Title 42 employees to, among other factors, the agency's response to urgent public health matters. For example, HHS officials said they used Title 42 to quickly hire experts needed to develop a vaccine in response to the H1N1 flu pandemic of 2009. Nearly all of HHS's Title 42 employees work in one of three operating divisions: NIH, FDA, and the CDC.

In implementing Title 42, HHS and EPA can set base pay as high as $250,000. In comparison, most Federal employees are paid under the general schedule, where the highest base pay amount was $155,500 in 2010, a threshold known as Executive Level 4. That same year, more than a fifth of HHS's Title 42 employees had a base salary that exceeded that Executive Level 4.

Importantly, special hiring authorities need adequate internal controls to ensure agencies use them cost-effectively. However, HHS lacks reliable data to manage and oversee its use of Title 42. As one example, because of shortcomings with its personnel database, it was difficult for HHS to provide accurate head counts of its Title 42 employees to us and to Congress.

For its part, since 2006, EPA has used Title 42 to appoint 17 employees, 15 of which earned over $155,500 in 2010. EPA appointment and compensation practices were generally consistent with its guidance; however, EPA does not have post-appointment procedures in place to ensure Title 42 employees meet ethics requirements to which they have previously agreed.

In our report on which this testimony is based, we made recommendations to HHS to strengthen its oversight and management of its Title 42 authority and a recommendation to EPA to improve enforcement of its ethics requirements. HHS agreed with our recommendations, while EPA disagreed, citing actions it had already taken. We acknowledge the EPA's plans to address these issues but maintain that the recommendation was needed to ensure implementation of tighter ethics provisions.

I will turn now to my colleague, Bob Cramer, who will discuss the extent to which statutory pay caps apply to certain Title 42 appointments.

STATEMENT OF ROBERT CRAMER

Mr. CRAMER. I am pleased to be here to discuss our legal opinion concerning pay caps for consultants appointed pursuant to Title 42 of the United States Code.

At the outset, let me say that this was a very difficult issue. It required us to analyze laws that have been enacted over the course of many years, from 1923 to 2009. Laws we analyzed are in different pay systems, and we encountered challenges in attempting to resolve ambiguities arising from pay laws enacted at different times over those many years, nearly 90.

What we did find was that a provision in a 1993 appropriations act established a permanent cap on the pay of individuals appointed on a limited-time basis under Title 42 at all the public health agencies except three. The cap currently limits base pay to $155,500. The permanent cap in the 1993 appropriation actually originated back in 1956, when Congress first enacted it. Congress

included it again in every appropriation until 1993, each year, but in 1993 it made it permanent.

Now, in 1956, when the Public Health Services regulations included time limitations on employment of all consultants—so everyone had a limited-time appointment, so the appropriation cap applied to everyone. But in 1966 the regulations changed and the time limitation was removed. But when Congress enacted the appropriation cap in 1967 and in each of the following years, it continued to apply the cap only to those consultants appointed for limited periods of time.

We also examined two pay caps found in Title 5. The first of these is Section 3109, which limits pay for temporary consultants.

In 1992, Congress directed OPM to prescribe regulations to administer 3109, and OPM's regulations provide that 3109 does not apply to consultants under Title 42. Under the law, this interpretation is entitled to considerable weight since OPM is the agency charged by Congress with administering 3109. Moreover, OPM's interpretation is consistent with actions of Congress, which have signaled that 3109 does not apply to the Title 42 consultants.

Since 1970, the appropriation acts for HHS have contained separate provisions placing identical compensation limits for consultants subject to 3109 and for Title 42 consultants appointed for limited periods of time. Obviously, identical provisions would be unnecessary if Congress believed that 3109 applied to the Title 42 folks.

The other pay cap that we considered is Section 5373 of Title 5. It caps pay at level 4 of the executive schedule, currently $155,500 also.

In deciding that 5373 does not apply to Title 42 consultants, we were again guided by congressional actions. For example, after 5373 was enacted, Congress enacted the permanent pay cap that I spoke of before, which limits pay for Title 42 limited-time appointments to Executive Level 4. This provision would not have been necessary if Congress believed that the pay cap in 5373 applied, since it also limits pay to Executive Level 4.

Additional evidence that 5373 does not apply to Title 42 is provided by Congress' actions when it extended the authority to EPA. Our review of the legislative history at the time indicates that EPA and HHS each informed Congress during the legislative process that they did not apply the 5373 cap to the Title 42 consultants.

In conclusion, if Congress wants to establish upper limits for appointments under Title 42, you may wish to consider, as indeed you are, enacting legislation to specifically enact such limits.

That concludes our statements, and Mr. Goldenkoff and I would both be happy to answer any questions you may have.

[The prepared statement of Mr. Goldenkoff and Mr. Cramer follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Health, Committee on Energy and Commerce, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
Friday, September 14, 2012

HUMAN CAPITAL

The Department of Health and Human Service's and Environmental Protection Agency's Use of Special Pay Rates for Consultants and Scientists

Statement of

Robert Goldenkoff,
Director, Strategic Issues

Robert Cramer
Managing Associate General Counsel

GAO-12-1035T

GAO
Accountability * Integrity * Reliability
Highlights

Highlights of GAO-12-1035T, a testimony before the Subcommittee on Health, Committee on Energy and Commerce, House of Representatives

Why GAO Prepared This Testimony

HHS and EPA have been using special hiring authority provided under 42 U.S.C. §§209(f) and (g)—referred to in this testimony as Title 42—to appoint individuals to fill mission critical positions in science and medicine and, in many cases, pay them above salary limits usually applicable to federal government employees. GAO was asked to review the extent to which HHS and EPA have (1) used authority under Title 42 to appoint and compensate employees since 2006, and (2) followed applicable agency policy, guidance, and internal controls for appointments and compensation. GAO was also asked to determine if there are statutory caps on pay for consultants and scientists appointed pursuant to Title 42.

This testimony is based on GAO's July 2012 report (GAO-12-692) and a legal opinion on whether there are statutory caps on pay for consultants and scientists appointed pursuant to 42 U.S.C. §§ 209(f) or (g). (B-3223357)

What GAO Recommends

In the report on which this testimony is based, GAO made recommendations to HHS to improve oversight and management of its Title 42 authority and a recommendation to EPA to improve enforcement of its ethics requirements. HHS agreed with GAO's recommendations, while EPA disagreed, citing actions already taken. GAO acknowledged EPA's plans to address these issues, but maintained the recommendation was needed to ensure implementation.

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September 2012

HUMAN CAPITAL

The Department of Health and Human Service's and Environmental Protection Agency's Use of Special Pay Rates for Consultants and Scientists

What GAO Found

The Department of Health and Human Services' (HHS) use of special hiring authorities under 42 U.S.C. §§ 209(f) and (g) has increased in recent years, from 5,361 positions in 2006 to 6,697 positions in 2010, an increase of around 25 percent. Nearly all HHS Title 42 employees work in one of three HHS operating divisions: the National Institutes of Health (NIH), the Food and Drug Administration (FDA), and the Centers for Disease Control and Prevention (CDC). Title 42 employees at HHS serve in a variety of areas, including scientific and medical research support and in senior, director-level leadership positions. At NIH, one-quarter of all employees, and 44 percent of its researchers and clinical practitioners, were Title 42 appointees.

HHS reported that Title 42 enables the agency to quickly fill knowledge gaps so medical research can progress and to respond to medical emergencies. HHS further reported Title 42 provides the compensation flexibility needed to compete with the private sector. In 2010, 1,461 of HHS's Title 42 employees earned salaries over $155,500. The highest base pay amount under the General Schedule – the system under which most federal employees are paid – was $155,500 in 2010. Under certain types of Title 42 appointments, statutory pay caps may apply. 2010 was the last year of HHS data available at the time of GAO's review.

HHS does not have reliable data to manage and provide oversight of its use of Title 42. Moreover, HHS did not consistently adhere to certain sections of its Title 42 section 209(f) policy. For example, the policy states that 209(f) appointments may only be made after non-Title 42 authorities have failed to yield a qualified candidate, but GAO found few instances where such efforts were documented. HHS has recently issued updated 209(f) policy that addresses most of these issues. HHS is developing agencywide policy for appointing and compensating employees under Title 42 section 209(g), but it is not clear the policy will address important issues such as documenting the basis for compensation.

Since 2006, the Environmental Protection Agency (EPA) has used section 209(g) to appoint 17 employees. Fifteen of EPA's 17 Title 42 employees earned salaries over $155,500 in 2010. EPA appointment and compensation practices were generally consistent with its guidance; however, EPA does not have post-appointment procedures in place to ensure Title 42 employees meet ethics requirements to which they have previously agreed.

In its legal opinion, GAO concluded that an appropriations pay cap applies to certain, but not all, employees appointed under 42 U.S.C. §§ 209(f) and (g). If Congress desires upper pay limits for appointments not currently subject to the pay cap, it may wish to consider legislation to specifically establish such limits.

Chairman Pitts, Ranking Member Pallone, Members of the Subcommittee,

Thank you for the opportunity to be here today to discuss a special hiring authority used by the Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) to help them overcome difficulties in recruiting and retaining individuals in medicine, science, engineering, and other fields in support of their missions. One reason for these difficulties, according to agency officials, is that salaries available under typical federal government hiring authorities are not always competitive with those in the private sector for individuals in these highly specialized fields. Since 2001, we have designated strategic human capital management a government-wide high-risk area in part because of the need to address current and emerging critical skills gaps that are undermining agencies' abilities to meet their missions.[1] Effective use of various human capital flexibilities such as special hiring authority is one way agencies can be more competitive in the labor market for top notch employees. At the same time, adequate internal controls are needed to ensure the flexibilities are used cost-effectively and in accordance with applicable laws and agency guidance.

One such human capital flexibility that is available only to HHS and EPA is known informally as Title 42 because it is provided under 42 U.S.C. §§209(f) and 209(g).[2] Section 209(f) authorizes the employment of special consultants to assist and advise in the operation of HHS's Public Health Service (PHS), while section 209(g) authorizes fellowships in the PHS for scientists who may be assigned to studies and investigations for the term of their fellowships.[3] In 2005, Congress provided EPA with the authority to use section 209 to make a limited number of appointments in its Office of Research and Development. Congress initially granted this authority to EPA for fiscal years 2006 through 2011, but Congress amended the authority twice and currently EPA is permitted to employ up

[1]GAO, *High-Risk Series: An Update*, GAO-11-278 (Washington, D.C.: Feb. 2011).

[2]HHS has other special hiring authorities provided under Title 42 of the U.S. Code, but this testimony deals exclusively with the special hiring authorities under 42 U.S.C. §§ 209 (f) and (g).

[3]The PHS is comprised of most operating divisions within HHS—including the National Institutes of Health, the Food and Drug Administration and the Centers for Disease Control and Prevention—as well as some staff divisions within the Office of the Secretary.

to 30 persons at any one time through fiscal year 2015. HHS has used sections 209(f) and (g) and EPA has used section 209(g) to appoint individuals from the private sector and academia as well as to convert federal government employees under other pay systems—such as the General Schedule—to Title 42.

In implementing Title 42, HHS and EPA can set higher pay limits than those provided under typical civil service hiring authorities. According to HHS and EPA officials, the pay setting flexibility is needed to compete with the private sector and academia to recruit and retain critical personnel. For example, the highest base pay amount in the General Schedule in 2012 is $155,500. In comparison, per HHS policy, the annual base salary for many appointments under Title 42 at HHS cannot exceed $250,000 per calendar year, with total compensation not to exceed $275,000 unless approved by the Secretary.[4] Similarly, EPA policy caps annual base salary for Title 42 employees at $250,000, with total compensation that may not exceed $275,000. As discussed below, under certain types of Title 42 appointments, statutory pay caps may apply.

To obtain a better understanding of the appointment and compensation practices under sections 209(f) and 209(g), we were asked to review the extent to which HHS and EPA have (1) used the authority under sections 209(f) and (g) to appoint and set pay for employees since January 2006, and (2) followed applicable agency policy, guidance, and internal controls for appointments and compensation.[5] We were also asked to determine whether there are any statutory caps on pay for consultants and scientists appointed under sections 209(f) and (g). This testimony is based on our report (GAO-12-692) and related legal opinion (B-323357) issued in July 2012 that both addressed the questions above.

[4]The salary and compensation limits were lowered in HHS policy issued in February 2012. In March 2007, HHS limited annual base salary for employees hired under section 209(f) to $350,000 and $375,000 in total compensation. These higher limits were in place during most years of our review of HHS's Title 42 use (2006 through 2010). Total compensation at HHS includes base pay; recruitment and retention incentives; and cash awards, such as performance bonuses.

[5]According to HHS human resource officials, personnel data prior to 2006 were likely not reliable for our analysis. EPA began using Title 42 in 2006. HHS data are available through the end of 2010, the last year of complete data available at the time we did our study; and at EPA, through the end of 2011.

For the report and legal opinion, we analyzed agency Title 42 data, interviewed agency officials, and conducted file reviews.[6] Details on our objectives, scope, and methodology are contained in those two products. The audit work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

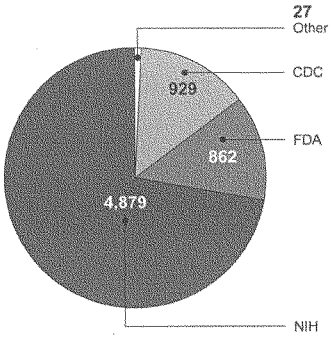
HHS Has Increased Its Use of Title 42, but More Reliable Data Could Improve HHS's Oversight

During calendar year 2010, HHS had 6,697 employees who were appointed under sections 209(f) or (g).[7] All but 27 of these employees served at the National Institutes of Health (NIH), the Food and Drug Administration (FDA), or the Centers for Disease Control and Prevention (CDC), while the remaining employees served in the Office of the Secretary or within other operating divisions, as shown in figure 1.

[6]See GAO, *Human Capital: HHS and EPA Can Improve Practices Under Special Hiring Authorities*, GAO-12-692 (Washington, D.C.: July 9, 2012), and GAO, *Pay for Consultants and Scientists Appointed under Title 42*, B-323357 (Washington, D.C.: July 11, 2012).

[7]All years are in calendar years unless otherwise stated. 2010 data was the last year of complete HHS data available at the time of the study.

Figure 1: Most Title 42, Sections 209(f) and (g) Employees Served at NIH, FDA, or CDC, 2010



Source: GAO analysis of HHS data.

The number of employees appointed under sections 209(f) and (g) increased overall at HHS by 25 percent from 2006 through 2010. Since 2006, the number of Title 42 employees grew by 15 percent at NIH, by 54 percent at FDA, and by 81 percent at CDC, while declining by 48 percent at the Office of the Secretary and all other operating divisions. HHS officials attributed the increases in Title 42 employees to, among other factors, the agency's response to urgent public health matters. For example, according to HHS officials, the agency used Title 42 authority to quickly hire experts needed to develop a vaccine in response to the H1N1 flu pandemic of 2009. HHS officials told us appointment agility associated with Title 42 is important because many research projects, particularly those at NIH, are not meant to be long-term and Title 42 appointments – which are indefinite or temporary term – can align with project time frames better than hiring full-time permanent staff under regular hiring authorities. In some cases, the temporary appointment of a researcher with highly-specialized skills to assist with a limited-scope, limited-duration study may be more appropriate than a permanent position.

As shown in table 1, NIH relies on Title 42 authority for a greater percentage of its total workforce than does FDA and CDC. In 2010, 25 percent of all NIH employees were Title 42 employees, while 6 percent of FDA employees and 10 percent of CDC employees were Title 42. Also,

NIH relied on the use of Title 42 authority for a substantial portion—44 percent—of its total research and clinical practitioner workforce.

Table 1: NIH Relied on Title 42 for a Greater Percentage of its Total Workforce and Research and Clinical Practitioners than FDA and CDC, 2010

Agency	Title 42 employees	Total operating division workforce	Title 42 percentage of total operating division workforce	Total researchers and clinical practitioners	Title 42 percentage of researchers and clinical practitioners
NIH	4,879	19,292	25	11,040	44
FDA	862	14,617	6	10,025	9
CDC	929	9,707	10	5,817	16

Source: GAO analysis of HHS and OPM's Central Personnel Data File data.

Title 42 Employees Serve in Various Functions

Title 42 employees at HHS serve in a variety of functional areas, including scientific and medical research support and in senior, director-level leadership positions. Base salary ranges for Title 42 employees varied by operating division and occupation. In 2010, almost 60 percent of Title 42 employees at NIH served in one of five general occupations: staff scientist, research fellow, senior investigator, clinical research nurse, and clinical fellow. Table 2 describes some of the general responsibilities and duties, and salary data for these occupations at NIH.

Table 2: Most Common Title 42 Occupations at NIH and Characteristics

Occupation (number of Title 42 employees in 2010)	Characteristics	Salary[a]
Staff Scientist (1,103)	Supports the long-term research of a senior investigator and independently designs experiments, but does not have responsibilities for initiating new research programs	• Base salary range: $82,000-200,000 • Average base salary: $118,000 • Median base salary: $114,000
Research Fellow (666)	Scientists obtaining experience in biomedical research while providing a service relevant to the NIH's program needs	• Base salary range: $45,000-112,000 • Average base salary: $70,000 • Median base salary: $69,000
Senior Investigator (521)	Has been granted tenure.[b] Some senior investigators are assigned organizational responsibilities in the institute or center, that is, section or branch chief	• Base salary range: $117,000-350,000 • Average base salary: $192,000 • Median base salary: $195,000
Clinical Research Nurse (347)[c]	Specializes in the care of research participants and is responsible for assuring participant safety, formulating patient care plans, integrity of protocol implementation, accuracy of data collection, and recording	• Base salary range: $62,000-96,000 • Average and median base salary: $78,000
Clinical Fellow (249)	Participates in protocol-based clinical research (i.e., research with people serving as volunteer participants) as well as laboratory research	• Base salary range: $57,000-137,000 • Average base salary: $84,000 • Median base salary: $82,000

Source: GAO analysis of HHS data and documents.

[a]Salary figures as of 2010. All figures are rounded to the nearest thousand dollars.

[b]Tenure at NIH differs from tenure at an academic institution. Tenure at NIH is defined as the long-term commitment of salary, personnel, and research resources needed to conduct an independent research program within the scope of the institutes' missions, and subject to regular review. Tenure may be conferred on Title 42 employees despite the nonpermanent nature of the position.

[c]As part of the sunsetting of the Clinical Research Support pilot, NIH is currently phasing out Title 42 appointments for nurses.

At FDA and CDC, the most common occupation of Title 42 employees is a fellow. In 2010, 340 (40 percent) of FDA's Title 42 employees were staff fellows. These positions are for promising research and regulatory review scientists. FDA staff fellows' base salary range in 2010 is approximately $42,000 to $224,000, with an average base salary of about $96,000 and a median salary of about $92,000. According to FDA policy, total compensation for staff fellows may not exceed certain pay limits ($155,500 in 2010) unless the FDA Director of Human Resources and Management and Services grants an exception. Three of 340 staff fellows at FDA earned more than $155,500 in 2010.

Of CDC's Title 42 employees in 2010, 687 (74 percent) were senior service fellows or associate service fellows appointed to study areas such as basic and applied research in medical, physical, biological, mathematical, social, biometric, epidemiological, behavioral, computer sciences, and other fields directly related to the mission of CDC. Senior service fellows had a base salary range in 2010 of approximately $49,000 to $155,500, with an average base salary of about $103,000 and a median salary of about $100,000. Associate service fellows had a base salary range of approximately $44,000 to $93,000, with an average base salary of about $69,000 and a median salary of about $71,000.

Some Title 42 Employees Are Paid Above Executive Salary Levels

The average base salary for all HHS Title 42 employees in 2010 was about $116,000 and the median salary was about $101,000. More than one-fifth of all Title 42 employees at HHS, however, earned a base salary above Executive Level IV ($155,500 in 2010). There were Title 42 employees that earned above $155,500 at NIH, FDA, and CDC.

Table 3: HHS Title 42 Employees with Base Salaries within or Exceeding Federal Executive Salary Levels, 2010

Executive level	Number of Title 42 employees[a]
At or above Executive Level I ($199,700)	629
Within Executive Levels I and II ($179,700-199,699)	319
Within Executive Levels II and III ($165,300-179,699)	295
Within Executive Levels III and IV ($155,500-165,299)	218
Total	**1,461**

Source: GAO analysis of HHS data.

[a]The remaining 5,236 Title 42 employees had salaries below Executive Level IV ($155,500)

HHS officials said compensation flexibility helps HHS compete with the private sector and academia to hire and retain highly qualified employees with rare and critical skill sets. Officials further stated the salaries HHS can offer to its top researchers are often not commensurate with private sector salaries. However, they said the higher compensation limits under Title 42 combined with other benefits—such as name recognition and access to advanced research equipment and technology not often available in the private sector or academia—can help offset compensation disparities and make HHS attractive to researchers, doctors, and scientists.

HHS Does Not Have Reliable Data on the Use of its Title 42 Authority

Our analysis of HHS data found thousands of cases where the section authority applicable to the Title 42 appointment (section 209 (f) or (g)) was not recorded in the HHS central personnel transaction system. Although HHS relies on Title 42 authority to fill some of its most critical scientific and medical research positions, the lack of complete data and guidance may limit the agency's ability to strategically manage the use of the authority. For example, the lack of section authority data in its personnel system has made it difficult for HHS to provide accurate headcounts of employees hired under sections 209(f) or (g) and resulted in HHS overstating the number and operating division of its employees hired under these sections to oversight bodies, including Congress, and in response to our audit. HHS also erroneously reported appointments made under sections 209(f) and (g) that would have been prohibited by law, indicating the agency's data management practices may preclude effective oversight of the program and workforce planning. Effective oversight is particularly important in light of HHS's increasing use of Title 42 and the number of employees earning salaries higher than most federal employees.

To address this issue, we recommended that HHS ensure section authority—sections 209(f) or (g)—be consistently entered in appropriate automated personnel systems, such as making section authority a required, drop-down field in its personnel system where this information is initially entered. HHS agreed with our recommendation and stated that, as it moves forward with the implementation of a new human resources system, it will explore the possibility of using a drop-down field to enter Title 42 section authority. HHS also said that its Office of Human Resources will continue to work with Operating and Staff Divisions to ensure that Title 42 personnel actions are processed in a consistent and accurate manner.

HHS Did Not Consistently Adhere to Sections of its Title 42 Policy and Lacks Guidance for Some Authority Provisions

HHS did not consistently adhere to certain sections of its policy for hiring and converting employees under section 209(f). For example,

- Special consultants may only be appointed under section 209(f) to fill scientific positions; however, the policy included no formal criteria and did not define "scientific." We reviewed the statement of duties for 28 section 209(f) cases and found in 5 cases that it was unclear the position was scientific.
- Appointments can only be made after other available personnel systems have failed to yield candidates that possess critical scientific

expertise. These recruitment and retention efforts, according to the policy, are to be documented prior to making an appointment under section 209(f). In only 5 of the 28 section 209(f) case files we reviewed was there documentation showing HHS considered other personnel systems before using Title 42.

- 209(f) policy also includes guidance for converting employees from other pay systems into special consultant positions under Title 42. The policy states conversions are only to be used in exceptional circumstances and employees may only be converted to the Title 42 program if they meet all conversion criteria, such as providing leadership in a field equivalent to a full-tenured professor in academia and recognition as a national or international expert in the field. In our case reviews of six conversions to section 209(f), two cases met each of the requirements for converting employees. For other case files we reviewed, documentation provided by HHS did not support the basis for conversion.

In August 2010, HHS's Office of Human Resources reviewed the agency's use of section 209(f) authority and found two issues similar to those found in our review. Recommendations from the audit report became the basis for a new 209(f) policy, which was issued in February 2012.[8] Significant changes to the 209(f) policy include a definition of "scientific position"; a requirement that the same recruitment plan be used for both Title 5 and Title 42 employees to demonstrate that other available personnel systems failed to yield qualified candidates, and identifies specific positions and/or categories of positions at NIH that may be filled through section 209(f) without "exhausting" other recruitment mechanisms or authorities.

While these changes to 209(f) policy are a step in the right direction, they still do not address the need to strengthen documentation to better support the use of Title 42. Therefore, we recommended that HHS, as part of its effort to implement new section 209(f) guidance, systematically document how policy requirements were fulfilled when hiring or converting 209(f) employees. HHS agreed with our recommendation and stated that its updated policy was, in part, due to our findings.

[8]HHS Human Resources Manual, Instruction 42-1: Appointment of 42 U.S.C. § 209(f) Special Consultants (Feb. 15, 2012).

For appointments made under Title 42, section 209(g), HHS has no agencywide implementing policy for appointing and compensating employees hired as fellows, including details about what documents are needed to support the basis for appointments and compensation. We have previously reported that agencies should have clearly defined, well-documented, transparent, and consistently applied criteria for appointing and compensating personnel.[9] In lieu of guidance from HHS, the individual operating divisions established their own policies and guidance for appointing and compensating fellows under 209(g), each with different levels of detail, compensation limits, and documentation requirements. The lack of an HHS-wide policy poses the risk that compensation decisions for section 209(g) fellows at HHS may not be made consistently across operating divisions. Although some guidance exists at the operating division level for setting compensation targets, in 11 of the 20 case files we reviewed of section 209(g) fellows, we found either no or insufficient documentation to support the basis for compensation. Without an agencywide policy, an agency cannot be assured that it is allocating its resources most appropriately.

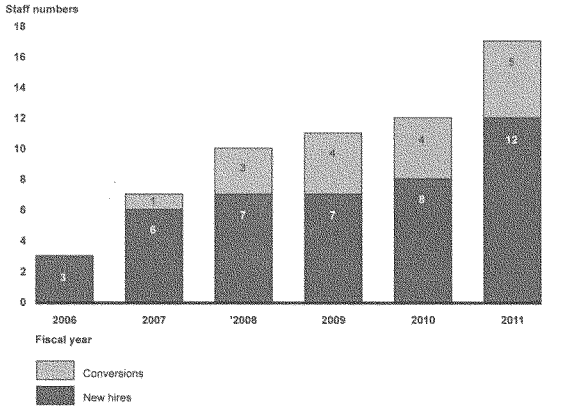
Therefore, we recommended that HHS, as part of its ongoing effort to develop agencywide policy for appointing and compensating employees hired under section 209(g), ensure the policy requires and provides guidance for documenting the basis for employee compensation. HHS agreed with our recommendation and stated that the section 209(g) policy will be implemented in the near future.

[9]GAO, *A Model of Strategic Human Capital Management*, GAO-02-373SP (Washington, D.C.: Mar. 15, 2002).

EPA Employs a Limited Number of Title 42 Fellows in Leadership Positions and Could Improve Procedures for Resolving Potential Conflicts of Interest

Congress provided EPA with the authority to use Title 42 to employ up to 30 persons at any one time through fiscal year 2015. At the time of our study, EPA had appointed 17 fellows in its Office of Research and Development from 2006 to 2011 under section 209(g) and all 17 fellows remained with EPA. Appointments for the three fellows hired in 2006 have been renewed for another 5-year term.[10] Figure 2 shows the cumulative onboard Title 42 staff, by new hire or conversion.

Figure 2: Cumulative Number of EPA Title 42 Staff, 2006 through 2011



Source: GAO analysis of EPA data.

[10]EPA policy provides that at the conclusion of their term, fellows with Title 5 permanent competitive status based on prior employment retain reinstatement eligibility but have no guarantee of return to a Title 5 position. Fellows who do not have Title 5 competitive status based on prior employment obtain no reinstatement eligibility due to service in a Title 42 position. In this case, if the employee is interested in a Title 5 position following the Title 42 appointment, they are subject to the normal application and competitive selection process.

According to EPA officials, the agency has identified mission critical personnel needs and is actively recruiting to fill the 13 remaining authorized Title 42 positions. The agency has no plans to use authority under section 209(f) at this time, but may consider it in the future. Officials told us EPA would need to develop guidance for implementing section 209(f) before using the authority.[11]

Title 42 fellows at EPA lead scientific research initiatives, are considered experts in the related scientific discipline, and some manage or direct a division or office. According to EPA officials, Title 42 provides two important tools EPA needs to achieve its mission: (1) the flexibility to be competitive in recruiting top experts who are also sought after by other federal agencies, private industry, and academia; and (2) the appointment flexibility needed to align experts with specific skills to changing scientific priorities. EPA officials stated it is not the agency's intention to hire a fellow long-term under Title 42, but rather employ the individual as long as a priority remains high.

Annual salaries for Title 42 fellows at EPA range from approximately $153,000 to $216,000, with an average salary of about $176,000 and a median salary of about $171,000. As shown in table 4, 15 of the 17 EPA fellows had salaries exceeding Executive Level IV.

Table 4: Number of EPA Title 42 Fellows with Salaries in Federal Executive Salary Levels, 2010

Executive level	Number of fellows
At or above Executive Level I ($199,700)	3
Within Executive Levels I and II ($179,700-199,699)	3
Within Executive Levels II and III ($165,300-179,699)	4
Within Executive Levels III and IV ($155,500-165,299)	5
Below Executive Level IV ($155,500)	2

Source: GAO analysis of EPA data.

[11]In response to a National Academy of Sciences National Research Council report in 2000, EPA modeled its Title 42 program after the NIH program. NIH had already implemented its program and many structural aspects of the program are similar.

In December 2010, EPA began a pilot of using market salary data to estimate salaries of what Title 42 candidates could earn in positions outside of government given their education, experience, professional standing, and other factors. EPA used the market salary data to inform salary negotiations for the five fellows appointed since the implementation of the pilot. According to EPA officials, the market salary pilot concludes in December 2012 and its effect will be analyzed at that time.

In appointing Title 42 fellows, EPA generally followed appointment guidance described in its Title 42 Operations Manual. EPA could, however, improve procedures for resolving potential conflicts of interest. We conducted 10 case file reviews of EPA Title 42 employees and in two cases we reviewed, employees had potential conflict of interest situations arise after appointment resulting, in part, from the agency's failure to ensure Title 42 employees followed agreed upon ethics requirements. EPA acknowledged it could improve its postappointment ethics oversight and reported it has plans to ensure that Title 42 employees follow requirements such as submitting confirmation of stock divestitures to its General Counsel, for example, and other ethics requirements. However, at the time of our review, EPA had not provided us with implementation plans or timeframes for its improved oversight.

To address this issue, we recommended that EPA, as part of its efforts to improve postappointment ethics oversight, develop and document a systematic approach for ensuring Title 42 employees are compliant with ethics requirements after appointment. EPA disagreed with our recommendation, citing certain actions already taken, such as a plan to require proof of compliance with ethics agreements. We acknowledged EPA's plans to address these issues, but maintained the recommendation was needed to ensure implementation because the two ethics issues we reported occurred over 2 years ago.

Legal Opinion Whether There are Statutory Caps on Pay for Consultants and Scientists Appointed under Title 42

Our legal opinion, issued on July 11, 2012, responded to a Congressional request for our views on whether there are statutory caps on pay for consultants and scientists appointed pursuant to 42 U.S.C. §§ 209(f) or (g).[12] We concluded that an appropriations law provision enacted as part of the Fiscal Year 1993 Labor-HHS-Education Appropriations Act established a permanent appropriation cap on the pay of individuals appointed on a limited-time basis under 42 U.S.C. §§ 209(f) or (g) at agencies funded through that Act. With regard to individuals not subject to this cap, we concluded further that two other pay limitations set forth in Title 5 of the U.S. Code that we considered do not apply to appointments made pursuant to 42 U.S.C. §§ 209(f) or (g).

Federal pay systems are extremely complex, and we encountered challenges in attempting to resolve ambiguities arising from pay laws enacted at different times over nearly 70 years. Sections 209(f) and (g) of title 42 were enacted in 1944 and have not been amended since that time. There have, however, been many significant changes in related laws and regulations that were relevant to our consideration of the issues raised. Consequently, we conducted extensive research of legislative history to aid in our understanding of congressional actions and the interplay of the laws addressed below, and examined regulations issued pursuant to these provisions over the last 65 years. We also solicited the views of HHS, the Office of Personnel Management (OPM), and the EPA.

The appropriations for each fiscal year from 1957 through 1993 included a cap on pay for "consultants or individual scientists appointed for limited periods of time" (underscoring added) pursuant to 42 U.S.C. §§ 209(f) or (g). The appropriations for fiscal year 1993 established a permanent cap on such compensation, providing that pay may be set at rates not to exceed "the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376." This cap currently limits base pay to $155,500. Our review of the legislative history of the first appropriation to contain the limit indicated that it was enacted due to other restrictions in law on compensation as an increase over then-existing pay authority.

[12]B-323357, July 11, 2012.

We considered the meaning of the phrase "for limited periods of time," which has appeared in all of the relevant appropriations provisions from 1956 to 1993. In 1956, when this language was first included in the appropriations law, the Public Health Service's regulations included time limitations on employment. Thus the time limit generally applied to all consultant appointments made under section 209(f) beginning in 1947, when the regulation containing the limit was first promulgated, unless "special circumstances" led the administrator to approve an extension. Further, the limit was in effect in 1956, when the first appropriations law provision referring to consultants appointed for "limited periods of time" was enacted.

However, this time limitation was removed from the regulations in 1966. 31 Fed. Reg. 12,939 (Oct. 5, 1966). Therefore, the appropriations pay cap applied to all section 209(f) consultants from 1956 until HHS changed the regulations in 1966 allowing for the hiring of consultants for indefinite periods.

Although the regulations implementing section 209(f) no longer included a time limitation on the employment of special consultants after 1966, the appropriations provisions for 1967 and subsequent years, using virtually identical language each year, imposed a cap only on pay of "consultants or individual scientists appointed for limited periods of time pursuant to [42 U.S.C. §§ 209(f) or (g)]." The appropriations restriction did not impose any cap on pay for those consultants whose appointments were not limited in time. As a result, after the 1966 regulations were promulgated and continuing to the present, HHS has employed two categories of consultants: those appointed for limited periods of time, to whom the pay cap applies, and consultants appointed for indefinite periods, to whom the pay cap does not apply.

Importantly, the appropriations pay restriction is applicable only to payments made from Labor-HHS-Education Appropriations Acts. Three components of the Public Health Service (the Agency for Toxic Substances and Disease Registrations, the Food and Drug Administration, and the Indian Health Services) are funded by appropriations acts other than the Labor-HHS-Education Appropriations Act, and are not covered by a restriction on funds appropriated under that Act. Thus, we concluded that there is a cap of Executive Level IV on the pay of consultants and scientists employed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) in all but three of the Public Health Service Agencies.

With respect to individuals not covered by the appropriation cap, we examined the applicability of two pay limitations found in title 5: section 3109, which limits pay for consultants "procure[d]" on a temporary or intermittent basis, and section 5373, which limits pay fixed by administrative action.

Section 3109, enacted in 1946, establishes specific legal parameters, including a pay cap and a limit on appointment duration, governing the employment of experts or consultants whose appointment must be authorized by an "appropriation or other statute." That pay cap applies unless a different cap is authorized by the appropriation or another statute.

Beginning in 1956, Congressional actions signaled that section 3109 did not apply to section 209(f) appointments. From1956 and continuing until 1993, Congress enacted provisions yearly in appropriations acts that set a cap (which may or may not have been higher than that found in section 3109 in any given year) for all those appointed pursuant to sections 209(f) or (g) for a limited period of time and funded out of the Labor-HHS-Education Appropriations Act. From fiscal year 1970 until the provisions became permanent in fiscal year 1993, the appropriations acts for HHS contained separate provisions placing identical compensation limits for experts and consultants subject to 5 U.S.C. § 3109, and for consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g). Identical provisions would have been unnecessary if Congress believed that the limitations in 5 U.S.C. § 3109 would apply to 42 U.S.C. §§ 209(f) and (g) consultants or scientists.

Further, in 1992, Congress added subsection (d) to section 3109. It directs OPM to prescribe regulations necessary to administer section 3109. OPM subsequently issued regulations which provide that section 3109 does not apply to the appointment of experts or consultants under other authorities. 5 C.F.R. § 304.101. It also informed us that it "does not consider the cap under 5 U.S.C. § 3109 to apply to consultants under 42 U.S.C. § 209(f)." This interpretation is entitled to considerable weight since OPM is the agency charged with administering section 3109.

Based on our review, we found that Congress had not spoken directly on the applicability of section 3109 to the authorities in 42 U.S.C. 209(f) and (g) and that OPM's interpretation was reasonable. Therefore, we concluded that the provisions of section 3109 do not apply to consultants employed pursuant to 42 U.S.C. § 209(f).

The other pay cap that we considered is found in section 5373 of title 5 of the United States Code, which places limits on pay fixed by administrative action. Pay fixed by administrative action refers to the various pay-setting authorities in which pay is determined by the agency instead of pursuant to pay rates under otherwise applicable statutory pay systems, such as the General Schedule. Congress first enacted section 5373 in 1964, 20 years after it passed sections 209(f) and (g). Section 5373 limits pay set by administrative action to no more than the rate for level IV of the Executive Schedule, and lists specific pay authorities which are excepted from coverage. The rate for level IV of the Executive Schedule is currently $155,500 per year. 42 U.S.C. §§ 209(f) and (g) are not among the authorities explicitly excepted from section 5373.

We looked at multiple issues in determining that the section 5373 cap does not apply to 42 U.S.C. §§ 209(f) or (g) appointees. We found no evidence that Congress had considered the section 209 authorities when the administrative pay cap was enacted. Sections 209(f) and (g) allow for compensation "without regard to the Classification Act of 1923." We parsed laws enacted in 1923 and later to see if this language should be interpreted to create an exemption from section 5373, which of course was enacted over 40 years after the Classification Act of 1923, and after several additional pay laws had also been enacted. Finally, we looked at Congressional action in appropriations passed from 1964 through 1993, and in extending section 209 authority to EPA in 2005 and in 2009. These Congressional actions led us to believe that it did not intend for the 5 U.S.C. § 5373 pay cap to apply to consultants and scientists hired pursuant to 42 U.S.C. §§ 209(f) and (g). Given the evidence of how Congress viewed the authority, we did not object to HHS's interpretation that the 1993 appropriations cap is the only restriction on its authority to compensate individuals appointed under 42 U.S.C. §§ 209(f) or (g).

In conclusion, with respect to the first issue, the 1993 appropriations act unequivocally limits the pay of consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) at agencies that are funded by Labor-HHS-Education Appropriations Acts. With regard to the two title 5 limitations, we think that the pay limitations do not apply to appointments made pursuant to 42 U.S.C. §§ 209(f) or (g).

The statutory pay provisions we analyzed, as mentioned earlier, were enacted over the course of nearly 70 years, and are in different federal pay systems. As one court has observed, "although some pay systems are 'linked' to one another," they have not been "fastidiously integrated" to achieve uniform federal compensation policies."[13] In this case, the issues raised – in particular the applicability of the two title 5 limitations on the title 42 authority to hire special consultants and fellows – reflect the difficulty of applying distinct statutory schemes to determine whether specific pay limits apply. Thus if Congress desires upper pay limits for appointments under sections 209(f) and (g), it may wish to consider amending these provisions to specifically establish such limits.

Concluding Observations

Both HHS and EPA have used Title 42 to recruit and retain highly skilled, in-demand personnel to government service in order to execute their missions. At the same time, HHS's lack of complete data and guidance on its use of Title 42 may limit the agency's ability to strategically manage its use and provide oversight of the authority. Effective monitoring of the use of Title 42 is particularly important in light of HHS's increasing use of the authority and the number of employees earning salaries higher than most federal employees.

EPA generally followed its Title 42 policies and has incorporated some modifications to improve its appointment and compensation practices; however, EPA's current ethics guidance does not sufficiently ensure Title 42 employees meet ethics requirements after appointment. EPA acknowledged it could improve its post-appointment ethics oversight and reported it has plans to ensure that Title 42 employees send its General Counsel confirmation of stock divestitures and other ethics requirements. However, at the time of our review, EPA had not provided us with implementation plans or timeframes. Although its plans appear to be prudent steps for addressing the specific issues that arose in the cases we reported, it will be important for EPA to implement them as soon as possible to mitigate the risk of future potential conflict of interest issues.

[13] *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 539 (C.A.D.C. 1983).

Going forward, our recommendations to HHS and EPA to strengthen certain practices under Title 42, if implemented, should help strengthen the management and oversight of this special hiring authority.

Chairman Pitts, Ranking Member Pallone, and Members of the Subcommittee, this completes our prepared statement. We would be pleased to respond to any questions you or others may have at this time.

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Mr. PITTS. The chair thanks both of you for your opening statements.

I will begin the questioning and recognize myself for 5 minutes for that pursuant purpose.

Mr. Goldenkoff, the report states that, according to HHS and EPA officials, the pay-setting flexibility is needed to compete with the private sector and academia pay schedules.

Did you review the existing pay schedules for research scientists and consultants in the private sector or academia? Did HHS do a review of existing pay schedules? If so, what were the differences? And, if not, how did they determine pay?

Mr. GOLDENKOFF. We did not review comparable pay in the private sector or in academia. That type of a study is extremely difficult to do. Mainly, it is hard to find apples-to-apples comparisons.

But having said that, HHS and EPA are in a labor market that is extremely competitive. They are competing for positions that are extremely well-paid. And so it is important for them to be able to compete and hire people, as has been said here. And pay is a big incentive.

Mr. PITTS. Please describe the role of the Secretary of HHS in determining pay levels outside of the civil service. Does any other Federal official have that kind of authority? Does the President have that authority?

Mr. GOLDENKOFF. With the Secretary of HHS, my understanding is that the Secretary has the authority to approve pay above a certain cap, the highest level. But we did not look at the authorities of other department heads or agency heads.

Mr. PITTS. Did you determine why the use of Title 42 increased by 25 percent at HHS from 2006 to 2010?

Mr. GOLDENKOFF. Well, we did speak to agency officials about that, and, yes, it was a dramatic increase. And the reason, a key reason was, as I said, was to respond to these health emergencies. One was the H1N1 virus, where they needed to bring people on board extremely fast to develop a vaccine for it.

Mr. PITTS. And what was the basis for HHS dropping the annual Title 42 salary cap from $350,000 to $250,000, which is almost a 30 percent decrease?

Mr. GOLDENKOFF. Right. That I don't——

Mr. PITTS. Mr. Cramer?

Mr. CRAMER. I don't know the basis upon which they decided to do it. I think it would seem like a policy judgment on their part.

Mr. PITTS. Referring back to the first question, was there any language in the existing laws or regulations that described Title 42 as a pay flexibility program needed to compete with the private-sector pay schedules?

Mr. Cramer?

Mr. CRAMER. In the legislative history when Title 42 was passed, and also when EPA was granted the authority, there was discussion about the need for the Public Health Service and then EPA to be able to attract scientists to come work for them, yes.

Mr. PITTS. Where is the authority that allows HHS and EPA to operate the Title 42 in this manner?

Mr. CRAMER. Well, it is actually Title 42, Section 209. And we are actually speaking about subsections F, which is the consult-

ants, and then G, which are the fellows. The scientists were brought in as—you know, to work for them for some period of time. It is those specific provisions.

Mr. PITTS. Mr. Goldenkoff, would you review the types of employees that were hired at HHS under Title 42 authority, such as nursing or research? And from your analysis of the laws, is there authority to hire a nurse under Title 42?

Mr. GOLDENKOFF. There is broad authority there. And, you know, for example, some of the occupations that they brought in people under Title 42, there was a staff scientist; there was a research fellow; a senior investigator; clinical research nurse, who specializes in the care of research participants and is responsible for showing participant safety. So they are not necessarily caring for patients but just caring for people who were involved in the research. The other position here, the other occupation was a clinical fellow.

So there does seem to be a lot of latitude in the positions that can be hired under Title 42.

Mr. PITTS. All right. My time has expired.

I recognize the ranking member for 5 minutes for questions.

Mr. PALLONE. Thank you, Mr. Chairman.

I wanted to discuss why it is important that the HHS maintain the hiring authority granted by Title 42.

I think we can all agree that it is essential for HHS to be able to recruit and retain highly trained and often specifically trained personnel in support of their mission. Because without it, you know, people like Dr. Tony Fauci, as I mentioned, or, you know, Dr. Harold Varmus, who is the director of the National Cancer Institute, or Dr. Neal Young, the NIH hematologist we read about in Wednesday's Washington Post—he found a cure for aplastic anemia, which is a rare and fatal bone marrow disease.

So, in your perspective—you know, I am asking the two of you—in your perspective, how does Title 42 serve as an essential tool for HHS to fulfill its mission? And why is it important that the Department maintain the special hiring authority?

Either one can start. Dr. Goldenkoff, I guess?

Mr. GOLDENKOFF. Well, it is important for all agencies to have this flexibility because agencies—it is about mission accomplishment. And agencies need to have the various tools that are required to compete in the labor market. And, you know, as we have already said, doctors and research scientists and engineers, these are highly paid professions, and the GS schedule is not always sufficient to match both the salaries and other forms of compensation that are available outside of government.

For example, in academia, you can have your base salary; you can also get money for publishing articles, for consulting. And those are things that are not available in the Federal Government, but those are things that—that is the competitive environment. And the Federal Government needs to have the flexibility to offer both the salary and other forms of compensation to get the best and brightest.

Mr. PALLONE. Mr. Cramer, do you want to respond?

Mr. CRAMER. Well, actually, you are asking about some policy issues, and my half of this is the legal side.

Mr. PALLONE. OK.

Mr. CRAMER. So we leave the policy to you folks.

Mr. PALLONE. All right.

Well, let me ask a second question, and that is—I want to make the record clear on two points. First question: Is it correct that HHS agreed with each of your three recommendations?

Mr. GOLDENKOFF. Yes, that is correct. And they have already started taking action on them.

Mr. PALLONE. Well, to the best of your knowledge, is HHS in the process of addressing each of these? And to the extent the Department hasn't don't so, do you want to describe what they are doing, if you could?

Mr. GOLDENKOFF. Yes. I mean, just very briefly, there were two key issues that we found. One had to do with the reliability of the data that was in their personnel database. And that sounds somewhat technical, but having a reliable personnel database gives you visibility over the kinds of people that you are hiring. And so it is very important for internal controls to have accurate data on your personnel.

And so, for example, it was unclear how many people under the Sections F or G were being hired. And, as we said, they gave us inaccurate information, they provided the Congress inaccurate information on the head count. And it was also unclear—and, initially, for example, it seemed as if they had hired people into components of HHS that was inconsistent with the Title 42 appointment authority. As it turned out, it wasn't; it was just the inaccurate data. So this data piece is an internal control issue.

The other finding where we made a recommendation was that they did not follow their internal guidelines in using Title 42 policies, for example, on making a business justification, the business case for why Title 42 was needed in the first place in terms of a particular appointment.

And so, while we were doing our audit work, they tightened up some of their procedures. And so they are making steps in the right direction, but we felt that they haven't gone far enough. And that was the basis for one of the recommendations dealing with better documentation was needed, to show that, yes, they have basically exhausted all possibilities and now they have to use the Title 42. And so that is an internal control or an accountability—it addresses those two issues.

And then on the data, we recommended that they—when they input the information, there is a drop-down screen in there—that they would ensure that they indicate whether it is a Section F or a Section G. And, again, that is the other piece of the internal control.

Mr. PALLONE. Thank you, Mr. Chairman.

Mr. Chairman, I just wanted to clarify that this authority could only be used for doctoral-level training. It is only used for that purpose——

Mr. GOLDENKOFF. I am sorry?

Mr. PALLONE. This authority, it is only used for doctoral-level training. That is my understanding.

Mr. CRAMER. Doctoral training?

Mr. PALLONE. Doctoral-level.

Mr. CRAMER. I am not familiar with——

Mr. PALLONE. I am just saying that, myself. I wasn't——

Mr. CRAMER. G is for the fellowships, the scientists, individual scientists. And F is for the consultants, which can be a variety of things.

Mr. PALLONE. OK. Thank you.

Mr. PITTS. Will the gentleman yield just to follow up on that?

Mr. PALLONE. Oh, sure. I don't have any time, but sure.

Mr. PITTS. Oh, you don't?

Mr. PALLONE. Oh, I guess I do. I am sorry.

Mr. PITTS. What is the justification, then, for hiring 347 nurses at NIH under this authority?

Mr. CRAMER. Well, I can try to say something about it.

You know, under F, it only talks about special consultants. They don't specifically mention nurses. But in this day and age, where consultants do so many things and we don't have a specific legal definition of what we mean by "consultant" in 209, arguably one could say that a nurse could be brought in as a consultant.

You know, I used to be an assistant U.S. attorney, and we would pick juries. And people would be asked their occupation, and they would say, "I am a consultant." And so the question would be, well, what do you do? Because consultants do so many different kinds of things.

Mr. PITTS. OK. Thank you.

The chair recognizes the gentleman, Mr. Barton, for 5 minutes for questions.

Mr. BARTON. Thank you.

Before I start asking my questions, I wanted to make a general statement.

I am not opposed or on some jihad to people who want to work in government service at HHS or NIH. You know, I am a Federal employee. My late aunt was a long-time employee of the Department of Agriculture. My sister is an EPA enforcement attorney at the regional office at the EPA in Dallas. So I am absolutely supportive of good people working in the public service area for the Federal Government.

What I am opposed to is using a provision that was originally intended for short-time, special consultants to fill specific critical needs being used as a substitute pay scale. That is what I am opposed to.

And when you have, you know, 44 percent of all the researchers at NIH under Title 42 and you have, you know, I think, 25 percent of the people at HHS under Title 42, something is out of control.

Now, I am going to ask a few questions that are trying to make that point.

Mr. Goldenkoff, are there any Title 42 employees that have won a Nobel prize?

Mr. GOLDENKOFF. We did not look into that.

Mr. BARTON. Do you know of any?

Mr. GOLDENKOFF. I am not aware of any.

Mr. BARTON. Do you know of any that are potential Nobel prize winners?

Mr. GOLDENKOFF. I am not in a——

Mr. BARTON. Were there any employees hired with the understanding that they might compete for a Nobel prize?

Mr. GOLDENKOFF. No, we can't comment on that.

Mr. BARTON. Or whatever the equivalent prize is.

Mr. GOLDENKOFF. It was mentioned that Dr. Fauci—I mean, obviously, a Nobel prize is only, you know, within each scientific field, you know, a handful that are selected every single year. So that is certainly the pinnacle of one's career. We do know, for example, that Dr. Fauci has won and earned a number of awards.

Mr. BARTON. And nobody begrudges what he is paid. I certainly don't. I have absolutely nothing but the highest esteem for him personally and professionally.

Is there any record at NIH or in HHS or, for that matter, EPA where there was a specific requirement for some unique skill set, that this individual was hired and they specifically said, we had to pay more because this is one of a handful of people in the country that has this skill set? Any indication that they even tried to do a normal job search before they used this special compensation skill?

Mr. GOLDENKOFF. Well, and that is what we want to see more of. And that was the basis for our recommendation, is greater accountability. Because with flexibility, that is fine, but an agency needs to have greater accountability to use something.

And so, you know, we have said in some of the other work that we have done on personnel issues that pay flexibility to be able to compete in the marketplace, the labor market for the best and the brightest, that is fine, but agencies also need to be held accountable that they are using it properly, cost-effectively, consistent with applicable laws and regulations and guidance, and that there is no abuse going on.

And so when we looked, we pulled, of the roughly 6,500 Title 42 appointments at HHS, we looked at the paperwork on about 60 of them, and we did find some gaps in that sort of documentation. That is precisely the type of thing that we were looking for, that they had exhausted all other outlets, all other avenues for getting folks that met those qualifications. And so the goal of the recommendation is to tighten that up and to see more of that.

But in terms of how that translates into specific numbers, whether 6,000 is too many, you know, should it be more than 6,000, should it be fewer than 6,000, we don't have a basis for that. But we would have a better sense, though, of knowing, if there was more robust documentation, that at least each one of those appointments met a certain threshold in terms of need and demand.

Mr. BARTON. Well, now, I don't want to beat a dead horse, but it is clear to me that Title 42 has been used as a substitute pay scale. And instead of doing the due diligence and trying to use the normal pay scale and find somebody competent, this has just been used as kind of a recruitment tool. "We will hire you under Title 42, and you will get an extra $50,000 or $75,000." And anybody who is being hired is going to say yes to more money instead of less.

But to sit here and say that this had to be used, that it was used only in a last resort because they could not find competent people, when you increase the use of it by 25 percent in a 2-year period,

it is being used sloppily, to say the least. And, hopefully, on a bipartisan basis, we can begin to do something about it.

And, again, the bill that has been introduced, it is not the Ten Commandments. If there is something we need to modify or change in consultation with the executive branch and the minority, I am very open to do that. But I do hope that we tighten this up.

And, with that, Mr. Chairman, thank you for the hearing, and I yield back.

Mr. PITTS. The chair thanks the gentleman and recognizes the gentlelady from Illinois, Ms. Schakowsky, for 5 minutes for questions.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

I would like to point out, in response to the issue of Nobel prizes, that Dr. Harold Varmus, who was the former head of the NIH—Mr. Barton, I wanted to just let you know that Dr. Harold Varmus, who was the former head of NIH, he then went to Sloan Kettering——

Mr. BARTON. I understand that, but that was before he worked at NIH.

Ms. SCHAKOWSKY. Oh. I thought the question was whether or not——

Mr. BARTON. He didn't get hired and win this Nobel—and, look, I am for him——

Ms. SCHAKOWSKY. No, I know. I know you are. And I don't want to be argumentative. I just wanted to say we actually do have, proudly, have someone, head of the National Cancer Institute, that won a Nobel prize.

Mr. BARTON. I have met that gentleman, and I am impressed with him.

Ms. SCHAKOWSKY. OK.

Mr. BARTON. But he didn't get hired under Title 42 before he won the Nobel prize. That is all I am saying.

Ms. SCHAKOWSKY. OK.

Let me also just say the enormous respect that I have for the GAO. And I certainly have found your advice and your studies so incredibly useful.

And I want to focus in on one part of what the GAO found, and wonder if it is not an area for bipartisan agreement. There are two sentences just in the cover sheet, one that HHS does not have reliable data to manage and provide oversight of its use of Title 42. It seems to me that unless the steps that they have taken satisfy your requirements—and I want going to ask you about that—that certainly seems like something that we ought to focus on. And, two, that the EPA—and you mentioned that in your testimony, I believe—does not have post-appointment procedures in place to ensure Title 42 employees meet ethics requirements to which they have previously agreed. And that seems like a place that we all definitely ought to focus on.

So, one, let me ask you if HHS has responded to the oversight of its use sufficiently. Because I know it has made changes.

And, two, I wanted to ask you, in your opinion, how would caps on the use of this hiring authority, in your view, affect NIH's ability to hire the skilled workforce needed to quickly respond to public health crises?

I want to just add one point. The chairman asked, do you look at the private sector? It seems to me that one of the criteria when HHS or EPA or whoever hires—and I am presuming that they do need to look at the private sector, that we are not just throwing out a number. Is there any requirement that they look at that?

So let me get those answers.

Mr. GOLDENKOFF. Well, under the general schedule, when general schedule pay is considered and adjusted on an annual basis, it is based on salary surveys with comparable jobs in the private sector. Soat least for the general schedule—now, you can argue with the methodology, and a lot of people have debated that—but there is some comparison with the private sector based on also location and level of position for GS positions.

But for the Title 42 positions, I am not familiar with exactly what they do to——

Ms. SCHAKOWSKY. OK, but in our small time here, let's now talk about these management issues, the oversight and monitoring that I had asked you about. I mean, has NIH made any of those changes? And what about focusing on how they monitor the——

Mr. GOLDENKOFF. Yes, they agreed with the recommendations, so that is a start. They also had already taken steps to tightenup certain of their procedures in making the appointments.

And what we will be doing, as part of our routine follow-up effort, as we do with all agencies that we make recommendations to, we will continue to follow up with them to make sure that they implement those recommendations.

Ms. SCHAKOWSKY. And what do you think the effect of caps would be?

Mr. GOLDENKOFF. It is difficult to say. I mean, we have not looked into that. Just more conceptually, though, where we have looked at, whether it is caps or things that are more formulaic in other areas, sometimes it doesn't always get the result that you want and does affect mission accomplishment. In this case, though, we can't say. We have not looked into it.

But I would say, it is something to be sensitive to. Because, really, what this is about, as we said earlier, it is about mission accomplishment. And, you know, whether the number should be 5 percent, whether it should be 2 percent, whether it should be 10 percent, it is really hard to say. And so, what is the basis for that number?

And this is why we keep coming back to the internal controls and the accountability. You know, so long as there is a justification for each one of those appointments—and this is where, for example, the annual reporting requirement in the new legislation would probably be a good thing because it could force HHS to——

Ms. SCHAKOWSKY. That is what I was thinking, too, Mr. Barton, that the annual reporting requirement is something I think all of us certainly could easily agree with and should.

Thank you. I yield back.

Mr. PITTS. The chair thanks the gentlelady and now recognizes Dr. Burgess for 5 minutes for questions.

Mr. BURGESS. Thank you, Mr. Chairman.

And, Mr. Goldenkoff, I think that is exactly the point. This whole process needs to be tightened up. And while we all want to see pro-

grams have flexibility to get the people in to get the work done that needs to be done, at the same time, if there is no oversight, I think we get the general impression that this is a program that hasn't been under tight control, and many things may have gotten away from not just HHS but other agencies, as well.

The chairman asked a good question about comparable salaries, and then I think Ms. Schakowsky followed up on that. You mentioned salary surveys. Would that also include salary history of the individual under consideration?

Mr. GOLDENKOFF. We did not—it was outside the scope of the study that we did.

Mr. BURGESS. But wouldn't that be a reasonable thing to include if you are——

Mr. GOLDENKOFF. Oh, yes, yes. Most definitely.

Mr. BURGESS. Again, I don't want to belabor the point, but the limited data I have available to me, which is the wiki org chart, the top salary earner on that, it is an individual named after a subatomic particle, who earns $350,000 a year. And I am sure he does a great job, I am sure his position is important, and the country is the better for having him there. He is the head of the endocrine oncology section's surgery branch at the National Cancer Institute—a tough job. We want him to do it. But his previous position, apparently earned $256,000 in 2008.

So that is a pretty big jump, almost a $100,000 jump in salary. Now, again, I am not saying that this individual is not worth it, but I would hope that somebody has got their hand on the tiller who is making these decisions.

Let me ask you this. Any big company is going to have an HR department director who kind of oversees this stuff. Is there the equivalent of an HR director at HHS?

Mr. GOLDENKOFF. Well, there is a chief human capital officer.

Mr. BURGESS. OK. Who is that individual?

Mr. GOLDENKOFF. Off the top of my head, I don't know.

Mr. BURGESS. OK. Maybe you could provide that information to us.

Mr. GOLDENKOFF. Sure. We can get that.

Mr. BURGESS. And, Mr. Chairman, that might be something we want to follow up on when we do our written questions.

And, as has just been said in so many ways, we want the people there to do the work that needs to be done when it needs to be done. Now, you referenced the H1N1 crisis, and that was a crisis. But it is odd that we think that that required a sudden increase in Title 42 hires at higher salaries because, you know, the stimulus bill passed not 2–1/2 months before that with an extra $10 billion to NIH. I mean, so they had cash, they had money in the coffers. Interesting to see how that was allocated.

And then, of course, the other thing is, we had also less than 10 years before come through 9/11, with all the beefing up of national labs and building the infrastructure.

So am I to understand from your line of reasoning that the NIH and these other national labs do not have the surge capacity to deal with an existential threat like H1N1?

Mr. GOLDENKOFF. Again, we have not looked at that. That was outside—you know, we looked at something that was just very, very narrow, and that was Title 42.

Mr. BURGESS. Yes. And I appreciate that. But, again, at the same time, it is like we spend all this money on readiness, and then we spend all the money in the stimulus; surely we weren't having to then go out and shop for the best and brightest minds in the business in order to bring them in to do this work.

Mr. Cramer, let me ask you a question. The National Cancer Act of 1971 made the positions of the Director of NIH and the Director of the National Cancer Institute into Presidential appointments. Since they are Presidential appointments, they were no longer Secretarial appointments. Under Title 42, does that mean the NIH Director and the NCI Director are not eligible for Title 42 salaries?

Mr. CRAMER. I am not in the position to answer that specific question now because I haven't considered it before. So I can look into it and get back to you on it. But I don't know——

Mr. BURGESS. Do you know the salary of Dr. Collins?

Mr. CRAMER. No, I don't.

Mr. BURGESS. I don't either. Is there anybody that earns more than Dr. Collins at the NIH?

Mr. CRAMER. I didn't look into the salary issues of people. I was——

Mr. BURGESS. Mr. Goldenkoff, do you have that information?

Mr. GOLDENKOFF. We have data on salaries, but we do not have it by specific individuals. The data was provided to us confidentially. We just have IDs, so we cannot link a particular salary level with a specific individual.

Mr. BURGESS. Oh, go to WikiOrgChart; they will do it for you.

But it is just interesting if there are individuals at NIH who earn more than the Director, and just how many individuals there are who earn this. And perhaps a quick glance at the services that they provide, where they would earn a salary in excess of the Director of the entire NIH.

And we will submit that as a question to be responded to in written form. I don't expect an answer right now.

Mr. GOLDENKOFF. Yes, we can provide that to you.

Mr. BURGESS. All right. Very well.

Thank you, Chairman. I will yield back the balance of my time.

Mr. PITTS. The chair thanks the gentleman and recognizes the gentleman from Illinois, Mr. Shimkus, for 5 minutes for questions.

Mr. SHIMKUS. Thank you, Chairman.

And I do appreciate you all for coming. I do agree, I find the work of the GAO very helpful to us as public policy folks.

But in just listening to your opening statements and testimonies, and, Mr. Cramer, for you to go back to 1926 and then figure out what happened in 1956 and try to weave this path of how we got to where we are at and why, just that analysis says we need to clean this up.

So, I mean, just the opening statements saying we are cobbling this together to figure out how we got here, where what Mr. Barton would do is just say, let's just take a look at it, write an authorization, get bipartisan support, clean it up, try to get reliable data on

the use of this Title 42 authority, as you stated in your report. So I am excited. I think this is much-needed.

Let me ask, I guess, a question. The Public Health Act—and this is Title 42 of that big law—EPA doesn't come under that authority under the Public Health Act,correct?

Mr. CRAMER. That is right. It is separate.

Mr. SHIMKUS. So the EPA got dragged into this through an appropriation bill; is that right?

Mr. CRAMER. Yes, it—well, it was a bill that authorized the EPA to make use of Title 42 authorities.

Mr. SHIMKUS. And I understand that was under an appropriation bill that then became law, and that is——

Mr. CRAMER. Yes. That is right. It was.

Mr. SHIMKUS. So we, as authorizers, also really dislike public policy created through spending authority versus authorization. So the other aspect would be, let's have this debate of whether EPA should be under this, let's go through the authorization process and have that debate, should this apply to—versus, let's let these sneaky appropriators do it through their process. Right? I mean, so that is another aspect.

We should not be afraid of this debate. And, again, even on both sides—and even my friend from Illinois, she has identified some things that I think we definitely can try to clean up and I wouldn't think would be that difficult.

Now, my question also comes from the report, to try to explain one of the footnotes here on page 2 of your report. And I will just read it to make it easy. It says, "The salary and compensation limits were lowered by HHS policy issued in February 2012 and in March 2007. HHS limits the annual base salary for employees hired under Section 209(f) to $350,000 and $375,000 in total compensation. These higher limits were in place during most years of our review of HHS's Title 42 use. Total compensation at HHS includes base pay, recruitment and retention," et cetera, et cetera, et cetera.

That is trying to make a statement that the administration itself said this thing has gotten overinflated—and I guess we will go to Mr. Goldenkoff—is that how I am reading it, these things got overinflated? And they are pulling it back. And the main section of that page, which is page 2, you have annual base salary for many appointees under Title 42 at HHS cannot exceed $250,000. That was by policy from the administrative staff.Is that correct?

Mr. GOLDENKOFF. I believe so. Yes, that is correct.

Mr. SHIMKUS. And so, without proper—going back to one of your main statements about there is no, really, market analysis of why we paid this, even the administration said, these things got overinflated, we are going to pull them back—which I think goes to some of the questions about what positions are being used, how we are evaluating their salary range. And I concur with Mr. Barton; to some extent, it just seems like there was a different salary range outside of the normal process, and it has just grown over time, as things do here.

Again, I appreciate the testimony. It is a great hearing. Mr. Chairman, thank you for it.

And thank you for your great work.

Mr. PITTS. The chair thanks the gentleman.

And I now recognize the gentleman from Georgia, Dr. Gingrey, for 5 minutes for questions.

Mr. GINGREY. Well, I thank you, Mr. Chairman, for recognizing me. I came in at the very tail end of this. And, doggone it, Mr. Shimkus, as he always does, took my question, the last question on my list. But he did it better than I could.

Let me just make a comment and say that I thank the witnesses from GAO for testifying this morning. And I would concur with my colleague from Illinois, that we are deeply appreciative of the work that you do, not just on this but in general. It is very, very helpful, as is CRS, to help us do our work and do a better job.

Maybe rather than me asking a question that has already been asked, the two of you could sort of summarize, if you have not already done that, if you don't mind, maybe in a condensed manner, do that for me in regard to what you have found in this report and what your recommendations are going forward, both for HHS and EPA, in regard to this issue?

Mr. GOLDENKOFF. Sir, I mean, in a nutshell, it was, you know, we recognize the importance of having pay flexibility, but, you know, we are GAO, our middle name is literally "accountability", so what we also were looking for was more accountability in their use of Title 42. Because we are in agreement, that we don't want abuse of it, we don't want any waste, we don't want there to be indiscriminate use of Title 42.

And so, when we went to look at within—we looked at the extent to which the Title 42 appointments at both HHS and EPA were consistent with the law, applicable regulations, agency policies. And what we found was that, within HHS, there were issues in terms of their ability to even oversee their use of Title 42, and that is that data issue. They really didn't have a good accounting of who was Title 42(f) or Title 42(g). There was just some sloppiness in there. And, actually, a fair amount of time of the audit was spent working with HHS just cleaning up their database. And so that was what led to one of the recommendations to HHS.

The second finding on HHS concerned their documentation, their justification for needing Title 42. And we found that, in some cases, they weren't always consistent with their own policies. And so that led to our other recommendation to HHS, dealing with the need to tighten up and better document the need for the authority.

And then for EPA, obviously they have far fewer Title 42 appointments. So what we did find there is that those 17 appointments were consistent with their policies, but we found that there were some issues with conflict-of-interest provisions, and they didn't always follow up with employees that did things that were—basically, that had holdings, stock holdings, and they did not divest in them, as they were asked to——

Mr. GINGREY. Well, I will just interrupt you to say this. I think that was a very, very important finding, that conflict-of-interest issue, particularly in regard to EPA and all these rules and regulations that get handed down. So I thank you for that work.

Mr. Cramer, did you have any comments that you wanted to add?

Mr. CRAMER. Well, we looked, essentially, at this question of pay caps and whether or not any of the pay caps that we considered that exist in the Federal compensation systems—there are a number of different systems—actually applied to the Title 42 folks. And we found that it was a very limited—there is a very limited cap on the pay involving those who work for a limited-time basis.

To sum it up, the statutory schemes are very complicated. And if the committee can begin to work on trying to harmonize the various things that have happened over the many years during which all of these laws have been passed, to bring it together and to make it simpler, it would be a great service to HHS and to the Federal Government.

Mr. GINGREY. I thank you.

And I yield back.

Mr. PITTS. Would you yield to Dr. Burgess, please?

Go ahead.

Mr. BURGESS. I would just like to ask Mr. Goldenkoff about, how does the HHS implementation of Title 42 differ or compare to EPA's implementation of Title 42?

Mr. GOLDENKOFF. Compare to what?

Mr. BURGESS. HHS and EPA, when they are governed under Title 42, is their approach identical, or are there differences between the two agencies?

Mr. GOLDENKOFF. It seemed that EPA's practices were a little bit tighter, a little bit more thorough, and certainly they were more consistent in following. Now, granted, there were also fewer cases to look at. So, you know, we were dealing with over 6,000 cases versus the 10 that we looked at in EPA, I believe. And, you know, so the likelihood was we were going to find more——

Mr. BURGESS. So how many Title 42 employees are there at EPA?

Mr. GOLDENKOFF. Seventeen.

Mr. BURGESS. And how many could they hire?

Mr. GOLDENKOFF. Up to 30.

Mr. BURGESS. Do they need those slots if they are unfilled?

Mr. GOLDENKOFF. My understanding is there are plans to fill them.

Mr. BURGESS. I would say don't.

Mr. GOLDENKOFF. And, you know, again, this is a policy issue. It is an internal management matter that we did not look——

Mr. BURGESS. All right. We will.

Thank you. I yield back.

Mr. PITTS. I recognize Mr. Barton for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. I am not sure I will take the 5 minutes.

Under current law or current regulations, is there a limit on what the Secretary of HHS can pay an exceptional individual?

Mr. CRAMER. There is a limit in the appropriation law if that person is a person who was appointed for a limited period of time.

Mr. BARTON. What if they are not appointed for a limited period of time?

Mr. CRAMER. No, there is no limit.

Mr. BARTON. So, theoretically, under current law and regulations, the Secretary of HHS could pay somebody $2 million a year?

They don't do it, I understand that. But there is no limit on it right now?

Mr. CRAMER. There is no law that would prohibit that at this time.

Mr. BARTON. At this time. Thank you.

Should there be a law that puts a specific cap on compensation?

Mr. CRAMER. If Congress decides there should be a law, there should be a law.

Mr. BARTON. That is a great answer. You can't beat that.

My understanding is that Title 42 originally was established during World War II for temporary special consultants.Is that correct?

Mr. CRAMER. Yes. Back in 1944, Title 42 was enacted into law. And, at that time, although the law itself did not specify that the employees had to be temporary, the regulations of the Public Health Service, which went into effect in 1946, actually, limited them in time.

But there is an interesting little twist here. It didn't limit them to, say, a year or 2 years or 3 years. What it provided was that consultants and fellows hired under Title 42 could only be employed for up to one-half the working days in any year. So, although they could have been there for many years, they could only work essentially half-time.

Mr. BARTON. When did the word "temporary"—or maybe I should—of the people that have been hired most recently under Title 42, are they classified as temporary, or are the classified as full-time permanent?

Mr. CRAMER. I can't speak to how HHS treats them on their books. I don't know if Mr. Goldenkoff——

Mr. GOLDENKOFF. Term appointments? OK——

Mr. BARTON. When they——

Mr. GOLDENKOFF [continuing]. Or indefinite.

Mr. BARTON. They are what?

Mr. GOLDENKOFF. It is our understanding it is either term or indefinite.

Mr. BARTON. Indefinite. So if I am hired under the general scale at HHS, GS-something, whatever, I am hired as a permanent full-time employee, correct?

Mr. GOLDENKOFF. That is correct.

Mr. BARTON. But if I am hired under Title 42, I am considered an indefinite. And indefinite could be 30 years.

Mr. GOLDENKOFF. But we did not see that going on. I mean, we did look at that, just precisely that, and we did not see that in the data that we looked at.

Mr. BARTON. Well, should a reform be that we either define what temporary is and put some specificity to it and require that Title 42 only be used for truly temporary special needs? Or should we go the other way and say, let's end this hypocrisy of indefiniteness and say that they are going to be full-time? In other words, let's be transparent about it.

Mr. GOLDENKOFF. To the extent—and I think this is one of the other flexibilities that we haven't discussed yet, is that Title 42, the fact that these are term appointments, does allow for bringing people in for a limited period of time, and that can align with a par-

ticular research project. And so, in theory, when that research project is over, then, you know, that——

Mr. BARTON. But that is apparently not how they are doing it. They don't sign a contract for a research project. They are just hired as regular employees, and they get all the benefits, but it is for an indefinite period of time.

Mr. GOLDENKOFF. But then compared to, say, a permanent employee, who is there for, you know, the next 30 years——

Mr. BARTON. Hopefully.

Mr. GOLDENKOFF. So, I mean, that flexibility is important. But, you know, you are correct, in that—and, again, it is part of having this oversight, that folks aren't there for an indefinite period of time and they are notre-upped on a regular basis.

Mr. BARTON. Well, my time is about to expire, and I appreciate the chairman letting me have a second round.

Should we legislatively define this program and put some definitions and caps in it? Or should it be left to the executive branch to handle it on an executive regulatory basis?

Mr. GOLDENKOFF. We would need to consider that more. You know, the implications of caps, in particular, and how that would affect the overall flexibility.

And, you know, certainly, there is the need to ensure that HHS and EPA don't use this indiscriminately or as an alternate to standard hiring procedures. But would a cap be too blunt of an instrument? And is the way to get around that through maybe tighter internal controls to ensure that for every appointment that is made that they have exhausted all other appointments?

Mr. BARTON. Well, my time has expired, but I just know, when I was in the private sector and had to make hiring decisions, if I really needed this position hired, you know, that was always the exceptional case, that I had to have that. I mean, I would go to my boss, if it was above my ability to pay them what I thought they needed, and say, "I have to have this individual, and we need to pay him 125 percent of the market." I never said, "Well, I really need him, but I just want to pay him 75 percent." I mean, if you leave it to the discretion at the executive level, they are always going to say we have to have that person and we need to pay them more.

And, with that, I yield back, Mr. Chairman.

Mr. PITTS. The chair thanks the gentleman.

And I now recognize the ranking member for 5 minutes.

Mr. PALLONE. Thank you, Mr. Chairman.

Gentlemen, I just wanted to make it clear and basically commend the Department, HHS, for the actions it has already taken to respond to your recommendations. I want to make it clear that they have.

And if I could ask unanimous consent, Mr. Chairman, to enter into the record the HHS human resources manual that has been updated, or the section that has been updated in February 2012.

Mr. PITTS. Without objection, so ordered.

[The information follows:]

HUMAN RESOURCES MANUAL
Instruction 42-1: APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS
Issuance Date: February 15, 2012

Effective April 2, 2012, section 42-50 (C), Tenure, of this Instruction has been sunsetted and is no longer applicable.

Significant changes to HHS Instruction 42-1 dated February 15, 2012 from HHS Instruction 42-1 dated August 5, 2004 include the following:

- Provides a definition of "scientific position," to include positions in which the incumbent is directly involved in or manages scientific research and/or activities, to include administrative positions that require the incumbent to have scientific credentials. Prior HHS Policy did not provide a definition of "scientific position."

- Under Qualifications, requires that appointees have a doctoral level degree in a scientific discipline related to the position and professional stature that is commensurate with the duties of the position being filled. Provides a mechanism for exceptions that require special justification and approval. Prior HHS Policy only required a Bachelor's Degree.

- Also under Qualifications, establishes a minimum qualification level, equivalent to that required at the GS-13. The prior HHS Policy did not establish a minimum qualification level.

- Requires that the same recruitment plan be used for both Title 5 and Title 42 in order to meet the requirement to demonstrate that other available personnel systems (i.e., Title 5), failed to yield qualified candidates.

- Includes a detailed explanation of the process and documentation requirements necessary to demonstrate that other available personnel systems, including Title 5, failed to yield candidates that possess critical scientific expertise.

- Eliminates the current restrictions placed on commissioned corps officers converting to Title 42 209(f) appointments upon retirement.

- Identifies specific positions and/or categories of positions at NIH that may be filled through Title 42 209(f) without "exhausting" other recruitment mechanisms/authorities.

- Prescribes the approval process, including necessary documentation for other OPDIVs to "designate" positions as Title 42 209(f), allowing them to fill such positions without first "exhausting" other recruitment mechanisms/authorities.

- Pay caps:
    - Base salary cannot exceed $250,000 in a calendar year unless a higher rate is approved by the Secretary. The previous policy delegated authority to the FDA, CDC, and NIH OPDIV Heads to set base salary up to $350,000.
    - Total compensation (including recruitment bonuses, retention allowances, and cash awards) cannot exceed $275,000 in a calendar year without the prior approval of the Secretary. The previous policy capped total compensation at $375,000.
    - Base salary for employees on time limited appointments may not exceed the rate set in accordance with Pub. L. No. 102-394. This cap was not in the previous policy.

HUMAN RESOURCES MANUAL
Instruction 42-1: APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS
Issuance Date: February 15, 2012

Material Transmitted:

Department of Health and Human Services (HHS) Instruction 42-1, Appointment of 42 U.S.C. § 209(f) Special Consultants, dated February 15, 2012.

Material Superseded:

HHS Instruction 42-1, Appointment of 42 U.S.C. § 209(f) Special Consultants, dated August 5, 2004.

Background:

This instruction provides guidance to Operating Divisions and Staff Divisions on the minimum eligibility and qualification requirements for appointments made under 42 U.S.C. § 209(f). Additionally, the Instruction provides guidance on compensation, awards, performance management and benefits for those serving on appointments made under 42 U.S.C. § 209(f).

This issuance is effective immediately. Implementation under this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Department policy.

/E. J. Holland, Jr./
E. J. Holland, Jr.
Assistant Secretary for Administration

INSTRUCTION 42-1

HHS PERSONNEL INSTRUCTION 42-1
APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS

42-00 Background

The authority to hire "special consultants" is granted by 42 U.S.C. §209(f) Special Consultants, which provides:

> In accordance with regulations, special consultants may be employed to assist and advise in the operations of the Service. Such consultants may be appointed without regard to the civil-service laws.

The implementing regulation, 42 C.F.R. § 22.3(a) Appointments of special consultants, provides:

> When the Public Health Service requires the services of consultants who cannot be obtained when needed through regular Civil Service appointment or under the compensation provisions of the Classification Act of 1949, special consultants to assist and advise in the operations of the Service may be appointed, subject to the provisions of the following paragraphs and in accordance with such

instructions as may be issued from time to time by the Secretary of Health and Human Services.

42-10 Purpose

The policy establishes the minimum qualification and eligibility standards for compliance with the regulation implementing 42 U.S.C. § 209(f). An operating division (OPDIV) may apply more stringent requirements where that OPDIV deems necessary for its purpose. These baseline standards, however, must be adhered to in all instances.

42-20 Authorities

- 42 U.S.C. § 209(f) Special consultants
- 42 C.F.R. § 22.3(a) Appointment of special consultants
- Pub. L. No. 102-394

42-30 Definitions

Peer Review means the scientific and technical evaluation by a panel of experts who are qualified by training and experience in particular scientific or technical fields, or as authorities knowledgeable in the various disciplines and fields related to the scientific areas under review, to give expert advice concerning the scientific and technical merit and relevance of the subject matter investigated.

Scientific Position means (1) a professional occupation directly involved in the conduct of high-level research studies, regulatory or product reviews, investigations, or experimentations in a branch of natural science, applied science, biomedical science, or related scientific field; or (2) management or supervision of such research studies, regulatory or product reviews, investigations, or experimentations, in which scientific expertise and credentials are required to provide appropriate program direction.

42-40 Coverage

A. Appointments under 42 U.S.C. § 209(f) may only be used to fill scientific positions. The authority will be used only when recruitment or retention efforts under other available and applicable personnel systems, including Title 5 of the United States Code, the Senior Biomedical Research Service (SBRS), and the PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. This instruction does not apply to any other excepted service appointments, including Special Government Employees (SGEs), Expert and Consultants (EE/EI), the SBRS, or those covered by 42 U.S.C. § 209(g).

B. While employees appointed under 42 U.S.C. § 209(f) are not covered by the laws or regulations outlined in 5 U.S.C or 5 C.F.R, there are instances in which Title 5 principles are used to effectuate actions for employees appointed under 42 U.S.C. § 209(f).

42-50 Tenure

HUMAN RESOURCES MANUAL
Instruction 42-1: APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS
Issuance Date: February 15, 2012

A. All appointments, including conversions from other pay systems, to positions under 42 U.S.C. § 209(f) are in the excepted service. Work schedules may be full-time, part-time, or intermittent.

B. Appointments may be indefinite. That is, they do not have a stated time limit so one may serve an entire Federal career under an indefinite appointment.

C. Appointments may be temporary for any period up to five years with unlimited extensions. Non-citizens on time-limited employment visas may only be given temporary appointments and appointments cannot exceed the visa expiration date.

42-60 Qualifications

A. Education

1. Candidates must meet education requirements in a scientific discipline directly related to the position being filled, in accordance with the Office of Personnel Management (OPM) qualification standards.

2. At a minimum, the candidate must possess a doctoral-level degree from an accredited institution of higher learning, including: Ph.D., M.D., D.V.M., D.D.S., D.M.D., Sc.D., or other research doctoral-degree widely recognized in U.S. academe as equivalent to a Ph.D. Exceptions to this requirement must be approved by the OPDIV head or designee and the justification must be documented.

3. Candidates that have completed part or all of their education outside of the United States must have their foreign education, necessary to meet qualification requirements, evaluated by an accredited organization to ensure that the foreign education is comparable to education received in the United States. It is the responsibility of the candidate to provide written proof of his/her foreign education accreditation prior to appointment. In addition, the servicing human resources office is responsible for verification.

4. Candidates must furnish proof, prior to appointment *(e.g.,* official transcript; ECFMG certification; foreign education accreditation), that they meet all required education requirements.

B. Experience

1. Candidates must have professional experience and stature in their area of expertise commensurate with the duties of the position being filled. At minimum, a candidate's experience must be equivalent to the minimum qualification standards prescribed for a position at the GS 13 level or higher.

2. In order to determine eligibility, supervisors must prepare a narrative statement fully describing the scientific duties and responsibilities of the position, the requisite educational background, and experience required to perform those duties. A classified position description is not required. However, the statement of duties must be reviewed to determine equivalent grade level.

C. Eligible Series

HUMAN RESOURCES MANUAL
Instruction 42-1: APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS
Issuance Date: February 15, 2012

All Title 42 positions must be identifiable within a General Schedule occupational group. The title and series assigned to the position will be based on the duties of the position.

42-70 Compensation

A. Salaries for individuals appointed on a full-time schedule will be set on a per annum basis commensurate with the applicants' qualifications, experience, and other factors as described below. Appointments that are on other than a full-time basis will be paid on a pro-rata basis of an annualized salary.

B. For purposes of this program, the appointee's compensation is the base salary for pay, leave, and benefits, as well as retention allowances, recruitment/relocation bonuses, and awards, which are not included in base salary. Base salary will be set at the lowest rate necessary to recruit the candidate. In determining the base salary, management must consider such factors as:

- Current salary;
- Competing offer of employment, either written or verbal;
- Stature of individual in his/her professional field;
- Average salary from a published salary survey;
- Urgency of the program relative to mission accomplishment;
- Role and impact of the individual in the program;
- Recruitment efforts, e.g., turnover rates, labor market factors, recruitment/retention statistics;
- Specialized skills/training, and experience that the applicant may possess that will benefit the agency/program;
- Compensation for cost of living disparity as reflected in a salary comparison;
- Complexity of duties;
- Consistency of pay with others in the organization; and
- Responsibilities within the organization

C. Base salary may be set up to $250,000 per annum at the discretion of the OPDIV except for those employed on time limited appointments. Recommendations for base salary above $250,000 must be submitted by the OPDIV head to the Assistant Secretary for Administration (ASA), for approval by the Secretary.

D. Base salary for employees on time limited appointments may not exceed the rate set in accordance with Pub. L. No. 102-394.

E. Pay Increases

1. Automatic cost of living adjustments do not apply to 42 U.S.C. §209(f) appointments. All pay increases will be performance based, will be consistent with the employee's annual performance appraisal and will be limited to one increase per year. Any pay increase outside of the normal performance cycle requires an exception authorized by the OPDIV head. Such exceptions must be fully documented and justified.

2. Performance based pay increases will normally be limited to a maximum of six percent. OPDIV heads may authorize higher increases where performance clearly warrants. All pay increases must be fully documented and justified.

3. Recommended pay increases that will increase base salary above $250,000 per annum, must be submitted by the OPDIV head to ASA for approval by the Secretary. Such requests must be fully documented and justified.

F. Pay Caps

1. Base salary cannot exceed $250,000 in a calendar year unless a higher rate is approved by the Secretary.
2. Total compensation (including recruitment bonuses, retention allowances, and cash awards) cannot exceed $275,000 in a calendar year without the prior approval of the Secretary.
3. Base salary for employees on time limited appointments may not exceed the rate set in accordance with Pub. L. No. 102-394

G. Pay Incentives

1. Employees appointed under 42 U.S.C. § 209(f) are eligible to receive recruitment, retention, and relocation bonuses. While not covered by the compensation laws and regulations outlined in 5 U.S.C. and 5 C.F.R., the same criteria and coding used for Title 5 employees will be used for employees appointed under Title 42 when making decisions regarding eligibility and implementation of these incentives.
2. Employees appointed under Section 209(f) cannot receive special salary rates, Physician's Comparability Allowances (PCAs), or Physician Special Pay (Title 38). No exceptions are authorized.

42-80 Initial Appointments

Appointments under 42 U.S.C. § 209(f) may only be used to fill scientific positions when recruitment or retention efforts under other available personnel systems, including Title 5 of the U.S. Code, the SBRS, and PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. The recruitment efforts used under other available personnel systems (i.e., Title 5) must be as extensive and exhaustive as those used to recruit under Title 42. These efforts, as well as the scientific credentials of the potential appointee, must be fully documented. Before 42 U.S.C. §209(f) may be used, the OPDIV must demonstrate that the following criteria have been met:

1. Efforts to recruit and/or retain under other available personnel systems were attempted, but unsuccessful, and these recruitment efforts must be completed prior to commencing recruitment under Title 42;

2. The recruitment efforts utilized for other available personnel systems were as extensive as those used to recruit under Title 42 (e.g., nationwide search, ads in professional journals, vacancy information shared with professional organizations, etc.); and

3. The applicant's credentials, experience, and stature in the scientific community are commensurate with, and directly related to the position being filled.

42-90 Conversions from Other Pay Systems

Conversions are only to be used in exceptional circumstances as outlined in this policy. A scientist may only be converted to a 42 U.S.C. § 209(f) appointment from another pay system if he/she is appropriately peer-reviewed according to the requirements outlined in this instruction and OPDIV procedures and is determined to meet all the following criteria:

1. Evidence of recognition as a national or international expert in the field, such as: specific experience, invited manuscripts, presentations, and consultations; receipt of honors and/or awards; or other recognition for noteworthy performance or contributions to the field;

2. Evidence of original scientific or scholarly contributions of major significance in the field;

3. Evidence of leadership in the field; and

4. Special knowledge and skills of benefit to the agency.

42-100 Positions Designated as 42 U.S.C. § 209(f)

A. There are some positions within HHS that require a level of scientific expertise that has historically not been successfully recruited or retained under regular civil service appointment. To expedite the recruitment process and limit the amount of time these positions remain vacant, a subset of high level, mission critical positions within each OPDIV may be designated as 42 U.S.C. § 209(f). This designation will allow such positions to be filled through 42 U.S.C. § 209(f) without the requirement to document efforts to fill the position through other available personnel systems each time the position is vacated and/or filled. In order to obtain this designation, OPDIVs must submit a request, in accordance with section 42-110 of this instruction, and obtain approval from the Assistant Secretary for Administration (ASA).

B. The list of NIH-specific individual and categorical positions, identified in Appendix 3, are covered by this designation.

42-110 Case Documentation and Approval Procedures

A template to document the required justification for initial 42 U.S.C. §209(f) appointments is provided as Appendix 1. The OPDIV must use this template, or develop an equivalent that documents how the criteria outlined in 42-80 of this policy have been met.

A. Conversions

Conversions are only to be used in exceptional circumstances as outlined in this policy. In addition, the OPDIV must document the results of the peer review, demonstrating that the employee meets the required criteria outlined in 42-90 of this policy.

B. Positions Designated as 42 U.S.C. § 209(f)

For positions not identified in Appendix 3, OPDIVs may request this designation for specific positions. This designation must be approved for each specific position, or group of positions, by the ASA. In order to be considered for 42 U.S.C. §209(f) designation, the OPDIV must submit the following documentation to the HHS OHR Title 42 Program Manager:

1. Historical data, including, but not limited to, current (not to exceed 5 years), local and national labor market analysis and workforce analysis, demonstrating that prior efforts to recruit and/or retain under other available personnel systems were attempted, but unsuccessful; and

2. Description of the position, including the credentials and experience necessary for an incumbent to possess to be successful in the position.

42-120 Benefits

A. While the laws and regulations outlined in 5 U.S.C. and 5 C.F.R. do not apply to employees appointed under 42 U.S.C. § 209(f), the benefits available (e.g., life insurance, health insurance, retirement, etc.), as well as the criteria for eligibility are the same for both groups of employees. Specifically, employees appointed under 42 U.S.C. § 209(f) for more than 12 months (with the exception of non-citizens in overseas locations) will receive benefits equivalent to those of employees appointed under Title 5.

B. As noted above, although the laws and regulations outlined in 5 U.S.C and 5 C.F.R do not apply to employees appointed under 42 U.S.C. § 209(f), these employees are covered by the same leave provisions as employees appointed under Title 5.

42-130 Awards

Employees appointed under 42 U.S.C. § 209(f) are eligible for the following categories of awards: performance-based cash awards, onetime special act awards (including on the spot and time off awards), and honorary awards.

42-140 Performance Management and Conduct

A. All Title 42 employees must be on a performance plan that meets all requirements of the appropriate Departmental performance system. Ratings under the performance plan will be used as the basis for pay decisions.

B. Title 42 employees must maintain acceptable performance and conduct in order to be retained in their positions.

42-150 Other Actions

A. If an employee voluntarily or involuntarily separates from a Title 42 position and seeks to return to a non-Title 42 position, the employee may be considered in accordance with all civil service or Commissioned Corps requirements. Pay of Title 42 employees, upon converting to a non-Title 42 position, will be set no higher than the maximum General Schedule pay limitations under Title 5 for civil servants and regular pay tables (including any applicable special or professional pay) for Commissioned Corps officers.

B. Prior to appointment or conversion to a Title 42 position, employees must be informed in writing that they are not entitled to Merit System Protection Board (MSPB) appeal rights under the Civil Service Reform Act (CSRA).

42-160 Conduct Laws and Regulations

Title 42 employees must comply with all ethical and conduct-related laws and regulations applicable to other Executive Branch employees. These include laws concerning financial interests, financial disclosure, and conduct regulations promulgated by the Department, by the Office of Government Ethics, and other agencies.

42-170 Processing Appointments and Conversions to 42 U.S.C. § 209(f)

A. Initial and Subsequent Appointments. Requests to appoint and/or convert individuals using 42 U.S.C. § 209(f) will be processed in accordance with the OPM Guide to Processing Personnel Actions.

B. Employees appointed or converted to a 42 U.S.C. § 209(f) position must sign a statement documenting their understanding that they are accepting an excepted service appointment and to acknowledge that they are not entitled to MSPB appeal rights under the CSRA.

C. Appointment of Non-citizens

Non-citizens may be appointed as permitted by law. The non-citizen must have an appropriate work visa.

42-180 Program Review and Evaluation

The ASA, Office of Human Resources, will periodically review appointments made under the 42 U.S.C. § 209(f) authority and associated supporting documentation to ensure proper use.

APPENDIX 1: REQUIRED DOCUMENTATION FOR INITIAL APPOINTMENTS UNDER 42 U.S.C. § 209(f)

The following information must be documented and maintained for each individual initial appointment made under 42 U.S.C. § 209(f). The information must be maintained by the OPDIV and made available upon request from the HHS OHR.

POSITION SUMMARY: Provide a summary of the position, including major duties/responsibilities and required qualifications/experience.

RECRUITMENT EFFORTS:

A. Provide a summary of recruitment efforts to fill this position through other available personnel systems. Provide detailed information regarding recruitment strategies (e.g., USAJOBS, professional journals, professional organizations, etc.); number of applicants; and probable reasons recruitment efforts were unsuccessful.

B. Provide a summary of recruitment efforts used to fill the position through Title 42, if different from those used for other personnel systems, please explain.

CANDIDATES QUALIFICATIONS AND EXPERIENCE: Provide a summary of the candidate's credentials, experience, and stature in the scientific community and explain how they are commensurate with, and directly related to the position being filled.

APPENDIX 2: DOCUMENTATION CHECKLIST FOR 42 U.S.C. § 209(f) APPOINTMENTS

For All Appointments be sure to include:

- ☐ Statement of Duties
- ☐ CV
- ☐ Documentation to support positive education requirements (e.g., official transcript)
- ☐ Statement signed by employee acknowledging he/she understands that he/she is accepting an excepted service appointment and is not entitled to MSPB appeal rights under the CSRA
- ☐ Appropriate employment visa (if applicable)
- ☐ Salary justification
- ☐ Any other documentation deemed necessary by the OPDIV

For Initial Appointments be sure to include:

- ☐ Summary of Recruitment Efforts and Supporting Documentation for Title 5 or Other Available Personnel System
- ☐ Summary of Recruitment Efforts and Supporting Documentation for 42 U.S.C. § 209(f)
- ☐ Qualification and Experience Summary

For Conversion Actions be sure to include:

- ☐ Peer Review Summary

APPENDIX 3: NIH 42 U.S.C. § 209(f) OFFICIAL SCIENTIFIC INDIVIDUAL/CATEGORICAL DESIGNATIONS

42 U.S.C. § 209(f) appointments may appropriately be made at the NIH if in the designated official scientific individual/categorical position titles listed below.

Senior Investigator (excluding Clinical Senior Investigators)
NIH Distinguished Investigator
NIH Clinical Track (HS)
- Investigator
- Staff Clinician
- Senior Clinician

Scientific Executive
NIH Deputy Director
IC Director
IC Deputy Director
Scientific Director

Mr. PALLONE. And, specifically, because I did mention before about this policy only applying to doctoral candidates, and I know you had mentioned the nurses, or it had come up about the nurses. And part of the manual change, it says that, under qualifications, it requires that appointees have a doctoral-level degree in a scientific discipline related to the position and professional stature that is commensurate with the duties of the position being filled.

Prior HHS policy only required a bachelor's degree. So it was, in fact, the case that, before, you could just have a bachelor's degree, which is, I assume, the reference to the nurses. But it is not true under the revisions that they have made that we have now entered into the record.

And the other thing I wanted to point out is that—and, again, this is my effort to try to make it clear that this is not or should not be partisan—that the EPA was added to this program in 2005, and that was under a Republican President and a Republican majority in the Congress. So it is not that this is something that has just existed under the Democrats. It has existed under both administrations. And in the case of HHS, they are clearly trying to rectify some of the problems pursuant to your recommendations.

That is all, Mr. Chairman. I yield back.

Mr. PITTS. All right. Thank you.

And that concludes the questioning from our Members. Your report has raised a lot of questions. I am sure Members will have additional follow-up questions that they will submit in writing.

I remind the Members that they will have 10 business days to submit questions for the record, and I ask the witnesses to respond to the questions promptly. Members should submit their questions by the close of business on Friday, September the 28th.

And, without objection, the subcommittee is adjourned.

[Whereupon, at 11:23 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Statement of Rep. Henry A. Waxman
Ranking Member, Committee on Energy and Commerce
Subcommittee on Health Hearing on "Title 42—A Review of Special Hiring Authorities"
September 14, 2012

Since the 1940s, the Department of Health and Human Services (and its precursors) have been authorized -- under Title 42 of the United States Code -- to hire and set compensation for special consultants and fellows. The Environmental Protection Agency was granted similar, although more limited authority in 2005.

This authority -- used by both Democrat and Republican administrations alike -- is known as the Title 42 hiring authority, or "Title 42" for short. Title 42 provides HHS (and the EPA) with the flexibility to hire top notch scientists, physicians, and others with expertise in specialty disciplines more quickly and to compensate them more competitively than otherwise would be allowed. As such, it has been an invaluable tool for HHS agencies such as NIH, CDC and FDA, and for the EPA, to recruit and retain the very best people in their fields. Indeed, just this week we learned of the ground-breaking work of one such Title 42 appointee. As reported in Wednesday's Washington Post, Dr. Neal Young, a NIH hematologist, has found the cure for aplastic anemia, a rare disease that shuts down the bone marrow's ability to make blood cells. Other NIH Title 42 appointees include Dr. Harold Varmus, Director of the National Cancer Institute, and Dr. Tony Fauci, Director of the National Institute of Allergy and Infectious Diseases. NIH also used this authority to hastily hire needed experts who may not be as well known, to develop a vaccine in response to the H1N1 flu pandemic of 2009.

Over the years and particularly in more recent times -- especially at NIH -- the use of Title 42 has increased significantly. According to both NIH and GAO, in 2010, 25% of all NIH employees, and 44% of its researcher and clinical practitioner workforce, were Title 42 appointees. Some of these individuals received compensation at or above executive level pay grades, including Executive Level One which provides for compensation of federal employees at a level of almost $200,000. Whether or not these numbers and these salary figures are too much -- or maybe even not high enough -- is a matter that I'm not sure Congress is best equipped to answer. Our job, it seems to me, is to ensure that NIH and all health-related government agencies have the flexibility they need to recruit and retain extraordinary scientific and medical personnel – and that they use this flexibility appropriately. We simply should not settle for anything less.

This is not to suggest that NIH should not comply fully with the requirements of Title 42, or provide and adhere to its own Title 42 guidance, or collect appropriate data on the use of Title 42, or otherwise be accountable for its Title 42 activities. It absolutely should. And to the extent that NIH has not acted accordingly -- as NIH uncovered on its own and as documented in the GAO studies we will hear about today -- NIH must re-work its policies to make certain that its Title 42 authority is administered, managed, and enforced as it should be. We can't settle for anything less here as well.

I understand that NIH is well on its way in addressing the issues that have been identified. We will follow its progress and are confident that what needs to be put right will be put right.

In the meantime, we should not rush to judgment in terms of a legislative fix. Chairman Emeritus Barton should be commended for bringing this matter to the attention of the Committee. But I am concerned that his Title 42 bill may go too far; that in insisting on specific percentages of individuals who may be hired under Title 42 and restricting the number of such individuals paid above a certain threshold, his legislation may have the unintended effect of setting back NIH (and other HHS agencies) in terms of their ability to recruit and retain outstanding scientists, researchers, and physicians. Again, as is demonstrated by Dr. Young's extraordinary achievement described just days ago, that recruitment and retention process is working exceptionally well. We should, then, be very wary of trying to "fix" it.

My thanks to our witnesses here today. I look forward to their testimony.

THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

September 12, 2012

To: Health Subcommittee Members

From: Majority Staff

Re: Hearing on Title 42

On Friday, September 14, 2012, the Subcommittee on Health will hold a hearing entitled "Title 42 – A Review of Special Hiring Authorities". The hearing will take place at 10:00 a.m. in 2123 Rayburn House Office Building. The subcommittee will examine the effect of Title 42 on personnel appointments at the Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) and their consistency with current Federal law and regulations.

I. Witnesses

Mr. Robert Goldenkoff
Director, Strategic Issues
Government Accountability Office

Mr. Robert Cramer
Managing Associate General Counsel
Government Accountability Office

II. Background on Title 42

In 1944, under 42 U.S.C. sections 209 (f) and (g) of the Public Health Service Act (PHSA), authority was provided to appoint and set pay for special consultants and scientists to fill mission-critical positions in science and medicine in the Public Health Service (PHS). Since then, HHS has issued regulations that provide that special consultants can only be hired when the PHS cannot fill these positions through regular channels and that appointments be time limited. The 1993 Labor-HHS Appropriations Act provided further guidance related to caps on salaries and length of employment. The appropriations bill placed a permanent appropriation cap on the pay of special consultants and fellows appointed on a time limited basis. These sections of the PHSA are collectively referred to as Title 42.

The use of Title 42 has grown significantly. HHS has cited difficulties in appointing qualified researchers and consultants as the main reason for its increased use. That dependence appears to have grown significantly in the past decade especially at the National Institutes of

Health (NIH) where 25 percent of all employees and 44 percent of its researchers and clinical practitioners are Title 42 appointees.

Although Title 42 is in the PHSA, since 2006 the EPA has used it to appoint 17 employees. According to the EPA, the appointments are for scientific and management positions that would have been difficult to fill without offering salaries commensurate with the private sector. Fifteen of EPA's 17 Title 42 employees earned salaries over Executive Level IV in 2010.

Congress has intermittently attempted to address the use of Title 42 at HHS and the EPA and ensure that its use complies with the guidance established in all the laws and regulations. Of specific concern are salary caps and the number of HHS employees whose pay exceeds Executive Level III. From 1957 through 1993, a pay cap was included in each fiscal year appropriation and in FY1993, Congress made this cap permanent subject to section 5373 of Title 5 of the U.S. Code. Despite this guidance, in 2010, 1,461 HHS Title 42 employees earned salaries over Executive Level IV, or $155,500.

As a result of these differences, Congress asked the Government Accountability Office (GAO) to study the use of the Title 42 hiring authority and the extent to which HHS and EPA used this authority under section 209 (f) and (g) - to appoint and compensate employees since 2006 and whether the agencies followed applicable policy and guidance for appointment and compensation. In addition, the GAO was asked to study whether there are statutory caps on pay for consultants and scientists appointed pursuant to 42 U.S.C. §§ 209(f) or (g), and specifically whether the pay cap under 5 U.S.C. § 5373 applies.

GAO Reports on Title 42

In July 2012, the GAO published two reports on the Title 42. One of those reports was a legal opinion on the statutory pay caps for those appointed under Title 42 authority. The other report was an audit of the use of Title 42 at HHS and EPA.

The GAO legal opinion stated that the 1993 appropriations language unequivocally limits the pay of consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) at agencies that are funded by the Labor-HHS-Education Appropriations Acts.

The program audit found that the use of special hiring authorities at HHS under 42 U.S.C. §§ 209(f) and (g) increased by 25 percent between 2006 and 2010. In addition, HHS does not have reliable data to manage and provide oversight of its use of Title 42 to determine if required guidance was followed. With respect to the EPA, GAO found that 15 of EPA's 17 Title 42 employees earned salaries over Executive Level IV in 2010. EPA appointment and compensation practices were generally consistent with its guidance except for post-appointment ethics requirements.

GAO recommended that HHS: (1) ensure section authority—209(f) or 209(g)—be consistently documented in personnel systems, (2) systematically document how policy requirements were fulfilled , and (3) ensure agency-wide policy provides guidance for

documenting the basis for employee compensation. GAO recommends EPA develop and document a systematic approach for ensuring Title 42 employees are compliant with ethics requirements after appointment.

III. Federal Legislation

H.R. 6214 was introduced by Rep. Barton to limit the number and pay of individuals serving as special consultants, fellow, or other employees hired under subsection 207 (f) and (g) of the Public Health Service Act. In addition, the bill:

- Limits the use of the provision to the Department of Health and Human Services;
- Caps the number of hires under this authority to 5 percent of the total number of employees at HHS;
- Ensures that Federal compensation may not exceed 150 percent of Executive Level I under section 5312- Title 5;
- Allows up to 50 employees may be paid without regard to compensation limitation if the Secretary determines that the position is vital to the mission; and,
- Requires a Report to Congress 6 months after enactment.

The hearing will provide Members with an opportunity to examine the use of Title 42 hiring authorities at HHS and EPA. In addition, it will review recommendations by the GAO to make the program more compliant.

IV. Staff Contacts

If you have any questions please contact Brenda Destro with the Committee staff at (202) 225-2927.

United States Government Accountability Office

GAO

Report to Congressional Requesters

July 2012

HUMAN CAPITAL

HHS and EPA Can Improve Practices Under Special Hiring Authorities

GAO-12-692

GAO
Accountability * Integrity * Reliability

Highlights

Highlights of GAO-12-692, a report to congressional requesters

July 2012

HUMAN CAPITAL

HHS and EPA Can Improve Practices Under Special Hiring Authorities

Why GAO Did This Study

HHS and EPA have been using special hiring authority provided under 42 U.S.C. §§209(f) and (g)—referred to in this report generally as Title 42 or specifically as section 209(f) or section 209(g)—to appoint individuals to fill mission critical positions in science and medicine and, in many cases, pay them above salary limits usually applicable to federal government employees. GAO was asked to assess the extent to which HHS and EPA have (1) used authority under sections 209(f) and (g) to appoint and compensate employees since 2006, and (2) followed applicable agency policy, guidance, and internal controls for appointments and compensation. GAO analyzed agency Title 42 data, interviewed agency officials, and conducted file reviews.

What GAO Recommends

GAO recommends HHS (1) ensure section authority—209(f) or 209(g)—be consistently entered in appropriate personnel systems, (2) systematically document how policy requirements were fulfilled when hiring or converting 209(f) employees, and (3) ensure agencywide 209(g) policy currently in development provides guidance for documenting the basis for employee compensation. GAO recommends EPA develop and document a systematic approach for ensuring Title 42 employees are compliant with ethics requirements after appointment.

HHS agreed with GAO's recommendations, while EPA disagreed, citing certain actions already taken. GAO acknowledges EPA's plans to address these issues, but maintains the recommendation is needed to ensure implementation.

View GAO-12-692. For more information, contact Robert Goldenkoff at (202) 512-2757 or goldenkoffr@gao.gov.

What GAO Found

The Department of Health and Human Services' (HHS) use of special hiring authorities under 42 U.S.C. §§ 209(f) and (g) has increased in recent years. Nearly all HHS Title 42 employees work in one of three HHS operating divisions: the National Institutes of Health (NIH), the Food and Drug Administration (FDA), and the Centers for Disease Control and Prevention (CDC).

HHS Operating Divisions Have Increased Their Use of Title 42, Sections 209(f) and (g) Appointments, 2006 through 2010

Operating division	2006	2007	2008	2009	2010	Percent change[a]
NIH	4,238	4,389	4,569	4,721	4,879	15%
FDA	559	564	595	816	862	54
CDC	512	603	708	796	929	81
Other	52	45	44	38	27	(48)
Total	**5,361**	**5,601**	**5,916**	**6,371**	**6,697**	**25%**

Source: GAO analysis of HHS data.

[a]Figures in parentheses indicate a decrease.

Title 42 employees at HHS serve in a variety of areas, including scientific and medical research support and in senior, director-level leadership positions. At NIH, one-quarter of all employees, and 44 percent of its researchers and clinical practitioners, were Title 42 appointees. HHS reported that Title 42 enables the agency to quickly fill knowledge gaps so medical research can progress and to respond to medical emergencies. HHS further reported Title 42 provides the compensation flexibility to compete with the private sector. In 2010, 1,461 HHS Title 42 employees earned salaries over Executive Level IV ($155,500 in 2010).

HHS does not have reliable data to manage and provide oversight of its use of Title 42 because the section authority used to hire Title 42 employees is not consistently recorded into personnel systems. Moreover, HHS did not consistently adhere to certain sections of its 209(f) policy. For example, the policy states that 209(f) appointments may only be made after non-Title 42 authorities have failed to yield a qualified candidate, but GAO found few instances where such efforts were documented. HHS has recently issued updated 209(f) policy that addresses most of these issues. HHS is developing agencywide policy for appointing and compensating fellows under 209(g), but it is not clear the policy will address important issues such as documenting the basis for compensation.

Since 2006, the Environmental Protection Agency (EPA) has used section 209(g) to appoint 17 employees. Title 42 employees lead scientific research initiatives and some manage or direct a division or office. According to EPA officials, Title 42 provides the flexibility to be competitive in recruiting top experts who are also sought by private industry, academia, and others. Also, Title 42 provides the appointment flexibility needed to align experts with specific skills to changing scientific priorities. Fifteen of EPA's 17 Title 42 employees earned salaries over Executive Level IV in 2010. EPA appointment and compensation practices were generally consistent with its guidance; however, EPA does not have post-appointment procedures in place to ensure Title 42 employees meet ethics requirements to which they have previously agreed.

Contents

Figures

Abbreviations

CDC	Centers for Disease Control and Prevention
EHRP	Enterprise Human Resources and Payroll
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
HHS	Department of Health and Human Services
NCCT	National Center for Computational Toxicology
NIH	National Institutes of Health
OGC	Office of General Counsel
ORD	Office of Research and Development
PHS	Public Health Service

GAO
Accountability * Integrity * Reliability
United States Government Accountability Office
Washington, DC 20548

July 9, 2012

The Honorable Denny Rehberg
Chairman
Subcommittee on Labor, Health and Human Services, Education, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

The Honorable Joe Barton
House of Representatives

The Honorable Michael Burgess
House of Representatives

The Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) are among the agencies that have cited difficulties in recruiting and retaining individuals in medicine, science, engineering, and other related fields in support of their missions. One reason for these difficulties, according to agency officials, is salaries available under typical federal government hiring authorities are sometimes not competitive with those in the private sector for individuals in these highly specialized and competitive fields. Since 2001, we have designated strategic human capital management a government-wide high-risk area in part because of the need to address current and emerging critical skills gaps that are undermining agencies' abilities to meet their missions.[1]

Effective use of various human capital flexibilities is one way agencies can improve their efforts to recruit, hire, and manage their workforces. Such flexibilities, provided under 42 U.S.C. §§209(f) and 209(g)—referred

[1]GAO, *High-Risk Series: An Update*, GAO-11-278 (Washington, D.C.: Feb. 2011).

to in this report generally as Title 42 or specifically as sections 209(f) or (g)—are available only to HHS and EPA.[2] Section 209(f) authorizes the employment of special consultants to assist and advise in the operation of the Public Health Service (PHS), while section 209(g) authorizes fellowships in the PHS for scientists who may be assigned to studies and investigations for the term of their fellowships. HHS has used sections 209(f) and (g) and EPA has used section 209(g) to appoint individuals from the private sector and academia as well as to convert federal government employees under other pay systems—such as the General Schedule—to Title 42.

In implementing Title 42, the agencies have set higher pay limits than those provided under typical civil service hiring authorities.[3] Per HHS policy, the annual base salary for many appointments under Title 42 at HHS cannot exceed $250,000 per calendar year, with total compensation not to exceed $275,000 unless approved by the Secretary.[4] In a related effort to this audit, we are issuing a legal opinion on whether there are any statutory caps on pay for consultants and fellows appointed under sections 209(f) and (g). Similarly, EPA policy caps annual base salary for Title 42 employees at $250,000, with total compensation that may not exceed $275,000. According to HHS and EPA officials, the pay setting flexibility is needed to compete with the private sector and academia to recruit and retain critical personnel. Because agencies exercise broad discretion in their use of Title 42 authority, it is important that they have robust policies and internal control mechanisms in place to implement and monitor use of the authority. To obtain a better understanding of the appointment and compensation practices under sections 209(f) and 209(g), you asked us to assess the extent to which HHS and EPA (1) have used authority under sections 209(f) and (g) to appoint and set pay

[2]HHS has other special hiring authorities provided under Title 42 of the U.S. Code, but this report deals exclusively with the special hiring authorities under 42 U.S.C. §§ 209(f) and (g).

[3]Most federal employees are paid under the General Schedule. The highest base pay amount under the General Schedule in 2012 is $155,500.

[4]The salary and compensation limits were lowered in HHS policy issued in February 2012. In March 2007, HHS limited annual base salary for employees hired under section 209(f) to $350,000 and $375,000 in total compensation. These higher limits were in place during most years of our review of HHS's Title 42 use (2006 through 2010). Total compensation at HHS includes base pay; recruitment and retention incentives; and cash awards, such as performance bonuses.

for employees since January 2006, and (2) have followed applicable agency policy, guidance, and internal controls for appointments and compensation.[5]

To assess the extent to which HHS and EPA have used authority under sections 209(f) and (g) to appoint and set pay for employees, we obtained agency personnel data that we analyzed to describe: (1) appointment and compensation trends at HHS and EPA since 2006, including the number of Title 42 employees; (2) the types of occupations and positions held by Title 42 employees; (3) compensation rates, including the number of Title 42 employees earning more than certain federal salary levels; (4) the number of Title 42 employees receiving nonsalary payments; and (5) the number of civil servants that have been converted to Title 42 appointments and the compensation changes associated with those conversions. We conducted a variety of data tests and interviews with agency officials to correct and refine HHS Title 42 data and were able to develop a data set that was reliable for our purposes. For EPA, we performed data testing, interviewed agency officials, and compared data to information found in official agency documents and determined that EPA's data were reliable for our purposes. To determine the extent to which HHS and EPA have followed applicable policy, guidance, and internal controls, we reviewed the policies and guidance at HHS and EPA to understand the conditions under which Title 42 employees are to be recruited, appointed, compensated, and managed. We conducted 63 case file reviews at HHS and 10 at EPA to document appointment and compensation practices and compared those practices to agency policies and guidance. Those cases were chosen based on a random selection of cases that had characteristics related to various areas of HHS's and EPA's Title 42 policy and guidance. We determined the number of case file reviews was sufficient to identify incidences where practices were or were not consistent with policies and guidance, but our findings are not generalizable to the entire population of Title 42 employees at HHS or EPA. See appendix I for a more detailed discussion of our objectives, scope, and methodology.

[5]According to HHS human resource officials, personnel data prior to 2006 were likely not reliable for our analysis. EPA began using Title 42 in 2006. HHS data are available through the end of 2010, the last year of complete data available at the time of this study; and at EPA, through the end of 2011.

We conducted this performance audit from May 2011 through July 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The authority to appoint and set pay for special consultants and fellows was provided as part of the Public Health Service Act in 1944.[6] Section 209(f) authorizes the employment of special consultants to assist and advise in the operation of the PHS. The PHS is comprised of most operating divisions within HHS—including the National Institutes of Health (NIH), the Food and Drug Administration (FDA), and the Centers for Disease Control and Prevention (CDC)—as well as some staff divisions within the Office of the Secretary. See figure 1 for HHS's organizational structure, including those operating divisions and main staff divisions considered to be within the PHS. Section 209(g) authorizes fellowships in the PHS for individual scientists who may be assigned for studies and investigations either in the United States or abroad. Sections 209(f) and (g) both authorize the establishment of regulations to further implement these authorities. HHS Office of the Secretary develops agencywide policy and guidance and operating divisions may set additional or supplemental policy as necessary. In 2005, Congress provided EPA with the authority to use section 209 to make a limited number of appointments in its Office of Research and Development (ORD).[7] Congress initially granted this authority to EPA for fiscal years 2006 through 2011, but Congress amended the authority twice and currently EPA is permitted to employ up to 30 persons at any one time through

[6]Pub. L. No. 78-410, § 208(c) and (d), 58 Stat. 682, 686 (July 1, 1944). These authorities were expansions of employment authorities originally provided to the National Cancer Institute in 1937. H. R. Rep. No. 1364 (1944).

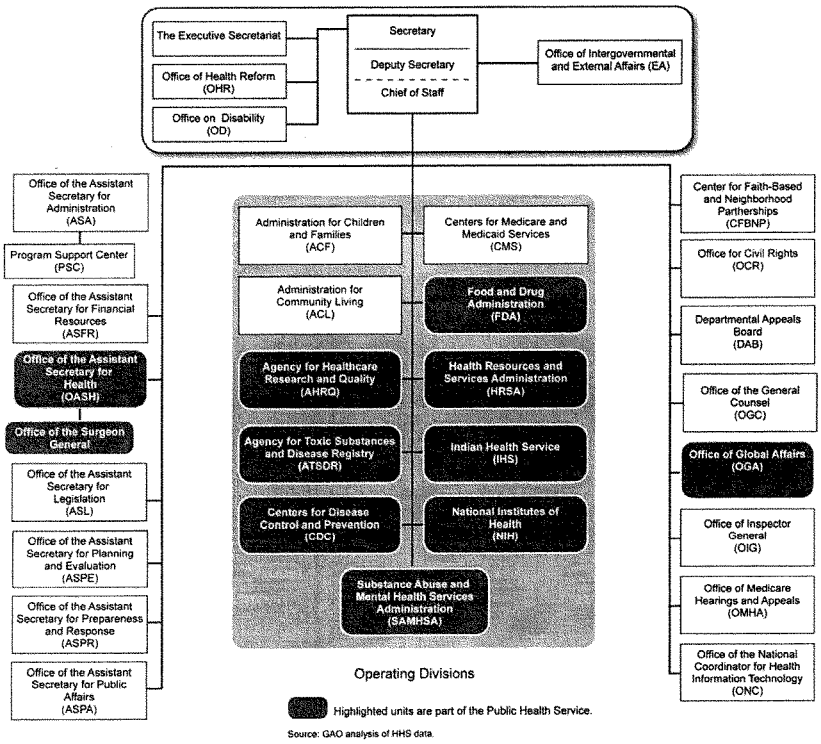
[7]Pub. L. No. 109-54, Title II, 119 Stat. 499, 531 (Aug 2, 2005). Although the legislation refers only to section 209, the legislative history of these grants of authority to EPA provides the intent was to grant EPA use of the authorities under sections (f), (g), and (h) of section 209. Subsection (h) of section 209 permits noncitizens to be appointed and compensated under sections 209(f) and (g).

fiscal year 2015.[8] EPA issued regulations in 2006 implementing this authority, which closely follow HHS regulations.[9]

[8]Pub. L. No. 111-8, title II, 123 Stat. 524, 729 (Mar. 11, 2009) and Pub. L. No. 111-88, Division A, title II, 123 Stat. 2904, 2938 (Dec. 30, 2009).

[9]40 C.F.R. part 18.

Figure 1: HHS Organizational Structure



Source: GAO analysis of HHS data.

HHS regulations for section 209(f) provide that special consultants may only be appointed when the PHS cannot obtain services through regular

civil service appointments or under the compensation provisions of the Classification Act of 1949.[10] The regulations further provide that rates of compensation for special consultants are to be set in accordance with criteria established by the Surgeon General. The Surgeon General is part of the Office of the Assistant Secretary for Health. HHS has used this authority, for example, to appoint doctors and others with expertise in specialty fields to initiate or provide assistance in conducting medical research and set pay for those individuals at rates above those allowed under other federal government pay systems.

HHS regulations covering section 209(g) provide that fellowships may be provided to secure the services of talented scientists for limited duration (up to 5 years) for health-related research, studies, and investigations.[11] The regulations further provide that the Secretary may authorize procedures to extend the term of fellowships, may authorize stipends for the fellows, and is responsible for establishing appointment procedures beyond those set forth in the regulations.[12]

Some Title 42 employees earn pay within or exceeding pay levels found in the Executive Schedule. The Executive Schedule is a five-level, basic pay schedule applicable to the highest-ranking executive appointments in the federal government. Executive Schedule pay rates range from Executive Level V ($145,700 since 2010) to Executive Level I ($199,700 since 2010).

Only HHS and EPA are authorized to use Title 42 hiring authority. By contrast, regular hiring authorities such as those under title 5 of the U.S. Code—commonly referred to as Title 5—may be used by any federal agency.[13] Pursuant to HHS and EPA policy, employees at HHS and EPA originally hired under Title 5 or other authorities may be converted to Title 42 in some circumstances. Under these policies, employees hired under

[10]42 C.F.R. § 22.3. The Classification Act of 1949 established the General Schedule, a single, nationwide pay structure for federal white-collar employees that today consists of 15 grades, each with 10 pay steps.

[11]42 C.F.R. § 61.32.

[12] 42 C.F.R. §§ 61.33 and 61.37-38.

[13]A small number of agency-specific personnel authorities, including hiring authorities, are contained in subpart I of part III of Title 5. For example, personnel flexibilities relating to the Internal Revenue Service are contained in chapter 95 of Title 5.

Title 42 are eligible for performance bonuses, incentives, and other nonsalary payments made available to federal employees compensated under Title 5.

Title 42 employees most frequently work within one of three operating divisions:

- *NIH* is the nation's medical research agency and is comprised of the Office of the Director and 27 institutes and centers, including the National Cancer Institute; National Institute on Aging; National Heart, Lung, and Blood Institute; and the National Center for Complementary and Alternative Medicine. Each institute and center has its own specific research agenda, often focused on a particular disease or body system. As the central office at NIH, the Office of the Director establishes NIH-specific policy and oversees the institutes and centers to ensure they operate in accordance with said policy. While most of its budget goes to extramural research personnel at more than 3,000 universities and research institutions, NIH also has intramural research laboratories on the NIH main campus in Bethesda, Maryland. The main campus is also home to the NIH Clinical Center, which is the largest hospital in the world totally dedicated to clinical research.
- *FDA* is responsible for, among other things, protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, the nation's food supply, cosmetics, and products that emit radiation. FDA is also responsible for regulating tobacco products.
- *CDC* conducts activities such as identifying and defining preventable health problems and maintaining active surveillance of diseases; serving as the PHS lead agency in developing and implementing operational programs relating to environmental health problems; and operational research aimed at developing and testing effective disease prevention, control, and health promotion programs.

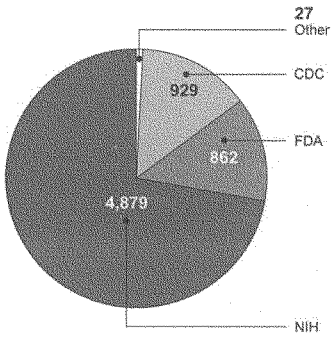
EPA uses section 209(g) as the basis for hiring some scientists within ORD, the scientific research arm of EPA. ORD's work at EPA laboratory and research centers provide the science and technology to identify environmental hazards, assess risks to public health and ecosystems, and determine how best to control or prevent pollution. According to EPA documents and officials, EPA uses Title 42 to secure the services of experienced and talented scientists for renewable appointments where, because of the nature of the work and expertise needed, regular hiring

authorities are impractical. EPA has not made appointments using section 209(f).

HHS Has Increased Its Use of Title 42, but More Reliable Data Could Improve HHS's Oversight

During 2010, HHS had 6,697 employees who were appointed under sections 209(f) or (g).[14] All but 27 of these employees served at NIH, FDA, or CDC, while the remaining employees served in the Office of the Secretary or within other operating divisions, as shown in figure 2.[15]

Figure 2: Most Title 42, Sections 209(f) and (g) Employees Served at NIH, FDA, or CDC, 2010



Source: GAO analysis of HHS data.

The number of employees appointed under sections 209(f) and (g) increased overall at HHS by 25 percent from 2006 through 2010, as shown in table 1. Since 2006, the number of Title 42 employees grew by 15 percent at NIH, by 54 percent at FDA, and by 81 percent at CDC,

[14]All years are in calendar years unless otherwise stated.

[15]Title 42 employees in the Office of the Secretary served in offices within the PHS and Title 42 employees in other operating divisions served in operating divisions within the PHS.

while declining by 48 percent at the Office of the Secretary and all other operating divisions.

Table 1: HHS Operating Divisions Have Increased Their Use of Sections 209(f) and (g) Appointments, 2006 through 2010

Operating division	2006	2007	2008	2009	2010	Percent change[a]
NIH	4,238	4,389	4,569	4,721	4,879	15%
FDA	559	564	595	816	862	54
CDC	512	603	708	796	929	81
Other	52	45	44	38	27	(48)
Total	**5,361**	**5,601**	**5,916**	**6,371**	**6,697**	**25%**

Source: GAO analysis of HHS data.

[a]Figures in parentheses indicate a decrease.

The increased use of Title 42 authority came during a period when HHS made recruiting and retaining mission-critical elements of its workforce a priority. HHS's 2007-2012 Strategic Plan included strategic objectives: (1) recruiting, developing, and retaining a competent health care workforce, and (2) strengthening the pool of qualified health and behavioral science researchers. HHS officials generally attributed the increases in Title 42 employees to the agency's response to urgent public health matters and effects of the economic downturn on the private sector and academia, which, according to officials, made the agency more attractive to prospective or on-board employees. Specifically, according to HHS:

- The 15 percent increase from 2006 through 2010 at NIH can be attributed, in part, to the effects of the economic downturn on the biomedical research labor market. Officials told us that as extramural research funding available in the private sector and academia is shrinking, NIH is able to use Title 42 to more successfully recruit and retain biomedical investigators and clinical specialists.
- The spike in Title 42 appointments at FDA in 2008 and 2009 is a result of the Food and Drug Administration Amendments Act of 2007 and the Food Protection Plan, FDA's strategy for protecting the

nation's food supply.[16] Additionally, in 2008 FDA launched its first class of Commissioner's Fellows (hired under section 209 (g) for up to a two year period) beginning with 50 fellows, another class of 50 in 2009, and a third class of 45 in 2010.[17]

- At CDC, increased use of Title 42 was attributed to the urgency of certain programs such as the overseas Global AIDS Program and those under the Office of Public Health Preparedness and Response. For these programs, officials told us they needed employees with specialized scientific skills or training and experience and would not have been able to obtain them without Title 42.

As discussed later, we were unable to determine which section authority—sections 209(f) or (g)—was used more often because HHS section authority data was not reliable for this purpose.

As shown in table 2, NIH relies on Title 42 authority for a greater percentage of its total workforce than does FDA and CDC. In 2010, 25 percent of all NIH employees were Title 42 employees, while 10 percent of CDC employees and 6 percent of FDA employees were Title 42. NIH relied on Title 42 authority for a substantial portion—44 percent—of its total research and clinical practitioner workforce.[18]

[16]The Food and Drug Administration Amendments Act of 2007, among other things, increased FDA's oversight responsibilities for food, drug, and medical device safety. Pub. L. No. 110-85, 121 Stat. 823 (Sept. 27, 2007).

[17]FDA offers the Commissioner's Fellowship Program for health professionals and scientists to receive training and experience at the FDA. Fellows are to explore a specific aspect of FDA regulatory science including biology, physics, and epidemiology.

[18]To determine the number of researchers and clinical practitioners, we counted the number of operating division employees categorized as providing research, development, or clinical practice services in the Office of Personnel Management's Central Personnel Data File. Researchers are categorized as those who provide systematic, critical, intensive investigation directed toward the development of new or fuller scientific knowledge of the subject studied. Clinical practitioners are those who provide direct clinical and related medical services to patients/clients including examination, testing, diagnosis, treatment, therapy, casework, counseling, disability evaluation, and related patient care services. We also included those categorized as in development. Those individuals provide systematic application of scientific knowledge directed toward the creation of new or substantially improved equipment, devices, systems, mathematical models, and others.

Table 2: NIH Relied on Title 42 for a Greater Percentage of Its Total Workforce and Research and Clinical Practitioners than FDA and CDC, 2010

Agency	Title 42 employees	Total operating division workforce	Title 42 percentage of total operating division workforce	Total researchers and clinical practitioners	Title 42 percentage of researchers and clinical practitioners
NIH	4,879	19,292	25%	11,040	44%
FDA	862	14,617	6	10,025	9
CDC	929	9,707	10	5,817	16

Source: GAO analysis of HHS and CPDF data.

Title 42 Employees Serve in Various Functions

Title 42 employees at HHS serve in a variety of functional areas, including scientific and medical research support and in senior, director-level leadership positions. Base salary ranges for Title 42 employees varied by operating division and occupation. In 2010, almost 60 percent of Title 42 employees at NIH served in one of five general occupations: staff scientist, research fellow, senior investigator, clinical research nurse, and clinical fellow. Table 3 describes some of the general responsibilities and duties, educational characteristics, and salary data for these occupations at NIH.

Table 3: Most Common Title 42 Occupations at NIH and Characteristics

Occupation (number of Title 42 employees in 2010)	Characteristics	Salary[a]
Staff Scientist (1,103)	• Supports the long-term research of a senior investigator and independently designs experiments, but does not have responsibilities for initiating new research programs • Usually has a doctoral degree	• Base salary range: $82,000-200,000 • Average base salary: $118,000 • Median base salary: $114,000
Research Fellow (666)	• Scientists obtaining experience in biomedical research while providing a service relevant to the NIH's program needs • Has a doctoral degree	• Base salary range: $45,000-112,000 • Average base salary: $70,000 • Median base salary: $69,000
Senior Investigator (521)	• Has been granted tenure.[b] Some senior investigators are assigned organizational responsibilities in the institute or center, that is, section or branch chief • Has a doctoral degree	• Base salary range: $117,000-350,000 • Average base salary: $192,000 • Median base salary: $195,000
Clinical Research Nurse (347) [c]	• Specializes in the care of research participants and is responsible for assuring participant safety, formulating patient care plans, integrity of protocol implementation, accuracy of data collection, and recording • Nursing degree or diploma from a professional nursing program	• Base salary range: $62,000-96,000 • Average and median base salary: $78,000
Clinical Fellow (249)	• Participates in protocol-based clinical research (i.e., research with people serving as volunteer participants) as well as laboratory research • Has a doctoral-level health degree with interest in biomedical research relevant to NIH program needs	• Base salary range: $57,000-137,000 • Average base salary: $84,000 • Median base salary: $82,000

Source: GAO analysis of HHS data and documents.

[a]Salary figures as of 2010. All figures are rounded to the nearest thousand dollars.

[b]Tenure at NIH differs from tenure at an academic institution. Tenure at NIH is defined as the long-term commitment of salary, personnel, and research resources needed to conduct an independent research program within the scope of the institutes' missions, and subject to regular review. Tenure may be conferred on Title 42 employees despite the nonpermanent nature of the position.

[c]As part of the sunsetting of the Clinical Research Support pilot, NIH is currently phasing out Title 42 appointments for nurses.

At FDA and CDC, the most common occupation of Title 42 employees is a fellow. In 2010, 340 (39 percent) of FDA's Title 42 employees were staff fellows. These positions are for promising research and regulatory review scientists. In general, staff fellows at FDA conduct or support research,

provide technical direction and supervision to other researchers, publish scientific articles, and review contract and grant proposals designed to support their research projects. Staff fellows must have a doctoral degree in bio-medical, behavioral, or related science and, according to FDA policy, total compensation may not exceed certain pay limits ($155,500 in 2010) unless the Director of Human Resources and Management and Services grants an exception. FDA staff fellows' base salary range in 2010 is approximately $42,000 to $224,000, with an average base salary of about $96,000 and a median salary of about $92,000. Three of 340 staff fellows at FDA earned more than $155,500 in 2010.

Of CDC's Title 42 employees in 2010, 687 (74 percent) were senior service fellows or associate service fellows appointed to study areas such as basic and applied research in medical, physical, biological, mathematical, social, biometric, epidemiological, behavioral, computer sciences, and other fields directly related to the mission of CDC. Senior service fellows must have a doctoral degree and associate service fellows must have a master's degree. Senior service fellows had a base salary range in 2010 of approximately $49,000 to $155,500, with an average base salary of about $103,000 and a median salary of about $100,000. Associate service fellows had a base salary range of approximately $44,000 to $93,000, with an average base salary of about $69,000 and a median salary of about $71,000.

Some Title 42 Employees Are Paid Above Executive Salary Levels

The average base salary for all HHS Title 42 employees in 2010 was about $116,000 and the median salary was about $101,000. More than one-fifth of all Title 42 employees at HHS, however, earned a base salary above Executive Level IV ($155,500 in 2010). Congress regularly refers to executive salary levels in order to express minimum or maximum levels of pay authorized for positions in the federal government. For example, Congress has imposed a cap of Executive Level IV on salary (i.e., basic pay) rates where pay is fixed by administrative action under 5 U.S.C. § 5373. In a related effort to this audit, we are issuing a legal opinion on whether there are any statutory caps on pay for consultants and fellows appointed under 42 U.S.C. §§ 209(f) or (g), including whether the cap under section 5373 applies. Table 4 shows the number of Title 42 employees whose base salary is within or above the various Executive Salary Levels in 2010.

Table 4: HHS Title 42 Employees with Base Salaries within or Exceeding Federal Executive Salary Levels, 2010

Executive level	Number of Title 42 employees[a]
At or above Executive Level I ($199,700)	629
Within Executive Levels I and II ($179,700-199,699)	319
Within Executive Levels II and III ($165,300-179,699)	295
Within Executive Levels III and IV ($155,500-165,299)	218
Total	**1,461**

Source: GAO analysis of HHS data.

[a]The remaining 5,236 Title 42 employees had salaries below Executive Level IV ($155,500)

HHS has converted a number of employees from positions under the General Schedule or other pay systems to positions under Title 42. Of the 1,183 new Title 42 appointees in 2010, 45 of them—or about 4 percent—were current HHS employees that were converted to Title 42 positions. Thirty of these conversions occurred at NIH. We also found that employees converted to Title 42 from other pay systems generally earned higher compensation than in their previous position. Employees converted in 2010 earned, on average, $34,000 more in base salary than earned in their previous position. However, many did not receive the same amount of nonsalary payments (including retention incentives) received while employed under the General Schedule or other pay system. Therefore, the average increase in total compensation (base salary and incentive or other nonsalary payments) was about $14,000 in 2010.

Under HHS policy, Title 42 employees are eligible to receive performance bonuses; recruitment, retention, and relocation incentives; and other nonsalary payments that are available to other HHS employees.[19] In 2010, HHS issued nonsalary payments to 6,336 of its 6,697 Title 42 employees.[20] Seventy-one percent of Title 42 employees earned ratings-based individual cash awards. Less than 1 percent (60) of Title 42

[19]According to HHS, these nonsalary payments are not made under the Title 5 authorities providing for such payments, but rather are made under the compensation authority of 42 U.S.C. § 209(f) and (g).

[20]The dollar value of these nonsalary payments were not available on an individual basis in the data provided by HHS, and as a result we could not determine the range or average amount of the various types of nonsalary payments.

employees received nonsalary payments in the form of recruitment, retention, or relocation incentives.[21]

According to senior officials at HHS's human resource office and NIH, Title 42 authority provides two primary benefits—appointment agility and compensation flexibility. These officials said appointment agility enables the agency to hire scientists, doctors, and other consultants to quickly fill knowledge, skill, and ability gaps so that medical research can move forward and to respond to medical emergencies. For example, according to HHS officials, the agency used Title 42 authority to quickly hire experts needed to develop a vaccine in response to the H1N1 flu pandemic of 2009. Appointment agility is also important because many research projects, particularly those at NIH, are not meant to be long-term and Title 42 appointments can align with project time frames better than hiring full-time permanent staff under regular hiring authorities. In some cases, the temporary appointment of a researcher with highly-specialized skills to assist with a limited-scope, limited-duration study may be more appropriate than a permanent position.

According to officials, compensation flexibility helps HHS compete with the private sector and academia to hire and retain highly qualified employees with rare and critical skill sets, such as neuroscientists, applied researchers in dietary intakes, and engineers that can operate particle accelerators. HHS human resource officials stated the salaries HHS can offer to its top researchers are often not commensurate with private sector salaries. However, they said the higher compensation limits under Title 42 combined with other benefits—such as name recognition and access to advanced research equipment and technology not often available in the private sector or academia—can help offset compensation disparities and make HHS attractive to researchers, doctors, and scientists.

HHS Does Not Have Reliable Data on the Use of Its Title 42 Authority

Because HHS does not consistently electronically record the authority under which many of its Title 42 employees were appointed, the number of employees hired under either section 209(f) or (g) could not be determined. When an employee is hired under Title 42 authority, HHS

[21]Six of our case studies were Title 42 employees receiving an incentive payment, and in all six cases there was a documented basis supporting the need for the incentive.

human resource officials create a personnel record in its central personnel transaction system, the Enterprise Human Resources and Payroll (EHRP) system. A required field in the personnel record exists to select a code from a drop-down menu designating the general authority under which the individual was hired, such as Title 42 or Title 5 authority. The personnel record also contains an open-ended text field to manually enter a specific section authority such as sections 209(f) or (g), applicable to Title 42 authority. Our analysis of HHS data found thousands of cases where the section authority applicable to Title 42 was not recorded in EHRP. We also found that when the section authority field was used, there were more than 400 different types of entries made in the EHRP records.

According to HHS officials, there are some data elements in the EHRP system—including the section authority under Title 42—that are unreliable. The majority of the unreliable data elements are those from nonrequired data entry fields. Whereas required fields must be completed before a personnel action is saved in the system, Title 42 section authority is a free-form, open-ended field and there is no system control in place to ensure the field is recorded or recorded accurately prior to saving the personnel action. Our case reviews found the section authority for appointment—such as sections 209(f) or 209(g)—was always documented on hard copy personnel action forms, but in many cases was not recorded in personnel records in the EHRP system.

We have previously reported that effective workforce planning and management require that human capital staff and other managers base their workforce analyses and decisions on complete and accurate personnel data.[22] The lack of reliable information in this area may preclude HHS, Congress, and other organizations from providing effective oversight of the Title 42 program and evaluating its effectiveness.[23] For example, the lack of section authority data in EHRP has made it difficult for HHS to provide accurate headcounts of employees hired under sections 209(f) or (g) and resulted in HHS overstating the number and

[22]GAO, *Foreign Assistance: Strategic Workforce Planning Can Help USAID Address Current and Future Challenges*, GAO-03-946 (Washington, D.C.: Aug. 22, 2003).

[23]We conducted a variety of data tests and interviews with agency officials to correct and refine HHS Title 42 data and were able to develop a data set that was reliable for the purposes of this report.

operating division of its employees hired under these sections to oversight bodies, including Congress, and in response to this audit. We identified more than 600 instances where HHS erroneously included employees in its data submission to us that were not appointed under sections 209(f) or (g). Some erroneous cases included individuals we later found were hired under appointing authorities other than sections 209(f) or (g), including appointing authorities under 42 U.S.C. §§ 247b-8 and 210(g). One result of including these cases in error was HHS reported it had made appointments under 209(f) or (g) at the Centers for Medicare and Medicaid Services, which would be prohibited by law.[24] Our analysis found these appointments were made under different authorities.

HHS officials acknowledged there were potentially many cases included that were not employees hired under sections 209(f) or (g) as it was sometimes difficult to discern from available data whether employees were hired under sections 209(f) or (g), rather than other authorities under Title 42. According to human resource officials, when attempting to report on the agency's Title 42 employees, they chose to include questionable cases rather than risk an undercount.

HHS Did Not Consistently Adhere to Sections of Its Title 42 Policy and Lacks Guidance for Some Authority Provisions

Section 209(f) Hiring and Conversions

HHS did not consistently adhere to certain sections of its policy for hiring and converting employees under section 209(f). We conducted 28 case file reviews of appointments made under existing section 209(f) policy to determine the extent to which HHS practices were consistent with its

[24]HHS may only use sections 209(f) and (g) for appointments within PHS. According to HHS, the Centers for Medicare and Medicaid Services is not an operating division within the PHS.

policy.[25] While not generalizable across the population of Title 42 employees, the case file reviews indicate that HHS appointment practices are consistent with some aspects of its section 209(f) policy. For example, all appointees met education requirements for the type of scientific position being filled. While not an explicit requirement of the policy, HHS consistently documented the basis for compensation and any recruitment or retention incentives provided to section 209(f) employees. In some cases, however, HHS did not consistently adhere to its requirements, as shown in table 5.

[25]HHS Personnel Instruction 42-1 (August 2004).

Table 5: HHS Compliance with Certain Sections of Its Policy for Hiring and Converting Employees Under Section 209(f) for Cases Reviewed

Appointment requirement	Observations
Appointments under section 209(f) may only be used to fill scientific positions.	In 5 of 28 cases, it was unclear or questionable whether the individuals were performing scientific duties or needed scientific expertise to perform their responsibilities.
Appointments can only be made after other available personnel systems—including Title 5, the Senior Biomedical Research Service, and PHS Commissioned Corps—have failed to yield candidates that possess critical scientific expertise. These recruitment and retention efforts shall be documented prior to making an appointment under section 209(f).	In 23 of 28 cases no documentation was provided to show other non-Title 42 recruitment and retention efforts under available personnel systems and hiring authorities failed to yield the candidates with needed scientific expertise.
Conversions from other pay systems are only to be used in exceptional circumstances as outlined in this policy. A scientist may only be converted to [209(f)] from another pay system if he or she is appropriately peer-reviewed according to operating division procedures and determined to meet all of the following criteria: • Evidence of recognition as a national or international expert in the field. • Evidence of original scientific or scholarly contributions of major significance in the field. • Evidence of leadership in the field equivalent to a full-tenured professor in academia. • Special knowledge and skills of benefit to the agency.	HHS conversions met all of the requirements in two of six cases we reviewed of individuals converted to Title 42 209(f). In two other cases, conversions met some but not all of the criteria and in the remaining two cases, documentation was not available to support the basis for conversion.
In order to determine qualifications, supervisors must prepare a narrative statement fully describing the scientific duties and responsibilities and the education and experience to perform those duties.	HHS consistently prepared narrative statements describing the position's duties and responsibilities and the education and experience needed to perform those duties.
All appointees must meet positive education requirements for the type of scientific position being filled, which must include, at a minimum, a bachelor's degree in a scientific discipline directly related to the position.[a] In addition, appointees must have professional experience and stature that is commensurate with the duties of the position being filled.	Individuals hired under section 209(f) met or exceeded educational requirements and had professional experience related to the duties to be performed.

Source: GAO analysis of HHS documents.

[a]For some Title 42 occupations, a doctoral degree or nursing degree may also be required.

In accordance with HHS 2004 Title 42 policy, special consultants may only be appointed under section 209(f) to fill scientific positions; however, the policy included no formal criteria and did not define "scientific." We reviewed the statement of duties for 28 section 209(f) cases and found in 5 cases that it was unclear the position was scientific. For example, special consultants hired under section 209(f) included an individual providing pastoral care services, quality assurance specialists, health scientist administrators, and data management and technology administration. In one case, a protocol manager's duties and

responsibilities appeared to require scientific expertise in providing medical protocol services. It is possible that these and most other positions noted are scientific in nature or require knowledge of particular scientific disciplines, but it was not clear from the statement of duties and other supporting documentation provided by HHS on what basis these positions were considered scientific.

Additionally, the section 209(f) policy states appointments can only be made after other available personnel systems, including Title 5 and PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. These recruitment and retention efforts, according to the policy, are to be documented prior to making an appointment under section 209(f). In only 5 of the 28 section 209(f) case files we reviewed was there documentation showing HHS considered other personnel systems before using Title 42. In one case, the memorandum requesting approval to hire a 209(f) candidate included a template with each of the section 209(f) policy requirements and how each requirement was met. In explaining other recruitment efforts, the template showed (1) how the position was a top-level scientific position and therefore not appropriate for Title 5 or other authorities, (2) due consideration was given to the PHS Commissioned Corps, and (3) recruitment incentives would be insufficient in light of past efforts to recruit individuals with the requisite scientific experience.

The section 209(f) policy also includes guidance for converting employees from other pay systems into special consultant positions under Title 42. The policy states conversions are only to be used in exceptional circumstances and employees may only be converted to the Title 42 program if they meet all conversion criteria, such as providing leadership in a field equivalent to a full-tenured professor in academia and recognition as a national or international expert in the field. In our case reviews of six conversions to section 209(f), two cases met each of the requirements for converting employees. In one case where each of the requirements was documented, NIH officials developed a memorandum explaining the need to convert a radiologist because radiologists in the particular specialty are rare, several with similar skill sets recently left NIH, and the individual will be maintaining equipment critical for multiple clinical trial protocols.

For other case files we reviewed, documentation provided by HHS did not support the basis for conversion. In two cases, the stated purpose of conversion to Title 42 was to retain a clinical research nurse and a medical technologist. While the justifications showed how both cases

provided special knowledge and skills of benefit to the agency, the documents did not provide evidence of recognized national or international expertise in their field, leadership equivalent to a full-tenured professor, or original scientific or scholarly contributions, as required. In the other two cases, we could not determine if conversion requirements were met because HHS could not provide documentation needed.

In August 2010, HHS's Office of Human Resources reviewed the agency's use of section 209(f) authority and found two issues similar to those in our review. The review found that HHS section 209(f) policy did not define "scientific," and in the absence of a definition, it appeared the operating divisions adopted an interpretation that was most accommodating to the appointment. The review also found most appointment documentation lacked any information about prior recruitment and retention efforts. Recommendations from the audit report became the basis for a new 209(f) policy, which was issued in February 2012.[26] Significant changes to the 209(f) policy include:

- Defines "scientific position" to include positions in which the incumbent is directly involved in or manages scientific research or activities, and administrative positions that require the incumbent to have scientific credentials.
- Requires that the same recruitment plan be used for both Title 5 and Title 42 to demonstrate that other available personnel systems failed to yield qualified candidates. Further, the policy also explains the process and documentation requirements necessary to demonstrate that other available personnel systems, including Title 5, the Senior Biomedical Research Service, and PHS Commissioned Corps, have failed to yield qualified candidates.
- Identifies specific positions and/or categories of positions at NIH that may be filled through section 209(f) without "exhausting" other recruitment mechanisms or authorities.

Section 209(g): Appointing and Compensating Fellows

HHS has no agencywide implementing policy for appointing and compensating employees hired as fellows under section 209(g), including details about what documents are needed to support the basis for appointments and compensation. We have previously reported that

[26]HHS Human Resources Manual, Instruction 42-1: Appointment of 42 U.S.C. § 209(f) Special Consultants (Feb. 15, 2012).

agencies should have clearly defined, well-documented, transparent, and consistently applied criteria for appointing and compensating personnel.[27] In lieu of guidance from HHS, the individual operating divisions established their own policies and guidance for appointing and compensating fellows under 209(g), each with different levels of detail, compensation limits, and documentation requirements. NIH has instructions for appointing fellows as well as guidance for the use of recruitment and retention incentives. FDA's Service Fellowship Plan provides appointment and compensation setting procedures for section 209(g) fellows and caps total compensation at Executive Level IV, with some exceptions above that cap available for consideration. CDC's policy for its 209(g) Fellowship Program provides provisions for all fellows and general compensation guidance. Top pay for a fellow is set at the equivalent of the Grade 15, Step 10 pay level.

The lack of an HHS-wide policy poses the risk that compensation decisions for section 209(g) fellows at HHS may not be made consistently across operating divisions. Although some guidance exists at the operating division level for setting compensation targets, in 11 of the 20 case studies we conducted of section 209(g) fellows, we found either no or insufficient documentation to support the basis for compensation. Without an agencywide policy, an agency cannot be assured that it is allocating its resources most appropriately. According to senior human resource officials at HHS, an agencywide policy is needed and the agency is developing a policy for appointment and compensating fellows under 209(g). However, it is not clear that the policy will address important issues such as documenting the basis for compensation. The section 209(g) policy was still in development as of May 2012.

[27]GAO, *A Model of Strategic Human Capital Management*, GAO-02-373SP (Washington, D.C.: Mar. 15, 2002).

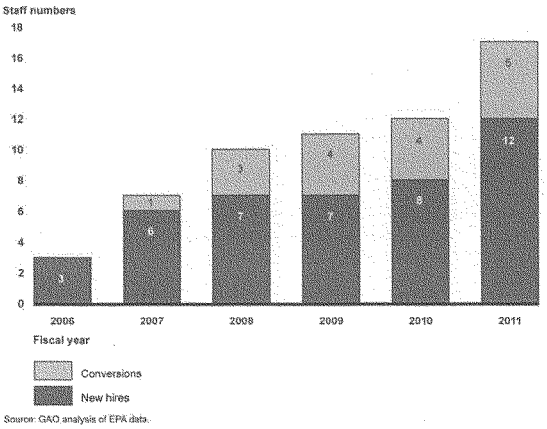
EPA Employs a Limited Number of Title 42 Fellows, Primarily in Leadership Roles

Congress provided EPA with the authority to use 42 U.S.C. § 209 to employ up to 30 persons at any one time through fiscal year 2015. EPA has appointed 17 fellows in ORD from 2006 to 2011 under section 209(g). Of the 17 fellows appointed under Title 42, 12 were hired from outside EPA, while the remaining 5 converted from other positions within EPA.[28] Of the 17 appointments, 14 were selected through advertised competition. To date, all 17 fellows remain with EPA and appointments for the three fellows hired in 2006 have been renewed for another 5-year term.[29] See figure 3 for the cumulative onboard Title 42 staff, by new hire or conversion.

[28]Of those hired from outside of EPA, 11 were from private industry or academia, and one from another federal agency.

[29]EPA policy provides that at the conclusion of their term, fellows with Title 5 permanent competitive status based on prior employment retain reinstatement eligibility but have no guarantee of return to a Title 5 position. Fellows who do not have Title 5 competitive status based on prior employment obtain no reinstatement eligibility due to service in a Title 42 position. In this case, if the employee is interested in a Title 5 position following the Title 42 appointment, they are subject to the normal application and competitive selection process.

Figure 3: Cumulative Number of EPA Title 42 Staff, 2006 through 2011



Source: GAO analysis of EPA data.

According to EPA officials, the agency has identified mission critical personnel needs and is actively recruiting to fill the 13 remaining authorized Title 42 positions. The agency has no plans to use authority under section 209(f) at this time, but may consider it in the future. Officials told us EPA would need to develop guidance for implementing section 209(f) before using the authority.[30]

According to agency documents, Title 42 fellows at EPA lead scientific research initiatives, are considered experts in the related scientific discipline, and some manage or direct a division or office. For example:

[30]In response to a National Academy of Sciences National Research Council report in 2000, EPA modeled its Title 42 program after the NIH program. NIH had already implemented its program and many structural aspects of the program are similar.

- One Title 42 fellow manages and provides oversight for research in an integrated systems toxicology research program, was previously an Associate Dean at a university where the individual led similar research efforts, and leads an ORD division with more than 80 staff.
- Another leads a research program by developing biological measures to assess the impact of environmental exposure on human health and serves as Director for the Environmental Public Health Division.
- The lead scientist for bioinformatics within the National Center for Computational Toxicology (NCCT) is a Title 42 fellow, responsible for conducting data analysis and developing solutions for data management, and serving as senior advisor to the center's director.

According to EPA officials, Title 42 provides two important tools EPA needs to achieve its mission. First, EPA reported that Title 42 provides the flexibility to be competitive in recruiting top experts who are also sought after by other federal agencies, private industry, and academia. Prior to using Title 42, EPA had difficulty recruiting and retaining scientists in certain highly specialized disciplines under regular hiring authorities. We reported in 2001 that EPA faced significant challenges in recruiting and maintaining a workforce with mission-critical skills in key technical areas such as environmental protection, environmental engineering, toxicology, and ecology.[31] EPA officials told us Title 42 has helped the agency recruit individuals in cases where, because of the specialization of expertise needed, authority to set pay over the limits of other hiring authorities was needed to be competitive in the labor market. As such, the minimum base salary for Title 42 employees at EPA is equal to the highest base pay level for employees paid under the General Schedule, and the maximum base salary is $250,000.[32]

EPA officials also stated Title 42 provides the appointment flexibility needed to align experts with specific skills to changing scientific priorities. One specific program where EPA cited the importance of using Title 42 in that way was in the development of the NCCT. There are four Title 42 fellows at NCCT, including its director. The fellows assist in the development of NCCT initiatives, such as the Computational Toxicology

[31]GAO, *Human Capital: Implementing an Effective Workforce Strategy Would Help EPA to Achieve its Strategic Goals*, GAO-01-812 (Washington, D.C.: July 31, 2001).

[32]Grade 15, Step 10 of the General Schedule at EPA's research facilities where Title 42 employees work include $152,364 at Research Triangle Park in North Carolina and $153,542 in Cincinnati, Ohio.

Research Program, a program that is developing alternatives to traditional animal testing. A 2010 review by the National Academy of Sciences National Research Council reported "the use of Title 42 appointments to develop NCCT is an excellent example of how such appointments can be used to build new capacity and advance the state of science."[33] EPA officials stated it is not the agency's intention to hire a fellow long-term under Title 42, but rather employ the individual as long as a priority remains high. For the three fellows hired in 2006, EPA renewed the terms for another 5-year appointment.

Annual salaries range from approximately $153,000 to $216,000, with an average salary of about $176,000 and a median salary of about $171,000. As shown in table 6, 15 of the 17 EPA fellows had salaries exceeding Executive Level IV.

Table 6: Number of EPA Title 42 Fellows with Salaries in Federal Executive Salary Levels, 2010

Executive level	Number of fellows
At or above Executive Level I ($199,700)	3
Within Executive Levels I and II ($179,700-199,699)	3
Within Executive Levels II and III ($165,300-179,699)	4
Within Executive Levels III and IV ($155,500-165,299)	5
Below Executive Level IV ($155,500)	2

Source: GAO analysis of EPA data.

Of the 12 new hires from outside EPA, 8 earned more in annual pay than earned in the position previously held, 3 earned less than in their previous position, and 1 appointee's salary did not change. Salary changes from previous positions ranged from a decrease of $85,000 to an increase of $40,000, not including recruiting incentives. Eight of the 12 new hires received recruitment incentives ranging from $10,000 to $50,000. EPA documents indicate that the recruitment incentives were offered to compete with private industry and to aid in career transition. All five employees converted from other positions within EPA received a salary increase, ranging from $6,000 to $15,000. None of the converted employees received incentive payments.

[33]National Research Council of the National Academy of Sciences, *The Use of Title 42 Authority at the U.S. Environmental Protection Agency: A Letter Report* (April 2010).

Converted employees generally assumed additional responsibilities as a Title 42 employee. Our case studies included four of the five EPA employees who converted to Title 42. Of the four appointees who came from within EPA, one was promoted from the lead oil research program scientist to the director of the land remediation and pollution division, one moved from being an associate director to a division director within the same national center, one was promoted from a branch chief to a division director, and one remained a director.

In December 2010, EPA began a pilot of using market salary data to estimate salaries of what Title 42 candidates could earn in positions outside of government given their education, experience, professional standing, and other factors. EPA used the market salary data to inform salary negotiations for the five fellows appointed since the implementation of the pilot. According to EPA officials, the market salary pilot concludes in December 2012 and its effect will be analyzed at that time.

EPA Appointment and Compensation Practices Were Generally Consistent with Its Guidance, but EPA Could Improve Resolution of Potential Conflicts of Interest

In appointing Title 42 fellows, EPA generally followed appointment guidance described in its Title 42 Operations Manual. The manual provides guidance for managers, supervisors, and human resources specialists implementing Title 42. In all 10 case files we reviewed, documents provided by EPA show Title 42 practices were generally consistent with its guidance and requirements. Table 7 shows some selected Title 42 appointment requirements and observations from our case reviews.

Table 7: EPA Appointment and Compensation Practices Were Generally Consistent with Guidance

Appointment guidance	Observations
Fellows appointed under Title 42 will be assigned duties in major or significant areas of scientific inquiry in support of environmental protection.	In all 10 cases, EPA assigned the Title 42 employee to leadership positions within ORD's scientific research areas.
For all Title 42 positions, a doctoral-level degree from an accredited institution of higher learning is required.[a]	In all 10 cases, Title 42 employees had doctoral-level degrees from accredited institutions of higher learning. Appointees have doctorates in areas such as human genetics, soil microbiology, chemistry, environmental science, biophysical ecology, synthetic organic chemistry, biology, medicine, and anatomy.
Each Title 42 appointee will have a written position description which describes principal duties.	In all 10 cases, there was a written position description describing the background and need for the position, major duties and responsibilities, and supervisory controls.
Title 42 positions may be recruited through advertised competition, direct-hire without advertised competition, or the conversion of a current EPA employee hired under a regular hiring authority with or without advertised competition.	In 8 of the 10 cases we reviewed, Title 42 positions were advertised. In one case, an employee was hired without advertisement, but was identified through a previous announcement for a different position. One case was a converted employee hired without advertised competition.
Title 42 appointees must have conducted outstanding research in a field of environmental science or engineering that is related to the mission of the ORD.	In all 10 cases, EPA provided documentation showing the Title 42 employee was actively engaged in peer reviewed original research.
Prior to entry on duty, appointees must provide a job offer acceptance letter, completed background investigation form, completed public financial disclosure report (SF-278), written acknowledgement of ethics agreement, and proof of appropriate employment visa, if applicable.	All new Title 42 employees to the agency provided the required documentation. EPA did not conduct new background investigations for converted fellows who had a background investigation upon original employment with the agency.
The Assistant Administrator of the Office of Research and Development (AA-ORD) or designee will approve or disapprove recommendations for appointment.	The ORD Assistant Administrator's approval was documented in all cases.
Title 42 appointments will be made initially for a period ranging from 1 year and 1 day to 5 years. Such an appointment may be extended for varying periods, not in excess of 5 years for each period, and requires approval by the AA-ORD or designee upon a written request by the Title 42 appointee's immediate supervisor.	EPA appointed all Title 42 employees for a period of 5 years.

Source: GAO analysis of EPA documents.

[a]In response to the National Academy of Sciences National Research Council report, EPA has implemented a two-year pilot to waive the requirement that all Title 42 employees have a doctoral-level degree. The report noted "[t]hat requirement may exclude many highly qualified scientist and engineers who do not have such degrees." The report continued, "EPA should be flexible, taking such situations into account and making exceptions as appropriate."

EPA Could Improve Procedures for Resolving Potential Conflicts of Interest

We conducted 10 case file reviews of EPA Title 42 employees and in 2 cases we discovered issues related to EPA's procedures for mitigating potential financial conflicts of interest.[34] EPA's Title 42 employees are subject to the same laws and regulations that govern the ethical conduct of other federal employees. For example, covered Title 42 employees are required to submit a public financial disclosure report (SF-278) as part of the appointment process and annually thereafter. Title 42 employees are also covered under the criminal conflict of interest law, 18 U.S.C. § 208. Section 208 prohibits a federal employee from participating personally and substantially in a particular matter in which he or she has a personal financial interest.[35] The statute is intended to prevent an employee from allowing personal interests to affect his or her official actions and to protect governmental processes from actual or apparent conflicts of interest. The application of the statute can be waived so that an employee need not divest his or her financial interest or recuse themselves from the particular matter, where the nature and size of the financial interest and the nature of the matter in which the employee would participate are unlikely to affect an employee's official actions.[36]

EPA's Title 42 guidance includes pre-employment ethics clearance procedures for identifying and mitigating potential conflicts of interest prior to appointment. As part of the procedures, an ethics official in EPA's Office of General Counsel (OGC/Ethics) works with the candidate to ensure that all required information is reported on the disclosure form and to develop an ethics agreement, as necessary, to mitigate or resolve any identified potential conflicts. A job offer may only be extended after OGC/Ethics signs the public financial disclosure report.[37] Although EPA has preappointment ethics clearance procedures as noted above, it does not have postappointment procedures in place to ensure Title 42 employees meet ethics requirements to which they have previously

[34]We did not conduct a similar review of ethics compliance at HHS because, unlike EPA, HHS has not included ethics procedures in its guidance specific to appointing and compensating Title 42 employees.

[35]Section 208 also prohibits an employee from participating in a particular matter in which certain persons or organizations, with which he or she is affiliated, have a financial interest.

[36]5 C.F.R. § 2640.101.

[37]The signature of the agency ethics official indicates the filer is in compliance with applicable laws and regulations.

agreed. In two cases we reviewed, employees had potential conflict of interest situations arise after appointment resulting, in part, from the agency's failure to ensure Title 42 employees followed agreed upon ethics requirements.

- In one case, EPA general counsel determined stock owned by the candidate could be a potential conflict of interest and directed the candidate to either recuse himself from certain duties or divest himself of the stock as a condition of employment. The candidate agreed to divest of the stock and was subsequently hired. A year later, during the routine review of the employee's annual financial disclosure form, EPA discovered that the employee still owned the stock. The employee was ordered to divest of the stock and this time immediately complied. EPA also reviewed the projects for which the employee was involved while still owning the stock and determined that the employee had not participated in any particular matter which would have constituted a conflict of interest. According to EPA, there was confusion concerning who, if anyone, was tasked to ensure the divestiture occurred.
- In another case, based on the review of the candidate's public financial disclosure form, EPA and the candidate entered into an ethics agreement, which documented ethical constraints that would apply to the candidate and to caution the candidate about certain assets held. The agreement listed entities in which the individual held stock and advised that, as required by 18 U.S.C. § 208, the individual should not participate in any particular matter that affected any of the listed entities unless the individual first obtained a written waiver from EPA/OGC or the value of the asset was low enough to qualify under a regulatory de minimis exemption.[38] Despite these efforts, a year later, while responding to the employee's request for additional time to file the annual public financial disclosure form, EPA discovered that the employee was participating in a matter while holding stock in a company (a listed entity in the ethics agreement) that EPA/OGC initially believed could be affected by this matter. Concluding that the

[38]Waivers of conflicts of interest are authorized under 18 USC § 208(b)(1) where an agency determines, in an individual case, that a disqualifying financial interest in a particular matter is not so substantial as to be deemed likely to affect the integrity of the employee's service to the government. 5 C.F.R. § 2640.301. Under the regulatory *de minimis* exemption provision of 18 U.S.C. 208(b)(2), if an individual owns less than the designated amounts, the individual may participate in the matter. Descriptions of the various exemption thresholds for interests in securities are found at 5 C.F.R. § 2640.202.

employee's participation was a conflict of interest, EPA/OGC directed the employee, who had been working on the matter for approximately 3 days, to immediately stop working on the matter. The employee immediately complied and sold the stock holding in question in order to resume working on the matter. OGC/Ethics made no inquiry into the specific activities the employee engaged in during those 3 days. Almost 2 years later, OGC/Ethics officials now conclude that this company was not sufficiently affected by the matter to present a violation of 18 U.S.C. § 208 in light of facts that subsequently emerged.

EPA officials acknowledge that beyond these two cases, its efforts to identify and mitigate potential conflicts of interest after appointment can be improved and have taken steps to improve ethics oversight. For example, in order to increase overall awareness of ethics responsibilities, EPA reported it provided additional training to a senior ethics official and now copies Deputy Ethics Officials – officials responsible for assisting employees in being compliant with ethics requirements – when cautionary memoranda are issued. EPA also told us it has plans to develop mandatory training sessions for ethics officials in its field laboratories and centers and implement a process where employees hired under the Title 42 and other authorities send EPA OGC confirmation of such actions as stock divestitures or signed recusals. As details and implementation timelines for these plans were not available at the time of our review, it is not clear that these plans fully consider and address ethics issues that arise after appointment and ensure previously agreed upon ethics requirements are followed, as was the issue in the two cases above.

Conclusions

HHS and EPA have used Title 42 to recruit and retain highly skilled, in-demand personnel to government service. Although HHS relies on Title 42 to fill some of its most critical scientific and medical research positions, the lack of complete data and guidance may limit the agency's ability to strategically manage the use of the authority. HHS erroneously reported appointments made under sections 209(f) and (g) that would have been prohibited by law, indicating the agency's data management practices may preclude effective oversight of the program and workforce planning. Effective oversight is particularly important in light of HHS's increasing use of Title 42 and the number of employees earning salaries higher than most federal employees. Inconsistencies between HHS's policies and practices related to section 209(f) may result in that authority being used in ways for which it was not intended. Recent changes to 209(f) policy issued by HHS should help the agency more consistently follow

requirements. As appointments have been made under 209(g) without documentation showing the basis for compensation, relying on 209(g) guidance issued only at the operating division level may not be sufficient to ensure appointments and compensation under this authority are appropriate and consistent. HHS has acknowledged the need for agencywide 209(g) guidance, but has not determined if it will include requiring documentation showing the basis for compensation. EPA generally followed its Title 42 policies and has incorporated some modifications to improve its appointment and compensation practices; however, EPA's current ethics guidance does not sufficiently ensure Title 42 employees meet ethics requirements after appointment. EPA acknowledged it could improve its postappointment ethics oversight and reported it has plans to ensure that Title 42 employees send OGC confirmation of stock divestitures and other ethics requirements. However, at the time of our review, EPA had not provided us with implementation plans or timeframes. Although its plans appear to be prudent steps for addressing the specific issues that arose in the cases we reported, it will be important for EPA to implement them as soon as possible to mitigate the risk of future potential conflict of interest issues.

Recommendations for Executive Action

To help ensure HHS has the data and guidance necessary to effectively oversee and manage its Title 42 authority, we recommend that the Secretary of HHS take the following three actions:

- Ensure section authority—sections 209(f) or (g)—be consistently entered in appropriate automated personnel systems, such as making section authority a required, drop-down field in its personnel system where this information is initially entered.
- As part of its effort to implement new section 209(f) guidance, systematically document how policy requirements were fulfilled when hiring or converting 209(f) employees. This could include such items as:
  - the basis for which the position is considered scientific,
  - recruitment and retention efforts made under other hiring authorities before using Title 42,
  - a conversion's recognition as a national or international expert in the field,
  - a conversion's original scientific or scholarly contributions of major significance in the field,
  - a conversion's leadership in the field equivalent to a full-tenured professor in academia, and

- a conversion's special knowledge and skills of benefit to the agency.
- As part of its ongoing effort to develop agencywide policy for appointing and compensating employees hired under section 209(g), ensure the policy requires and provides guidance for documenting the basis for employee compensation.

To help improve enforcement of ethics requirements, we recommend the Administrator of the EPA direct the Designated Agency Ethics Official:

- As part of its efforts to improve postappointment ethics oversight, develop and document a systematic approach for ensuring Title 42 employees are compliant with ethics requirements after appointment. Implement, as part of this approach, reported plans to require Title 42 employees to provide proof of compliance with ethics agreements to a designated ethics official within a reasonable timeframe after appointment.

Agency Comments and Our Evaluation

We provided the Secretary of Health and Human Services and the Administrator of the EPA an opportunity to comment on a draft of this report. The HHS Assistant Secretary for Legislation and EPA's Acting Assistant Administrator for Research and Development provided written responses and technical comments, which we incorporated as appropriate. The agencies' comments appear in appendix II and III.

In a June 7, 2012, letter responding to a draft of this report, HHS agreed with each of the three recommendations. HHS's ongoing and proposed actions noted in the response address our concerns and are likely to improve the agency's management and oversight of its Title 42 authority.

HHS agreed with our first recommendation to ensure section authority is consistently entered in appropriate automated personnel systems. Specifically, HHS stated that as it moves forward with the implementation of a new enterprise human resources system, it will explore the possibility of using a drop-down field to enter Title 42 section authority. HHS stated that its Office of Human Resources will continue to work with the Operating Divisions and Staff Divisions to ensure that Title 42 personnel actions are processed in a consistent and accurate manner.

HHS also agreed with our two recommendations addressing Title 42 policies. HHS stated that, in part due to our findings, it updated its section 209(f) policy to address our concern that HHS document how policy requirements were fulfilled when hiring or converting section 209(f)

employees. In addition, HHS agreed with our recommendation to develop agencywide policy for appointing and compensating employees hired under section 209(g) authority. HHS stated that the section 209(g) policy will be implemented in the near future.

In a June 6, 2012, letter responding to our draft, EPA disagreed with the recommendation directed to EPA and our discussion of the second ethics case. Specifically, EPA requested that we update our discussion to note that the individual had not yet visited a site related to work on the matter. EPA stated that since the individual had not yet visited the site, EPA is not aware of any evidence that the employee personally and substantially participated in the matter.

We do not believe a change in the discussion of this ethics matter is warranted. GAO made no independent conclusions as to whether the individual's participation during the brief period of time we note constituted personal and substantial participation in the matter and whether this was a conflict of interest in violation of 18 U.S.C. § 208. Rather, our discussion of this case, including whether the individual's participation was a conflict of interest, was based exclusively on and attributed to conclusions made by EPA/OGC, both at the time of the event and in subsequent interviews conducted for this engagement.

Specifically, documentary evidence at the time of our review supports the fact that EPA's concern was the individual's participation in the matter in general, and that EPA's concern was not influenced by the fact that the individual was not yet on site. As we reported, EPA/OGC directed the individual to stop working on the matter when it found he owned stock in a company that could be affected by the matter he was working on (the individual immediately stopped working on the matter and sold the stock in order to resume working on this matter.)

EPA disagreed with our statement that it is not clear that EPA plans to develop an approach to address ethics issues that arise after appointment and ensure previously agreed upon ethics requirements are followed. In its comments, EPA noted that on February 17, 2012, it sent us a letter documenting the steps it has taken and plans to take to address postappointment ethics issues and ensure previously agreed upon ethics requirements are followed. Specifically in its February letter, EPA reported it recently implemented a process in which they now copy Deputy Ethics Officials when cautionary memoranda are issued to OGE 278 filers. EPA also reports it has plans to implement a process for public filers, including employees hired under the Title 42 special hiring

authority, to ensure that they send OGC confirmation of stock divestitures, for example, or signed recusals.

We agree that providing cautionary memoranda to the officials responsible for assisting the employee in remaining compliant with ethics requirements is a step that could improve EPA's postappointment ethics oversight and added this example to the report accordingly. However, because EPA did not provide a firm date or timelines for implementing its reported plan to ensure employees send OGC confirmation of stock divestitures or signed recusals, we did not revise the finding.

EPA disagreed with the recommendation that it develop and document a systematic approach for ensuring Title 42 employees are compliant with ethics requirements after appointment and consider adding steps to the ethics clearance process that require Title 42 employees to provide proof of compliance with ethics agreements. EPA asked that we remove the recommendation or revise it to acknowledge the plans mentioned above and that EPA continues working towards implementation.

We acknowledge EPA is considering a plan to require proof of compliance with ethics agreements and, because we believe this is a prudent and needed step for improved ethics oversight, have revised the recommendation to reflect EPA's plans. As the two ethics issues we reported occurred over two years ago and EPA has acknowledged improvements in its postappointment ethics oversight are needed, such plans should be implemented as soon as possible. We maintain that the recommendation is still necessary to ensure EPA develops detailed plans and begins moving toward implementation as soon as possible to mitigate the risk of additional potential conflict of interest issues.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees. We are also sending copies to the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-2757 or goldenoffr@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on

the last page of this report. GAO staff who made key contributions to this report are listed in appendix IV.

Robert Goldenkoff

Robert N. Goldenkoff
Director, Strategic Issues

Appendix I: Objectives, Scope, and Methodology

This report examines the extent to which the Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) have (1) used authority under 42 U.S.C. §§ 209(f) and (g) to appoint and set pay for employees since January 2006, and (2) followed applicable agency policy, guidance, and internal controls for Title 42 appointments and compensation.

To address the first objective, we obtained and analyzed personnel data from HHS and EPA to describe Title 42 appointment and compensation trends at HHS and EPA since 2006, including the number of Title 42 employees; the types of occupations and positions held by Title 42 employees; compensation rates, including the number of Title 42 employees earning more than certain federal salary levels; the number of nonsalary payments (e.g., performance bonuses and retention incentives) provided to Title 42 employees and their purpose; and the number of civil servants that have been converted to Title 42 appointments and compensation changes associated with those conversions. We determined 2006 was the most appropriate beginning year for our analysis because, according to HHS human resource officials, personnel data prior to 2006 was likely not sufficiently reliable for our analysis. Also, EPA began using Title 42 in 2006. HHS data presented in this report is 2006 through the end of 2010, the last year of complete data available; and at EPA, 2006 through the end of 2011.

We conducted a variety of data tests and interviews with agency officials to correct and refine HHS Title 42 data and were able to develop a data set that was sufficiently reliable for our purposes. We could not, however, report on the number of HHS Title 42 employees hired under a particular section authority—sections 209(f) or (g)—because section authority is not consistently recorded by HHS. For EPA, we performed data testing and interviewed agency officials to identify any data gaps or inconsistencies with compensation data provided and compared EPA data to information found in official agency documents. We determined that EPA's data were sufficiently reliable for the purposes of our report.

To assess the extent to which HHS and EPA have followed applicable policy, guidance, and internal controls, we reviewed the policies and guidance at HHS and EPA in order to understand the conditions under which Title 42 appointees are to be recruited, appointed, compensated, and managed. We determined case file reviews would be the most appropriate approach to obtain the information needed to (1) compare practices with policy and guidance, and (2) provide illustrations and context for data analysis results. We conducted a total of 63 case file

reviews out of 1,502 HHS cases within selected strata in two phases. In the first phase, we conducted 23 case file reviews to address data reliability concerns. The number of case file reviews in this phase was proportional to the frequency with which we identified and observed cases with data characteristics that deviated from our understanding of the purpose and use of sections 209(f) and (g). In the second phase, we conducted 40 case file reviews based on a random selection of cases that had characteristics related to various areas of HHS Title 42 policy and guidance.

For the HHS case file selection, cases were grouped into strata based on certain characteristics—such as hired under section 209(f), hired under section 209(g), newly hired in 2010, converted in 2010, or with aspects of data inconsistent with our understanding of Title 42's purpose—and randomly selected from within those strata. For EPA, we selected 10 of the 17 Title 42 employees for case file reviews based on a cross section of (1) labs and centers within EPA to understand if Title 42 was implemented uniformly across the agency; (2) Title 42 candidate sources such as the private sector, academia, and conversions to determine if differences existed in recruitment and pay setting; (3) length of service as a Title 42 employee to understand the effect of recent appointment and compensation guidance; and (4) compensation characteristics. We developed a data collection instrument for both HHS and EPA file reviews to capture information that was uniform and comparable.

At the conclusion of each phase of our case file reviews, we analyzed the results and recorded our observations and listed the next steps—such as interviews with agency officials and further data analysis—needed to obtain further context for our observations. The results from the case file reviews and subsequent activities enabled us to understand the results of our data analyses and provided the basis for findings. We determined the number of case file reviews was sufficient to identify incidences where practices were or were not consistent with policies and guidance, but our findings are not generalizable to the entire population of sections 209(f) and (g) employees at HHS or EPA.

We conducted this performance audit from May 2011 through July 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Comments from the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

JUN 7 2012

Robert Goldenkoff
Director, Strategic Issues
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Mr. Goldenkoff:

Attached are comments on the U.S. Government Accountability Office's (GAO) report entitled: "Human Capital: HHS and EPA Can Improve Practices under Special Hiring Authorities" (GAO-12-692).

The Department appreciates the opportunity to review this draft section of the report prior to publication.

Sincerely,

Jim R. Esquea
Assistant Secretary for Legislation

Attachment

GENERAL COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENTITLED, "HUMAN CAPITAL: HHS AND EPA CAN IMPROVE PRACTICES UNDER SPECIAL HIRING AUTHORITIES" (GAO-12-692)

The Department appreciates the opportunity to respond to GAO's report on the use of Title 42 appointment and compensation authorities at HHS under 42 U.S.C. § 209 (f) and (g) (together, Title 42). HHS has no major disagreement with the facts as represented in the draft report. As noted, HHS uses these sections to appoint and compensate key scientific personnel, including some of our most senior leadership positions. As these sections are the key mechanisms available to recruit and retain vital scientific staff for HHS, we agree that the GAO recommendations will serve to strengthen the use of the authority.

The Department's responses to GAO's recommendations are below:

GAO Recommendation:

Ensure section authority – 209(f) or (g) – be consistently entered in appropriate automated personnel systems, such as making section authority a required, drop-down field in its personnel system where this information is initially entered.

HHS Response:

HHS agrees with this recommendation and recognizes the need to improve the accuracy of personnel data for appointments under both 42 U.S.C. § 209 (f) (42 209(f)) and 42 U.S.C. § 209 (g) (42 209(g)) and is committed to doing so. In response to our internal review and the subsequent GAO engagement, HHS has undertaken and will continue to undertake definitive steps to effectively oversee and manage the HHS Title 42 authority and ensure consistency in entering section authority – 209(f) or (g) – in appropriate automated personnel systems.

Specifically, we have:

1) Launched a data validation effort to review and correct inaccuracies in the current HHS HR database;
2) Developed, published, and mandated use of the New HR Data Processing Guide for HR Specialists and those with HR Data entry responsibilities; and
3) To ensure greater consistency and oversight at the corporate level, moved forward with the implementation of an Enterprise HR IT end-to-end system scheduled to launch next fall.

As HHS moves forward with the implementation of this new enterprise-wide automated human resources system, we will also explore the possibility of using a drop down field to enter the Title 42 209(f) and (g) appointment information. As the method for documenting the appointments is finalized in this new system, the HHS Office of Human Resources will continue to work with the Operating and Staff Divisions to ensure that Title 42 personnel actions are processed in a consistent and accurate manner.

1

GENERAL COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENTITLED, "HUMAN CAPITAL: HHS AND EPA CAN IMPROVE PRACTICES UNDER SPECIAL HIRING AUTHORITIES" (GAO-12-692)

GAO Recommendation:

As part of its effort to implement new section 209(f) guidance, systematically document how policy requirements were fulfilled when hiring or converting 209(f) employees.

HHS Response:

HHS agrees with this recommendation. In response to our internal review and GAO's findings during this engagement, HHS updated its policy regarding the use of 42 U.S.C. § 209(f). The policy, issued February 15, 2012, addresses GAO's recommendations. Specifically, it includes:

- A definition of scientific position;
- A detailed explanation of the process and documentation requirements necessary to demonstrate that other available personnel systems, including Title 5, failed to yield candidates that possess critical scientific expertise; and
- States that a scientist may only be converted to a 42 U.S.C. § 209(f) appointment from another pay system if he/she is appropriately peer-reviewed according to the requirements outlined in the instruction and OPDIV procedures and is determined to meet all the following criteria:
    1. Evidence of recognition as a national or international expert in the field, such as: specific experience, invited manuscripts, presentations, and consultations; receipt of honors and/or awards; or other recognition for noteworthy performance or contributions to the field;
    2. Evidence of original scientific or scholarly contributions of major significance in the field;
    3. Evidence of leadership in the field; and
    4. Special knowledge and skills of benefit to the agency.

2

GENERAL COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENTITLED, "HUMAN CAPITAL: HHS AND EPA CAN IMPROVE PRACTICES UNDER SPECIAL HIRING AUTHORITIES" (GAO-12-692)

GAO Recommendation:

As part of its ongoing effort to develop agency-wide policy for appointing and compensating employees hired under 209(g), ensure the policy requires and provides guidance for documenting the basis for employee compensation.

HHS Response:

HHS agrees with this recommendation and will soon implement the recommendation. HHS's Title 42 209(g) policy, which will be issued in the near future, will require Operating Divisions to establish service fellowship plans/programs that prescribe, in writing, the conditions under which service fellows are appointed and hold their fellowships. This includes, but is not limited to, compensation.

Specifically, it will state that Operating Divisions are responsible for the establishment of service fellowships, or a series of service fellowships and shall prescribe, in writing, the conditions under which service fellows will be appointed and hold their fellowships. In addition, there is a compensation section that requires the following:

- Salaries for individuals appointed on a full-time schedule will be set on a per annum basis commensurate with the applicant's qualifications, experience, and other factors as described below. Appointments that are on other than a full-time basis will be paid on a pro-rata basis of an annualized salary;
- Base salary will be set at the lowest rate necessary to recruit the candidate. In determining the base salary, management must consider such factors as:
    - Qualifications and stature of the individual in his/her professional field;
    - Salary the Fellow may be expected to receive outside the federal government for work similar to their fellowship assignment;
    - Specialized skills/training, and experience that the applicant may possess that will benefit the agency/program; and
    - Consistency of pay with others in the organization; and
- Base salary may not exceed the rate set in accordance with Section 202 of Pub. L. No. 102-394.

3

Appendix III: Comments from the Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 06 2012

OFFICE OF
RESEARCH AND DEVELOPMENT

Mr. Robert N. Goldenkoff
Director
Strategic Issues
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Goldenkoff:

Thank you for the opportunity to review and comment on GAO's draft report "*HUMAN CAPITAL: HHS and EPA Can Improve Practices Under Special Hiring Authorities.*" Although we received a copy of the entire draft report, we want to clarify that the Environmental Protection Agency's (EPA) response letter only speaks to the portions pertaining to our Agency.

EPA appreciates GAO's recognition of our efforts to improve our Title 42 appointment and compensation practices. However, the Agency has significant concerns with regard to some of the ethics information that has been stated in your draft report. The purpose of this letter is to provide EPA's response to both the remaining areas of concern while also addressing the recommendation you have provided to EPA in your draft report.

In your draft report, you state (page 35):

> "*In two cases we reviewed, employees had potential conflict of interest situations arise after appointment resulting, in part, from the employee's failure to follow agreed upon requirements.*"

EPA respectfully disagrees with this statement; specifically the second example included in your draft report (pages 35 – 36). As your draft report mentioned, EPA and the candidate entered into an ethics agreement which documented ethical constraints that would apply to the candidate and cautioned the candidate about certain assets held. We would like to clarify that, while responding to the employee's request for additional time to file the annual public financial disclosure form, EPA discovered that the employee was making arrangements to travel to a particular site to work on a new matter. The Ethics Staff in EPA's Office of General Counsel (OGC/Ethics) reviewed his last OGE 278 filing to determine whether any of his assets posed a

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potential conflict of interest for the new matter. He held stock in a company (a listed entity in the ethics agreement) that OGC/Ethics initially believed could be affected by this matter.

Out of an abundance of caution, OGC/Ethics concluded that the employee's stock presented a potential conflict of interest, and OGC/Ethics directed the employee to not work on the matter or to immediately divest; the latter of which the employee chose to do. It is important to note that the individual had not yet visited the site, so we are not aware of any evidence that would suggest the employee personally and substantially participated in the matter, which under 18 U.S.C. § 208 would be required to qualify as a conflict of interest. We ask that your final report be updated accordingly.

In your draft report, you state (page 36):

> *"EPA officials acknowledge that...its efforts to identify and mitigate potential conflicts of interest can be improved and have taken steps to improve ethics oversight."*

EPA respectfully disagrees with this statement. We believe this statement may have resulted from confusion with regard to a statement EPA previously provided GAO. Therefore, we would like to clarify that, during the pre-appointment process, OGC/Ethics, working through the respective Deputy Ethics Official, identifies and conducts a thorough review of all possible ethics issues. EPA does agree that during the post-appointment process, EPA could provide better oversight to ensure that employees follow through in understanding what they need to do to be in compliance with the ethics rules. We ask that you update your final report to reflect this clarification.

In your draft report, you state (page 36):

> *"It is not clear, however, that EPA plans to develop an approach to address ethics issues that arise after appointment and ensure previously agreed upon ethics requirements are followed, as was the issue in the two cases above."*

EPA respectfully disagrees with this statement. On February 17, 2012, we sent a letter to your staff outlining plans EPA has recently implemented or will soon implement that will address ethics issues that arise after appointment and ensure previously agreed upon ethics requirements are followed. As outlined in this letter, OGC/Ethics recently implemented a new process in which they now copy Deputy Ethics Officials when cautionary memoranda are issued to OGE 278 filers. EPA believes that this is a significant step in addressing ethics issues that may arise after appointment. Previously, the filer was simply informed of his or her ethical considerations. Other examples were also mentioned in this letter as it pertains to EPA's plans to implement processes that will ensure previously agreed upon ethics requirements are followed. Therefore, we ask that you update or remove this language as appropriate, including the similar statement you have included on the bottom of page 37 of your draft report.

GAO Recommendation #4 (only one addressed to EPA): *"As part of its efforts to improve ethics oversight, develop and document a systematic approach for ensuring Title 42 employees are compliant with ethics requirements after appointment. Consider, as part of this approach, adding steps to the Title 42 ethics clearance process that require Title 42 employees to provide proof of compliance with ethics agreements to a designated ethics official within a reasonable timeframe after appointment."*

EPA Response: As previously mentioned in this letter, we sent a letter to your staff on February 17, 2012 that outlined plans EPA has recently implemented or will soon implement that will address ethics issues that arise after appointment and ensure previously agreed upon ethics requirements are followed. One step that EPA outlined in the letter was a plan to implement a process for public filers, including employees hired under the Title 42 special hiring authority, to ensure that they send OGC confirmation of stock divestitures, for example, or signed recusals. We believe that this plan already addresses the recommendation that you provided to EPA in your draft report. We ask that you remove this recommendation or, at the very least, update the recommendation's language to acknowledge the plans mentioned above and that we continue working towards implementation. If you choose to include a revised recommendation, we ask that you address it to the Designated Agency Ethics Official who has the statutory requirement for overseeing ethics within the Agency.

In closing, we want to thank you again for the opportunity to review and respond to the draft GAO report. If you have any questions, please do not hesitate to contact me.

Sincerely,

Lek Kadeli
Acting Assistant Administrator for
Research and Development

Enclosure

cc: Scott Fulton, General Counsel, OGC
Barbara J. Bennett, Chief Financial Officer, OCFO
Craig Hooks, Assistant Administrator, OARM

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact	Robert N. Goldenkoff, (202) 512-2757 or goldenkoffr@gao.gov
Staff Acknowledgments	In addition to the individual named above, Trina Lewis, Assistant Director; Shea Bader; Carl Barden; Laurel Beedon; Andrew Ching; Sara Daleski; Jeffrey DeMarco; Karin Fangman; Ellen Grady; James Lager; Cynthia Saunders; Jeff Schmerling; and Gregory Wilmoth made major contributions to this report.

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B-323357

July 11, 2012

The Honorable Denny Rehberg
Chairman
Subcommittee on Labor, Health and Human Services,
Education, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

The Honorable Joe Barton
House of Representatives

The Honorable Michael Burgess
House of Representatives

Subject: *Pay for Consultants and Scientists Appointed under Title 42*

This responds to your request for our views on whether there are statutory caps on pay for consultants and scientists appointed pursuant to 42 U.S.C. §§ 209(f) or (g), and specifically whether the pay cap under 5 U.S.C. § 5373 applies.[1] To answer this question, we address several issues. First, we consider the effect of an appropriation provision that restricts pay for individuals appointed on a limited-time basis pursuant to 42 U.S.C. §§ 209(f) and (g). Then, we examine two provisions in title 5 of the United States Code that also limit pay. The first is 5 U.S.C. § 3109,

[1] You also asked GAO to perform audit work on the extent to which the Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) have used this authority and followed applicable guidance. *See,* GAO, *Human Capital: HHS and EPA Can Improve Practices under Special Hiring Authorities*, GAO-12-692 (Washington, D.C.: July 9, 2012).

which limits pay for consultants "procure[d]" on a temporary or intermittent basis. The second is 5 U.S.C. § 5373, which limits pay fixed by administrative action.

In brief, we find that the appropriations law provision enacted in 1993 established a permanent appropriation cap on the pay of individuals appointed on a limited-time basis under 42 U.S.C. §§ 209(f) and (g) at agencies funded through the Labor-HHS-Education Appropriations Act. With regard to the two title 5 limitations, we think these pay limitations do not apply to appointments made pursuant to 42 U.S.C. §§ 209(f) or (g).

At the outset, we note the extraordinary complexity of the federal pay systems and the difficulties we have encountered in attempting to resolve ambiguities arising from pay laws enacted at different times over nearly 70 years. Sections 209(f) and (g) of title 42 were enacted in 1944 and have not been amended since that time. There have, however, been many significant changes in related laws and regulations since 1944 that may be relevant to the interpretation of 42 U.S.C. §§ 209(f) and (g). One court, in deciding similar issues, has noted the inherent complexity of resolving ambiguities in this area of the law. In 1983, in *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 539 (C.A.D.C. 1983), the court noted that there were six separate federal pay systems, plus "depending on the degree of disaggregation, over forty other, separate pay systems." The statutory scheme has only become more complex since 1983. In formulating our views, we conducted extensive research of legislative history to aid in our understanding of congressional actions and the interplay of the laws addressed below, and examined regulations issued pursuant to these provisions over the last 65 years. We also solicited the views of the Department of Health and Human Services (HHS) and the Office of Personnel Management (OPM).[2]

BACKGROUND

The authority for special consultants and scientists appointed to fellowships within the Public Health Service contained in 42 U.S.C. §§ 209(f) and (g) was enacted as part of the Public Health Service Act, as amended,[3] which reads as follows:

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[2] Our practice when issuing decisions and opinions is to develop a factual record on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. The record in this case consists of the request letter and the views of the Department of Health and Human Services and the Office of Personnel Management.

[3] Pub. L. No. 410, sec. 208(c) and (d), 58 Stat. 682, 686 (July 1, 1944); amended by Pub. L. No. 425, sec. 5, 62 Stat. 38, 40 (Feb. 28, 1948), redesignated section 208 as section 207 and redesignated subsections (c) and (d) as subsections (e) and (f);

(continued...)

> "(f) In accordance with regulations, *special consultants* may be employed to assist and advise in the operations of the Service. Such consultants may be appointed without regard to the civil-service laws and their compensation may be fixed without regard to the Classification Act of 1923, as amended."
>
> "(g) In accordance with regulations, individual scientists, other than commissioned officers of the Service, may be designated by the Surgeon General to *receive fellowships*, appointed for duty with the Service without regard to the civil-service laws and compensated without regard to the Classification Act of 1923, as amended, may hold their fellowships under conditions prescribed therein, and may be assigned for studies or investigations either in this country or abroad during the terms of their fellowships."[4]

(Emphasis added). Subsection (f) applies to special consultants ("consultants"), while subsection (g) applies to scientists designated to receive fellowships ("scientists" or "fellows"). This authority was an expansion of authorities that had been given to the National Cancer Institute.[5] These provisions of the Public Health

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(...continued)
Pub. L. No. 84-492, §3(b), 70 Stat. 116 (Apr. 27, 1956), redesignated subsections (e) and (f) as subsections (f) and (g).

[4] Additionally, 42 U.S.C. § 210(f) provides that fellows appointed "shall have included in their fellowships such stipends or allowances . . . as the Surgeon General may deem necessary to procure qualified fellows."

[5] According to the accompanying report, the authority to hire special consultants was intended to broaden to all branches of the Public Health Service an authority that had been previously conferred to the National Cancer Institute. H.R. Rep. No. 78-1364, at 8 (1944). The National Cancer Institute Act, Pub. L. No. 244, §5(d), 50 Stat. 559, 561 (Aug. 5, 1937) authorizes the Surgeon General to secure "from time to time and for such periods as may be advisable, the assistance and advice of experts, scholars, and consultants from the United States or abroad who are learned and experienced in the problems" related to the research and treatment of cancer. The authority in the National Cancer Institute Act contains no mention of the application of civil service or classification laws. The accompanying report to the Public Health Service Act provides that the exemptions from the civil service and compensation laws were a confirmation of the existing situation. The report accompanying the Act states that the authority to appoint fellows to the Public Health Service was a similar expansion of an authority originally conferred on the National Institutes of Health and the National Cancer Institute. H.R. Rep. No. 78-1364, at 8 (1944).

Service Act, as included in the United States Code, omit as obsolete the references to "compensation . . . without regard to the Classification Act of 1923, as amended." The United States Code serves as an editorial compilation of federal statutes and as *prima facie* evidence of the law for titles that have not been enacted as positive law.[6] 1 U.S.C. § 204(a); *United States National Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). Since Title 42 has not been enacted into positive law, the language of the Public Health Service Act as included in the Statutes at Large, rather than the United States Code, is controlling. Therefore, the language regarding compensation "without regard to the Classification Act of 1923" remains effective, and we include that language in our analysis.

The Public Health Service first issued regulations implementing section 209(f) for consultants on October 24, 1947, and regulations for section 209(g) for scientists on September 16, 1947.[7] The regulations for consultants specified that "[n]o such consultant shall be employed for an aggregate of more than one-half of the number of working days of any fiscal year unless the Administrator, because of special circumstances, shall approve an extension thereof." The regulations also placed limits on the duration of fellowships of periods not to exceed 16 months, which could be extended or renewed.[8]

In 1956, in its appropriations for the Public Health Service for fiscal year ending June 30, 1957, Congress included a pay cap, providing that "compensation to consultants or individual scientists appointed for limited periods of time pursuant to [42 U.S.C. §§ 209(f) and (g)] at rates established by the Surgeon General [shall] not . . . exceed $15,000 per annum."[9] As discussed below, this "cap" authorized the Public Health Service to pay special consultants and fellows at a higher rate of pay than otherwise allowed at that time.

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[6] Positive law codification is the process of preparing and Congress enacting, one title at a time, a revision and restatement of the general laws of the United States. A title of the United States Code that has been enacted into positive law is itself legal evidence of the law. 1 U.S.C. § 204(a).

[7] Regulations for special consultants were published at 12 Fed. Reg. 6,924 (Oct. 24, 1947). Regulations for fellows were published at 12 Fed. Reg. 6,199 (Sep. 16, 1947).

[8] 42 C.F.R. § 61.12 (1949).

[9] Pub. L. No. 84-635, 70 Stat. 423, 430 (June 29, 1956). The language of the provision refers to sections 207(f) and (g) of the Public Health Service Act, which are codified at 42 U.S.C. §§ 209(f) and (g). For ease of discussion, the references to the United States Code sections will be used throughout this opinion.

The appropriations for each fiscal year from 1957 through 1993 included a cap on pay for "consultants or individual scientists appointed for limited periods of time" pursuant to 42 U.S.C. §§ 209(f) or (g). The appropriations for fiscal year 1993 established a permanent cap on such compensation, providing that pay may be set at rates not to exceed "the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376."[10]

In 1966, all functions of the Public Health Service were transferred to the Secretary of Health, Education, and Welfare (HEW).[11] After the reorganization, HEW revised its regulations "to reflect current requirements" and removed the language limiting the number of days in a fiscal year that special consultants could be employed.[12] Current regulations do not contain such limits.[13] HHS also issued regulations governing the appointment, duration, and compensation of fellows which include time limits on the appointment of fellows.[14]

Finally, in 2005, Congress extended to the Environmental Protection Agency (EPA) authority to hire a limited number of scientists pursuant to 42 U.S.C. § 209.

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[10] Pub. L. No. 102-394, §202, 106 Stat. 1792, 1810-1811 (Oct. 6, 1992).

[11] Reorg. Plan No. 3 of 1966, eff. June 25, 1966, 31 Fed. Reg. 8855 (June 25, 1966), 80 Stat. 1610. The Secretary of the Department of Health, Education and Welfare has since been redesignated as the Secretary of Health and Human Services.

[12] 31 Fed. Reg. 12,939 (Oct. 5, 1966).

[13] These regulations, found at 42 C.F.R. § 22.3, read as follows:

(a) When the Public Health Service requires the services of consultants who cannot be obtained when needed through regular Civil Service appointment or under the compensation provisions of the Classification Act of 1949, special consultants to assist and advise in the operations of the Service may be appointed, subject to the provisions of the following paragraphs and in accordance with such instructions as may be issued from time to time by the Secretary of Health and Human Services.

(b) Appointments, pursuant to the provisions of this section, may be made by those officials of the Service to whom authority has been delegated by the Secretary or his designee.

(c) The per diem or other rates of compensation shall be fixed by the appointing officer in accordance with criteria established by the Surgeon General.

[14] The regulations authorize a fellow to receive "such stipend as is authorized by the Secretary for each service fellowship or series of service fellowships," and for each service fellowship to have an initial appointment of varying periods, not to exceed 5 years, and to be extended for varying periods not to exceed 5 years. 42 C.F.R. pt. 61, subpt. B.

DISCUSSION

The Appropriation Pay Cap

Under the U.S. Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .." Art. 1, § 9, cl. 7. This power of the purse means that Congress, through its authority to appropriate funds, can determine the terms under which an appropriation may be used. *See, e.g., New York v. United States*, 505 U.S. 144, 167 (1992); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

As discussed previously, since fiscal year 1957, pay for consultants and scientists appointed for a limited period of time pursuant to sections 209(f) and (g) has been capped by appropriations acts for most components of the Public Health Service. The first cap, in the appropriations bill for the fiscal year ending June 30, 1957, authorized pay "not to exceed $15,000 per annum."[15] In response to our inquiry, HHS stated that the existence of a restriction in an appropriations act supports the analysis that the compensation authority is otherwise unrestricted.[16] Our review of the legislative history of the first appropriation to contain the limit indicates that it was enacted due to other restrictions in law on compensation authority, and that the authorization for pay not to exceed $15,000 per annum was an increase over then existing pay authority.

The provision appeared in the appropriation bill (H.R. 9720) originally passed by the House, but it was limited to appointments made to the National Institutes of Health (NIH). The report from the House Committee does not explain why this provision was added. H. Rep. No. 84-1845 (1956). However, in testimony before the House Subcommittee on the Departments of Labor, and Health, Welfare, and Education, and Related Agencies of the Committee of Appropriations, Dr. James A. Shannon, the Director of the National Institutes of Health, noted that NIH had "the ability to bring in non-Government scientists from laboratories and clinics for indefinite periods of time," but a "practical problem exists in that we have to stay within salary levels of the civil service of a grade 15 job as far as compensation is concerned."[17]

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[15] Pub. L. No. 84-635, 70 Stat. 423, 430 (June 29, 1956).

[16] Letter from Acting General Counsel, Department of Health and Human Services, to Assistant General Counsel for Strategic Issues, GAO (Dec. 30, 2011) (HHS Letter), at 1.

[17] *Labor-Health, Education, and Welfare Appropriations for 1957, Hearings before the Subcommittee of the Committee on Appropriations, United States House of*

(continued...)

According to Dr. Shannon's testimony, at that time the limitation was equal to $12,600.

In hearings before the Senate, the following comment from the Public Health Service on the provision was placed on the record:

> "The compensation of such scientists and consultants is limited by existing authority to the highest salary in grade 15 of the Classification Act. It is anticipated that the increase authorized by the House will make it easier for the National Institutes of Health to bring in non-Government scientists from laboratories and clinics for indefinite periods of time.
>
> The language as written in the House bill is inequitable in that it does not apply to scientists and consultants who may be utilized in other parts of the Public Health Service .... Uniform authority could be provided to all parts of the Public Health Service if the language . . . were modified by deleting the words "by the National Institutes of Health."[18]

The Senate Committee recommended removing the limitation of the authority to personnel at the National Institutes of Health and extending it to the entirety of the Public Health Service. S. Rep. No. 84-2093, at 12 (1956). From the statements made in hearings referenced above, it is clear that this "cap" authorized the Public Health Service to pay consultants and scientists at a higher rate of pay than what the Public Health Service believed it could pay. The record does not indicate the specific basis on which HHS determined in 1956 that the compensation authorities under sections 209(f) and (g) were limited to the highest salary in grade 15.

Each appropriation for the Public Health Service from FY 1957 through FY 1993 contained a limitation on pay for consultants and scientists appointed for limited

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(...continued)
Representatives, 84th Cong. 530 (1956) (Statement of Dr. James A. Shannon, Director, National Institutes of Health).

[18] *Labor-Health, Education, and Welfare Appropriations for 1957- Hearings on H.R. 9720 Before the Subcommittee of the Committee on Appropriations, United States Senate,* 84th Cong. 327-329 (1956) (Statement of Dr. Jack C. Haldeman, Chief, Division of General Health Services). Both Dr. Shannon and Dr. Haldeman use the phrase "indefinite periods of time" to describe the length of appointments pursuant to sections 209(f) and (g). As discussed above, the regulations at that time indicate that all such appointments were of limited duration. We do not know what the actual practice of Public Health Service was in 1956.

periods of time under sections 209(f) and (g) with identical language each year (except for amount).[19] The limit became permanent in the FY 1993 Labor/HHS/Education Appropriation, which stated:

> "Appropriations in this or any other Act *or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts* shall be available for...the payment of compensation to consultants or individual scientists *appointed for limited periods of time* pursuant to section 207(f) or section 207(g) of the Public Health Service Act, at rates established by the Assistant Secretary for Health, or the Secretary where such action is required by statute, not to exceed the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376."[20]

(Emphasis added). Generally, a provision in an annual appropriation act is effective only for that fiscal year, as appropriations acts are, by their nature, non-permanent legislation. B-319414, June 9, 2010. The presumption of non-permanence can be overcome, however, if the provision of law contains language indicating futurity. The provision in the 1993 Appropriations Act contains the phrase "in this or any other Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts." The words "this or any other Act," standing alone, are not words of futurity. *Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001); 65 Comp. Gen. 588 (1986); B-230110, April 11, 1988.

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[19] The first such provision limited pay to rates not to exceed $15,000 annually. Pub. L. No. 85-67, 71 Stat. 210, 217 (June 29, 1957). The appropriation for the fiscal year ending June 30, 1960, increased the limit to rates not to exceed $19,000 annually. Pub. L. No. 86-158, 73 Stat. 339, 347 (Aug. 14, 1959). The appropriation for the fiscal year ending June 30, 1965, increased the limit to rates not to exceed $24,500. Pub. L. No. 88-605, 78 Stat. 959, 967 (Sep. 19, 1964). In 1970, the limit was changed again, this time to "not to exceed the per diem rate equivalent to the rate for GS-18." Pub. L. No. 91-204, 84 Stat. 23, 44 (March 5, 1970). Each annual appropriation contained the provision limiting pay at that rate until 1991. On November 5, 1990, Congress passed the Federal Employees Pay Comparability Act of 1990 which, among other things, replaced references to GS-18 with references to 5 U.S.C. § 5376. Pub. L. No. 101-509, § 529, 104 Stat. 1389, 1433 (Nov. 5, 1990). The appropriation for fiscal year 1992, described the limit as "not to exceed the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376." Pub. L. No. 102-170, 105 Stat. 1107, 1140 (Nov. 26, 1991).

[20] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-394, § 202, 106 Stat. 1792, 1810-1811 (Oct. 6, 1992).

However, when used in conjunction with other language, the result is different.[21] In this case, the addition of the phrase "or *subsequent* Labor, Health and Human Services, Education Appropriations Acts" clearly indicates Congressional intent that the pay limitation become permanent law. These are words of futurity. HHS agrees that this language constitutes words of futurity and as such the pay limitation continues to be in effect.

The appropriation provision limits the rate of pay to no more than "the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376." The maximum rate of basic bay for senior level positions under section 5376 when the permanent appropriation cap was enacted was set at level IV of the Executive Schedule. Subsequently, in 2008, 5 U.S.C. § 5376 was amended to allow for a higher maximum compensation of up to Executive Level II for Senior Level and Scientific and Professional employees covered by a performance appraisal system certified by the Office of Personnel Management.[22] However, since the appropriation cap was enacted prior to the 2008 amendment of section 5376, its reference to section 5376 is to be interpreted as referring to the lower pre-amendment level.[23] As such, the maximum rate payable under this provision is the rate of basic pay (excluding locality pay) payable for level IV of the Executive Schedule, which currently is $155,500.[24]

HHS asserts that the appropriation provision pay cap applies only to appointments made on a limited-time basis because of the language limiting its application to consultants and scientists employed "*for limited periods of time* pursuant to

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[21] *See*, B-230110, April 11, 1998, finding the addition of the phrase "with respect to any fiscal year" to constitute words of futurity; B-309704, Aug. 28, 2007, "with respect to any fiscal year"; B-316510, July 15, 2008, "beginning in fiscal year 2008 and thereafter."

[22] Senior Professional Performance Act of 2008, Pub. L. No. 110-372, 122 Stat. 4043 (Oct. 8, 2008).

[23] In its guidance to agencies, OPM directed that existing references to pay at the maximum rate payable under 5 U.S.C. § 5376 in statutes enacted prior to April 2, 2009, are to be interpreted as references to the previously authorized pay rates. *See* OPM guidance under Compensation Policy Memorandum 2009-06.

[24] The locality adjusted rate is capped at level III of the Executive Schedule, which is currently, $165,300. The President's pay agent is delegated the authority to provide locality pay for employees not otherwise eligible. 5 U.S.C. § 5304(h). The President's pay agent has not authorized locality pay for employees appointed under 42 U.S.C. §§ 209(f) or (g).

[42 U.S.C. §§ 209(f) or (g)]" (emphasis added).[25] We considered the meaning of the phrase "for limited periods of time," which has appeared in all of the relevant appropriations provisions from 1956 to 1993. In 1956, when this language was first included in the appropriations law, the Public Health Service's regulations included time limitations on employment. It stated:

> No such consultant shall be employed for an aggregate of more than one-half of the number of working days of any fiscal year unless the Administrator, because of special circumstances, shall approve an extension thereof.

42 C.F.R. § 22.3 (1949). Thus the time limit generally applied to all consultant appointments made under section 209(f) beginning in 1947, when the regulation containing the limit was first promulgated, unless "special circumstances" led the administrator to approve an extension. Further, the limit was in effect in 1956, when the first appropriations law provision referring to consultants appointed for "limited periods of time" was enacted.

However, as noted in the Background section, this time limitation was removed from the regulations in 1966. 31 Fed. Reg. 12,939 (Oct. 5, 1966). Thus under the regulations at that time, the appropriations pay cap applied to all section 209(f) consultants from 1956 until HHS changed the regulations in 1966 allowing for the hiring of consultants for indefinite periods. But, although the regulations implementing section 209(f) no longer included a time limitation on the employment of special consultants after 1966, the appropriations provisions for 1967 and subsequent years, using virtually identical language each year, imposed a cap only on pay of "consultants or individual scientists appointed for limited periods of time pursuant to [42 U.S.C. §§ 209(f) or (g)]." The appropriations restriction did not impose any cap on pay for those consultants whose appointments were not limited in time. The result is that, after the 1966 regulations were promulgated and continuing to the present, HHS has employed two categories of consultants: those appointed for limited periods of time, to whom the pay cap applies, and consultants appointed for indefinite periods, to whom the pay cap does not apply. At present, according to HHS, the consultants employed for term appointments under section 209(f) and all scientists employed pursuant to section 209(g) are considered by HHS to be employed for limited periods of time.

Importantly, the appropriations pay restriction is applicable only to payments made from Labor-HHS-Education Appropriations Acts. Three components of the Public Health Service (the Agency for Toxic Substances and Disease Registrations, the

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[25] HHS Letter dated Dec. 30, 2011, at 1. Appointments of fellows pursuant to section 209(g) are all made on a limited-time basis and are therefore covered by the appropriation cap.

Food and Drug Administration, and the Indian Health Services)[26] are funded by appropriations acts other than the Labor-HHS-Education Appropriations Act, and are not covered by a restriction on funds appropriated under that Act. Therefore, this limitation on pay does not apply to the pay of consultants and scientists employed by these agencies.[27]

In sum, we conclude that there is a cap of Executive Level IV on the pay of consultants and scientists employed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) in all but three of the Public Health Service Agencies.

Statutory Pay Caps

The permanent appropriation restriction applies by its terms only to limited time appointments funded by Labor-HHS-Education Appropriations Acts. The specific language of sections 209(f) and (g) as enacted contains no cap on compensation for consultants or scientists, nor any limit on the length of consultants' employment.[28] Thus, we still need to examine the applicability of two pay caps found in title 5: section 3109, which limits pay for consultants "procure[d]" on a temporary or intermittent basis, and section 5373, which limits pay fixed by administrative action.

Pay Cap under 5 U.S.C. § 3109

We consider whether individuals appointed pursuant to sections 209(f) and (g) are covered by the provision governing length of service and amount of pay for "experts

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[26] Funding for the National Institute of Environmental Health Sciences is shared between Interior-Environment and Labor-HHS-Education appropriations. Library of Congress, Congressional Research Service, Locate an Agency or Program Within Appropriation Bills, No. R40858 (Oct 20, 2009).

[27] According to HHS, the Public Health Service consists of the following components: the Office of the Assistant Secretary for Health, the Office of Global Affairs, the Office of the Assistant Secretary for Preparedness and Response, the Federal Occupational Health Service, the Agency for Healthcare Quality and Research, the Agency for Toxic Substances and Disease Registrations, the Centers for Disease Control and Prevention, the Food and Drug Administration, the Health Resources and Services Administration, the Indian Health Service, the National Institutes of Health, and the Substance Abuse and Mental Health Services Administration. HHS Letter dated Dec. 30, 2011, at 3-4.

[28] Section 209(g) refers to a "term" of employment for scientists who receive a fellowship. HHS agrees that all appointments of fellows under section 209(g) are limited-time appointments.

and consultants" currently codified at 5 U.S.C. § 3109. Originally enacted in 1946,[29] section 3109 has been amended several times and today provides in relevant part:

> "When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants.... Services procured under this section are without regard to—
>
> (1) the provisions of this title governing appointment in the competitive service; [and]
>
> (2) chapter 51 and subchapter III of chapter 53 of this title;[30]
>
> However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title (GS-15) only when specifically authorized by the appropriation or other statute authorizing the procurement of the services."

5 U.S.C. § 3109(b).

Whereas 42 U.S.C. §§ 209(f) and (g) are independent authorities authorizing the appointment of consultants and fellows, 5 U.S.C. § 3109 is not. Instead, it establishes specific legal parameters, including a pay cap and a limit on appointment duration, governing the employment of experts or consultants whose appointment must be authorized by an "appropriation or other statute." That pay cap applies unless a different cap is authorized by the appropriation or another statute.

In 1992, Congress added subsection (d) to section 3109. It directs OPM to prescribe regulations necessary to administer section 3109. OPM subsequently issued regulations, which provide that they do not apply to the appointment of experts or consultants under other authorities. 5 C.F.R. § 304.101. OPM stated in its reply to our question that it "does not consider the cap under 5 U.S.C. § 3109 to apply to consultants under 42 U.S.C. § 209(f)." Letter from General Counsel, Office of Personnel Management, to Assistant General Counsel, GAO (Nov. 22, 2011) at 1.

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[29] Pub. L. No. 600, § 15, 60 Stat. 806, 810 (Aug. 2, 1946). Sections 209(f) and (g) were enacted in 1944. See footnote 3.

[30] As discussed below, chapter 51 and subchapter III of chapter 53 of this title are references to the Classification Act of 1949.

GAO has only addressed the interaction of section 3109 and section 209(f) once. In 1947, shortly after the passage of section 3109, but well before Congress gave OPM authority to issue regulations under section 3109, GAO was asked by a certifying officer for the Public Health Service whether the pay of a consultant who had been appointed pursuant to section 209(f) was limited by the then recently enacted section 3109.[31]

Since section 3109 refers only to consultants whose services are procured "by contract," the certifying officer inquired whether it applied to a consultant who had been "appointed" under section 209(f). GAO found nothing in the legislative history to indicate that section 3109 was intended to "distinguish between an employment agreement in the form of an appointment and an employment agreement in the form of a formal contract." GAO then determined that section 3109 was intended to apply to all temporary or intermittent employment of experts or consultants, regardless of the type of employment agreement. At the time of the 1947 decision, all appointments made pursuant to section 209(f) were time-limited appointments, and section 3109 places a pay cap on temporary appointments, applying generally where there is no other specific cap. Since no other pay rate was specifically provided by 42 U.S.C. § 209(f) or in the appropriations act at that time, a special consultant hired pursuant to section 209(f) was not entitled to be compensated at a rate in excess of that authorized by section 3109.

However, subsequent to the 1947 decision, Congress, by its actions, signaled that section 3109 did not apply to section 209(f) appointments. Beginning in 1956 and continuing until 1993, Congress enacted provisions yearly in appropriations acts that set a cap (which may or may not have been higher than that found in section 3109 in any given year) for all those appointed pursuant to sections 209(f) and (g) for a limited period of time and funded out of the Labor-HHS-Education Appropriations Act. From fiscal year 1970 until the provisions became permanent in fiscal year 1993, the appropriations acts for HHS contained separate provisions placing identical compensation limits for experts and consultants subject to 5 U.S.C. § 3109, and for consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g). One could argue that identical provisions would have been unnecessary if Congress believed that the limitations in 5 U.S.C. § 3109 would apply to 42 U.S.C. §§ 209(f) and (g) consultants or scientists.

[31] The certifying officer also asked about a provision that was part of the Federal Employees Pay Act of 1945. This provision prohibited payment at a rate in excess of $10,000, and applied only to pay provided pursuant to the Classification Act of 1923. Since section 209(f) authorized compensation "without regard to the Classification Act of 1923," GAO concluded that the provision of the Federal Employees Pay Act of 1945 did not limit the consultant's pay. 27 Comp. Gen. 46 (1947).

We must also consider that in 1992, Congress assigned OPM the responsibility for enforcing 5 U.S.C. § 3109 and issuing regulations necessary for administration of its provisions.[32] OPM, in its regulations, explicitly states that the limitations under 5 U.S.C. § 3109 do not apply to consultants hired pursuant to other hiring authorities.[33] OPM's interpretation is entitled to considerable weight as the agency charged with administering it. In determining how much "deference" or weight should be accorded an agency interpretation, the Supreme Court in *Chevron, Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), formulated its approach to deference in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 42. In this case, we think it clear that Congress did not expressly address the interaction of the title 5 and title 42 hiring authorities. Then, under *Chevron,* we must determine whether OPM's determination is reasonable, or whether it is arbitrary and capricious. Generally, when the agency's interpretation is in the form of a regulation, the deference is at its highest.[34] As mentioned earlier, OPM has determined that section 3109 does not apply to consultants hired pursuant to other hiring authorities. In light of the discussion above, we find OPM's interpretation reasonable.

Therefore, we follow OPM and conclude that the provisions of section 3109 do not apply to consultants employed pursuant to 42 U.S.C. § 209(f).[35]

Pay Cap under 5 U.S.C. § 5373

The other pay cap that we consider is found in section 5373 of title 5 of the United States Code, which places limits on pay fixed by administrative action. Pay fixed by administrative action refers to the various pay-setting authorities in which pay is determined by the agency instead of pursuant to pay rates under otherwise applicable statutory pay systems, such as the General Schedule.[36] Congress first

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[32] Technical and Miscellaneous Civil Service Amendments Act of 1992, Pub. L. No. 102-378, §2(8), 106 Stat. 1346, 1347(Oct. 2, 1992).

[33] 5 C.F.R. § 304.101.

[34] For an extensive list of Supreme Court cases giving *Chevron* deference to agency statutory interpretations found in rulemaking or formal adjudication, see *United States v. Mead Corp.,* 533 U.S. 218, 231 at n. 12 (2001). The Supreme Court has stated that when Congress leaves ambiguity in a statute, "it is for agencies, not courts, to fill statutory gaps." *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005).

[35] We also find that to the extent that the 1947 GAO decision conflicts with this conclusion, it is overruled.

[36] Examples of statutory pay systems include those pay rates established for the General Schedule (subchapter III of chapter 53 of title 5 of the United States Code),

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enacted section 5373 as part of the Government Employees Salary Reform Act of 1964, 20 years after it passed sections 209(f) and (g). Section 5373 reads as follows:

> a) Except as provided . . . by the Government Employees Salary Reform Act of 1964[37] and notwithstanding the provisions of other statutes, the head of an Executive agency . . . who is authorized to fix by administrative action the annual rate of basic pay for a position or employee may not fix the rate at more than the rate for level IV of the Executive Schedule. This section does not impair the authorities provided by—
>
> > (1) sections 248, 482, 1766, and 1819 of title 12, section 206 of the Bank Conservation Act, sections 2B(b) and 21A(e)(4) of the Federal Home Loan Bank Act, section 2A(i) of the Home Owners' Loan Act, and sections 5.11 and 5.58 of the Farm Credit Act of 1971;[38]
> >
> > (2) section 831b of title 16;[39]

(...continued)
the Foreign Service (section 403 of the Foreign Service Act of 1980), the Executive Schedule (subchapter II of chapter 53 of title 5), and the Veterans Health Administration (chapter 74 of title 38 of the United States Code).

[37] The Government Employees Salary Reform Act of 1964 created both the administrative pay cap under section 5373 and the Executive Schedule. Pub. L. No. 88-426, 78 Stat. 400 (Aug. 14, 1964). "The Executive Schedule is a five-tier annual salary schedule for most of the federal government's highest officials, and the rates are adjusted on an annual basis." B-309301, June 8, 2007. Among the purposes of the 1964 Act were "to establish a new, consistent, and rational salary structure for positions of the highest level in the Federal Government in the legislative, executive, and judicial branches," which it did by creating the Executive Schedule, and "to provide a logical and appropriate relationship between career salaries paid under the four civilian statutory pay systems and compensation for top positions in the three branches." S. Rep. No. 88-1121 at 1(1964). The 1964 Act removed authorities of agency heads to set rates of compensation for certain employees above GS-18. H.R. Rep. No. 88-1388 at 32 (1964).

[38] Relating to the pay for employees of the National Bank, the Federal Reserve, Office of the Comptroller of the Currency, National Credit Union Administration, Federal Deposit Insurance Corporation; Federal Housing Finance Agency; Farm Credit Administration; Farm Credit System Insurance Corporation.

[39] Relating to the Tennessee Valley Authority.

(3) sections 403a-403c, 403e-403h, and 403j of title 50;[40]

(4) section 4802[41]

(5) section 2(a)(7) of the Commodity Exchange Act (7 U.S.C. 2(a)(7)).[42]

The rate for level IV of the Executive Schedule is currently $155,500 per year. When first enacted, section 5373 included provisions exempting employees found in subsections (1), (2), and (3) above. Provisions in subsections (4) and (5) exempting employees of the Securities and Exchange Commission and the Commodity Futures Trading Commission were added in 2002.[43]

In addition to the authorities listed as excepted within the text of 5 U.S.C. § 5373, other statutory pay authorities contain explicit exemptions from section 5373.[44] However, sections 209(f) and (g) are not among the sections explicitly excluded from coverage under the section 5373 pay cap.

When previously faced with the question of the application of section 5373 to prevailing rate employees under a title 5 pay system, we determined that the pay of the crew of vessels required by statute to be fixed in accordance with prevailing industry rates was subject to the limitation in section 5373. The Court of Appeals, D.C. Circuit, concluded similarly, finding that the phrase "notwithstanding the provisions of other statutes" in section 5373 was evidence that "Congress wanted the pay cap to cut a wide swath." *International Org. of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 542 (D.C. Cir. 1983). As we examine the title 42 authorities 35 years after we addressed section 5373 in the context of prevailing rate

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[40] Relating to the Central Intelligence Agency.

[41] Relating to the Securities and Exchange Commission.

[42] Relating to the Commodity Futures Trading Commission.

[43] Investor and Capital Markets Fee Relief Act, Pub. L. No. 107-123, § 8(d)(1)(C), 115 Stat. 2390, 2399 (Jan. 16, 2002) and Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10702(c)(3), 116 Stat. 134, 517 (May 13, 2002).

[44] See, for example, 5 U.S.C. § 5376 (pay rates for senior-level (SL) and scientific or professional (ST) positions); 5 U.S.C. § 5382 (pay rates for SES positions); 10 U.S.C. § 1587 (DOD's authority to pay senior executives of nonappropriated fund instrumentalities at levels equivalent to SES); 10 U.S.C. § 2113 (pay for faculty at the Uniformed Services University of Health Sciences); 42 U.S.C. § 239l-1(pay for faculty at the U.S. Public Health Sciences Track) and 38 U.S.C. § 7281 (pay rates for Court of Veterans Appeals clerks and employees).

employees, we are struck by some of the differences between the two cases. The provisions governing the pay of prevailing rate employees are found in title 5, as is section 5373. Certainly there is a closer relationship with pay authorities that are both found in the same title. It is also more likely that Congress was aware of the prevailing rate statute when it included "notwithstanding the provisions of other statutes" in the language of section 5373.

HHS has determined that "the salary levels paid to individuals appointed under sections 209(f) and (g) are not subject to 5 U.S.C. § 5373 because . . . the plain language of [sections 209(f) and (g)] states that the civil service laws do not apply to these appointments."[45] It has interpreted this language in sections 209(f) and (g) as giving the agency authority to set levels of pay under sections 209(f) and (g) above the section 5373 limit.

HHS's interpretation of the language providing for an exemption from the civil service laws appears to be overly broad. Sections 209(f) and (g) contain two independent clauses addressing exemptions. The exemption from the civil service laws applies to the *appointment* of special consultants and fellows, whereas the exemption from the Classification Act of 1923, applies to *compensation* for these positions. HHS conflates the two clauses. The courts have not had much occasion to address the meaning of sections 209(f) and (g).

In an unreported district court decision, two scientists who had been appointed to fellowships pursuant to section 209(g) were terminated, and the district court confronted the question whether their positions were exempted from all provisions of the Civil Service Reform Act. The court noted that no other federal court appeared to have examined the language "appointed without regard to the civil-service laws" in section 209(g).[46] It concluded that the language meant that Congress intended to "provide federal agencies with the flexibility to hire Service Fellows without regard to the normal hiring formalities of the Civil Service," but that Congress did not intend to disregard the civil service laws in their entirety with respect to section 209(g) fellows.[47] The district court decided that such fellows were in the excepted service under the Civil Service Reform Act, as the excepted service "consists of those civil service positions which are not in the competitive or Senior Executive Service," and the Civil Service consists of "all appointive positions in the . . . Government of the United States, except positions in the uniformed services."[48]

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[45] Letter from Acting General Counsel, Department of Health and Human Services, to Assistant General Counsel for Strategic Issues, GAO (Oct. 25, 2011), at 4.

[46] *Afshari v. Leavitt*, 2006 U.S. Dist. LEXIS 77107 (N.D. W. Va. Oct. 23, 2006).

[47] *Id.* at 77110.

[48] The court relied on a Merit Systems Protection Board decision, which concluded that positions under section 209(f) were in the excepted service and that authority for

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Of more direct applicability than the exemption from the civil service laws is the provision that appointees under sections 209(f) and (g) may be "compensated without regard to the Classification Act of 1923." We therefore consider whether that language gives HHS the authority to compensate appointees in excess of the section 5373 limit. Case law is not helpful in determining the limit of the phrase "compensated without regard to the Classification Act of 1923."[49] Certainly, in 1944, when sections 209(f) and (g) were enacted into law, the words "without regard to the Classification Act" eliminated any of the pay caps found in that Act. The more pertinent issue is whether, 20 years later, Congress intended to supersede the pay provisions of sections 209(f) and (g) with the enactment of section 5373 of title 5. A review of the evolution of law may prove helpful here.

In 1949, five years after sections 209(f) and (g) were enacted, Congress passed the Classification Act of 1949, which replaced the Classification Act of 1923 and provided that references in other laws to the 1923 Act should be held and considered to mean the 1949 Act.[50] As mentioned above, in 1964, Congress passed section 5373 as part of the Government Employees Salary Reform Act. When section 5373 was enacted, there is no indication in the legislative history or in the subsequent actions of the Public Health Service, OPM, or Congress that they believed it superseded the authority granted to the Public Health Service in sections 209(f) and (g). In 1966, the Classification Act of 1949 was enacted into positive law and codified in title 5 of the United States Code.[51]

Neither the Classification Act of 1949 nor the title 5 codification specifically addressed pay limits for appointments under sections 209(f) and (g). The Classification Act of 1949 and its predecessor Act of 1923 were codified in Chapter

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"appointment without regard to the civil-service laws" in section 209(f) was intended to provide the agency with flexible hiring authority. *Fishbein v. HHS,* 102 M.S.P.R. 4 (M.S.P.B. 2006). The court also cited a U.S. Court of Appeals for the Federal Circuit decision which found that similar language regarding TVA employees meant that such appointments are to the excepted service rather than the competitive service. *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985) (authority for appointment of TVA employees "without regard to the civil service laws" placed TVA employees in the excepted service, not the competitive service.)

[49] See, for example, *Abell v. United States*, 518 F.2d 1369 (Ct. Cl.1975); *Afshari v. Leavitt*, 2006 U.S. Dist. LEXIS 77107 (N.D. W. Va. Oct. 23, 2006).

[50] Pub. L. No. 81-429, §1106(a), 63 Stat. 954, 972 (Oct. 28, 1949).

[51] Pub. L. No. 89-554, 80 Stat. 378 (Sep. 6, 1966). See the Background section for a discussion of the meaning of codification and enactment into positive law.

51 ("Classification) and subchapter III ("General Schedule of Pay Rates") of Chapter 53 of title 5.[52] Section 5373 is codified in subchapter VII ("Miscellaneous Provisions") of Chapter 53. Thus one possible reading of the codification is that the language in sections 209(f) and (g) that appointees may be "compensated without regard to the Classification Act of 1923" should not be interpreted as an exemption from the later enacted pay cap set forth in section 5373.

However, this construction would conflict with actions of Congress subsequent to the enactment of section 5373. Congress's actions lead us to believe that it in fact did not intend that section 5373 would apply to these appointments. For example, even after section 5373 was enacted in 1964, Congress continued to impose a specific limit on pay for consultants and scientists appointed under sections 209(f) and (g). Every annual appropriation law enacted by Congress for 27 years after section 5373 was effective contained a separate pay cap, which suggests that Congress did not consider these positions to be under any existing pay cap. Finally, in 1993, Congress enacted a permanent and separate pay cap. It restricted compensation for limited-time appointments to the maximum rate payable under 5 U.S.C. § 5376, which, as discussed above, limits pay to Executive Level IV. A permanent provision limiting pay to Executive Level IV would have been unnecessary if Congress believed that the pay restriction in 5 U.S.C. § 5373, which also limits pay to Executive Level IV, was applicable. Thus it appears that Congress did not intend for the 5 U.S.C. § 5373 pay cap to apply to consultants and scientists hired pursuant to 42 U.S.C. §§ 209(f) and (g).

Additional evidence that the 5 U.S.C. § 5373 pay cap does not apply to 42 U.S.C. §§ 209(f) or (g) appointees is provided by Congress' actions when it extended section 209 authority to certain Environmental Protection Agency (EPA) components. In 2005, Congress granted EPA authority to make a limited number of appointments "under the authority provided in 42 U.S.C. § 209" beginning in fiscal year 2006. That authority has twice been further granted and now extends through fiscal year 2015.[53] Our review of the legislative history of the appropriations

[52] Chapter 51 of title 5 contains the classification provisions of the General Schedule, and subchapter III of Chapter 53 of title 5 contains the General Schedule pay rates *See* S. Rep. No. 89-1380 (1966), pages 57, 102, 212-213.

[53] "For fiscal years 2006 through 2011, the Administrator may, after consultation with the Office of Personnel Management, make not to exceed five appointments in any fiscal year under the authority provided in 42 U.S.C. § 209 for the Office of Research and Development." Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, title II, 119 Stat. 499, 531 (Aug. 2, 2005). The authority was extended to allow EPA to employ up to 30 persons at any one time under 42 U.S.C. § 209 by the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, title II, 123 Stat. 524, 729 (Mar. 11, 2009), and extended through fiscal year 2015 by the Department of Interior, Environment, and Related Agencies

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provisions giving EPA this authority indicates that Congress had specific knowledge that both EPA and HHS were interpreting sections 209(f) and (g) as exempt from 5 U.S.C. § 5373 limitations on pay.

The recommendation that EPA request this title 42 authority came from a report by the National Research Council (NRC),[54] which Congress had requested in the conference report accompanying the law containing EPA's appropriations for Fiscal Year 1995, Public Law 103-327.[55] In that report and in subsequent testimony by a member of the NRC before a congressional subcommittee,[56] NRC stated that "even greater measures" than the authority to appoint Senior Technical positions were "warranted and practicable to attract and retain outstanding research leaders." Senior Technical employees may be paid up to Executive Level III, currently $165,300, or in certain circumstances up to Executive Level II, currently $179,700.[57] 5 U.S.C. § 5376. Such levels of pay are above those set forth in section 5373, which sets a pay cap of Executive Level IV, currently $155,500. The NRC therefore recommended that EPA seek authority to create and fill positions similar to the authority contained in 42 U.S.C. §§ 209(f) and (g).[58]

Further, in hearings for Fiscal Year 2009 appropriations, before Congress extended the length of the authority, the Chairman of the House Subcommittee on Interior, Environment, and Related Agencies, asked EPA for information about its use of the title 42 authority and whether there were any statutory or regulatory caps on pay for

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Appropriations Act, 2010, Pub. L. No. 111-88, Division A, title II, 123 Stat. 2904, 2938 (Oct. 30, 2009).

[54] *Strengthening Science at the U.S. Environmental Protection Agency: Research-Management and Peer-Review Practices*, Committee on Research and Peer Review in EPA, Board on Environmental Studies in Toxicology, National Research Council (2000).

[55] H.R. Conf. Rep. No. 103-715 (1994).

[56] The testimony was given before the Environment, Technology and Standards Subcommittee, Committee on Science, U.S. House of Representatives.

[57] Salaries can be paid up to the Executive Level II when an agency has a performance appraisal system which, as designed and applied, is certified as making meaningful distinctions based on relative performance.

[58] *H.R. 64: A Proposal to Strengthen Science at the Environmental Protection Agency, Hearings before the Environment, Technology and Standards Subcommittee, Committee on Science, U.S. House of Representatives,* 107th Cong. (March 29, 2001) (Statement of Raymond C. Loehr, Ph.D.), available at http://www7.nationalacademies.org/ocga/testimony/HR64.asp (last visited July 5, 2012).

scientists employed under this authority. The record shows that EPA responded to the Subcommittee that there is no statutory or regulatory cap on what scientists hired pursuant to the authority can be paid, although EPA had established an internal policy capping pay at $250,000.[59] This amount is clearly in excess of the maximum amount authorized under 5 U.S.C. § 5373 of $155,500. Finally, as noted by both HHS and OPM in their letters to GAO, in the conference report for H.R. 2996, which was enacted as Public Law 111-88 (October 30, 2009), the conferees describe the title 42 authority granted to EPA as supporting the public's best interest by allowing EPA to employ elite scientists who are compensated at or near market rates.[60] After these hearings and receipt of these reports, Congress passed appropriations authorizing the program at EPA.

This evidence that Congress viewed the authority under 42 U.S.C. §§ 209(f) and (g) as providing pay in excess of the 5 U.S.C. § 5373 pay cap at HHS and EPA, and Congress's decision to extend section 209 authority to certain EPA appointees knowing that EPA planned to set compensation at a level higher than the 5 U.S.C. § 5373 pay cap, lends further support to the conclusion that Congress does not view the 5 U.S.C. § 5373 pay cap as applying to sections 209 (f) and (g) appointees.

Finally, we note that both HHS and OPM maintain that the section 5373 pay cap does not apply to appointments under 42 U.S.C. §§ 209(f) and (g). OPM defers to HHS with regard to the title 42 authorities. Given the evidence of how Congress viewed the authority and the complexity of the numerous pay authorities, we do not object to HHS's interpretation of its pay authority.

CONCLUSION

With respect to the first issue, the 1993 appropriations language unequivocally limits the pay of consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) at agencies that are funded by the Labor-HHS-Education Appropriations Acts. With regard to the two title 5 limitations, we think the pay limitations do not apply to appointments made pursuant to 42 U.S.C. §§ 209(f) or (g).

Some of the statutory pay provisions analyzed in this opinion, as mentioned earlier, were enacted nearly 70 years ago in different federal pay systems. As one court has observed, "although some pay systems are 'linked' to one another," they have

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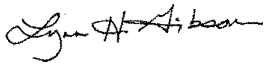
[59] Interior, Environment, and Related Agencies Appropriations for 2009: Hearings before the Subcomm. on Interior of the House Comm. on Appropriations, 110th Cong. 35 (2008). The appropriations for EPA for FY 2009 were subsequently passed as part of the Omnibus Appropriations for 2009, Pub. L. No. 111-8 (2009).

[60] H. Rep. No. 111-316, at 130 (2009).

not been "fastidiously integrated" to achieve uniform federal compensation policies."[61] In this case, the issues raised – in particular the applicability of the two title 5 limitations on the title 42 authority to hire special consultants and fellows – reflect the difficulty of applying distinct statutory schemes to determine whether specific pay limits apply. If Congress desires upper pay limits for appointments under sections 209(f) and (g), it may wish to consider amending these provisions to specifically establish such limits.

If you have any questions, please contact Robert J. Cramer, Managing Associate General Counsel, at (202)512-7227.



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[61] *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 539 (C.A.D.C. 1983).