

July 2012

HUMAN CAPITAL

HHS and EPA Can Improve Practices Under Special Hiring Authorities



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Highlights of [GAO-12-692](#), a report to congressional requesters

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.

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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.

^aFigures 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.

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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

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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

¹GAO, *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

²HHS 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).

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

⁴The 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.

⁵According 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

⁶Pub. 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).

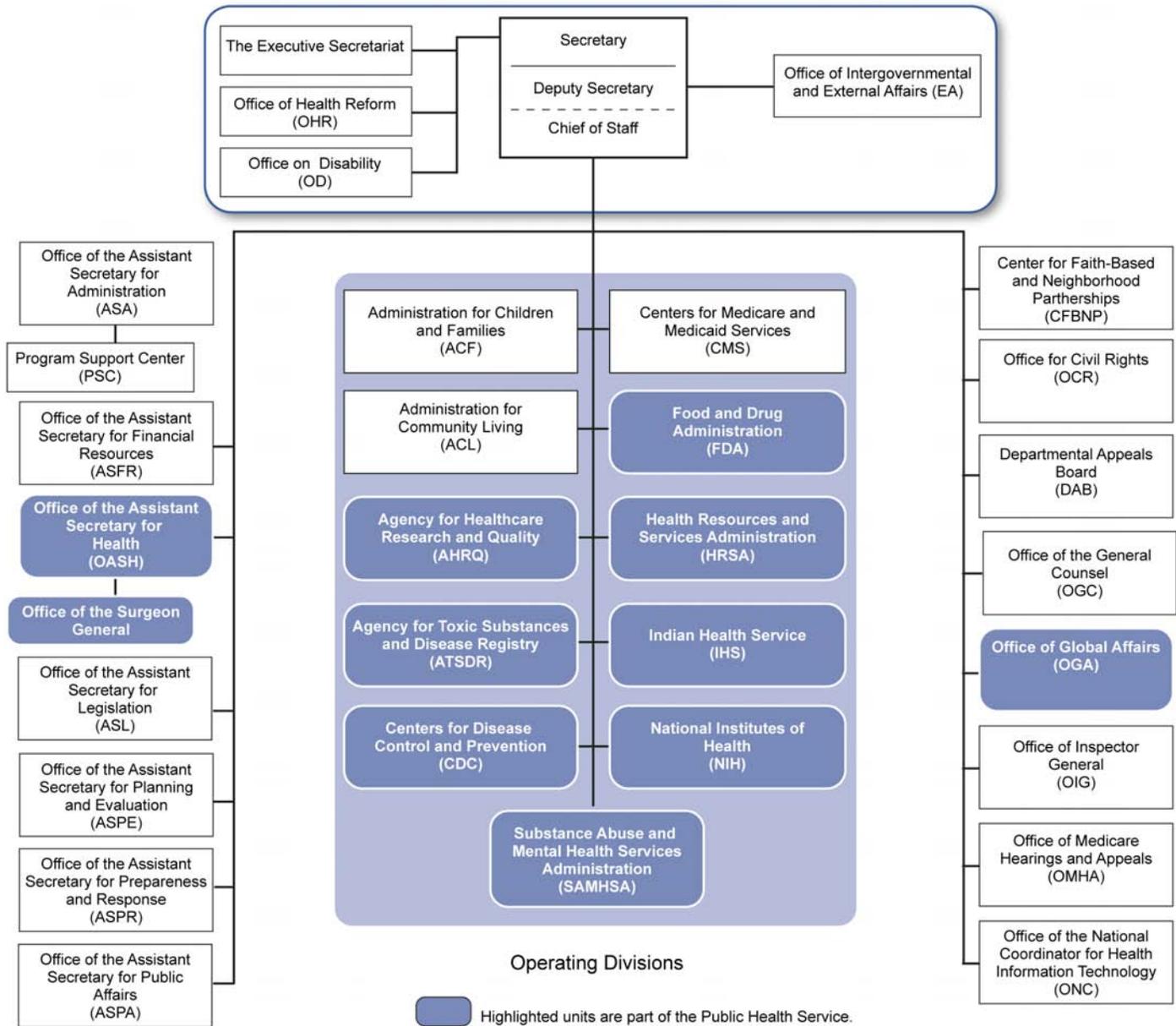
⁷Pub. L. No. 109-54, Title II, 119 Stat. 499, 531 (Aug 2, 2005). Although the legislation refers only to section 209, the legislative history of these grants of authority to EPA provides the intent was to grant EPA use of the authorities under sections (f), (g), and (h) of section 209. Subsection (h)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

⁸Pub. 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).

⁹40 C.F.R. part 18.

Figure 1: HHS Organizational Structure



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

¹⁰42 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.

¹¹42 C.F.R. § 61.32.

¹² 42 C.F.R. §§ 61.33 and 61.37-38.

¹³A 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.

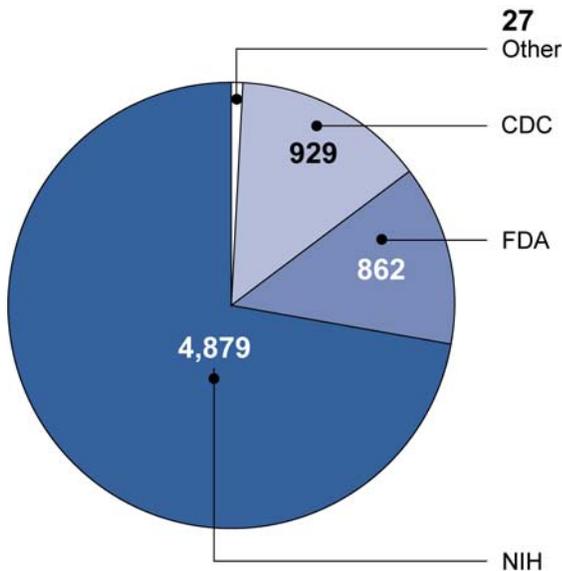
EPA uses section 209(g) as the basis for hiring some scientists within ORD, the scientific research arm of EPA. ORD's work at EPA laboratory and research centers provide the science and technology to identify environmental hazards, assess risks to public health and ecosystems, and determine how best 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,

¹⁴All years are in calendar years unless otherwise stated.

¹⁵Title 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.

^aFigures 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

¹⁶The 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).

¹⁷FDA 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.

¹⁸To 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)	<ul style="list-style-type: none"> 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 	<ul style="list-style-type: none"> Base salary range: \$82,000-200,000 Average base salary: \$118,000 Median base salary: \$114,000
Research Fellow (666)	<ul style="list-style-type: none"> Scientists obtaining experience in biomedical research while providing a service relevant to the NIH's program needs Has a doctoral degree 	<ul style="list-style-type: none"> Base salary range: \$45,000-112,000 Average base salary: \$70,000 Median base salary: \$69,000
Senior Investigator (521)	<ul style="list-style-type: none"> 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 	<ul style="list-style-type: none"> Base salary range: \$117,000-350,000 Average base salary: \$192,000 Median base salary: \$195,000
Clinical Research Nurse (347) ^c	<ul style="list-style-type: none"> 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 	<ul style="list-style-type: none"> Base salary range: \$62,000-96,000 Average and median base salary: \$78,000
Clinical Fellow (249)	<ul style="list-style-type: none"> 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 	<ul style="list-style-type: none"> 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.

^aSalary figures as of 2010. All figures are rounded to the nearest thousand dollars.

^bTenure 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.

^cAs part of the sunseting 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.

^aThe 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

¹⁹According 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).

²⁰The 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

²¹Six 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

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

²³We 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

²⁴HHS 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.

²⁵HHS 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.
<p>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:</p> <ul style="list-style-type: none"> • 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.

^aFor 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

²⁶HHS 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.

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

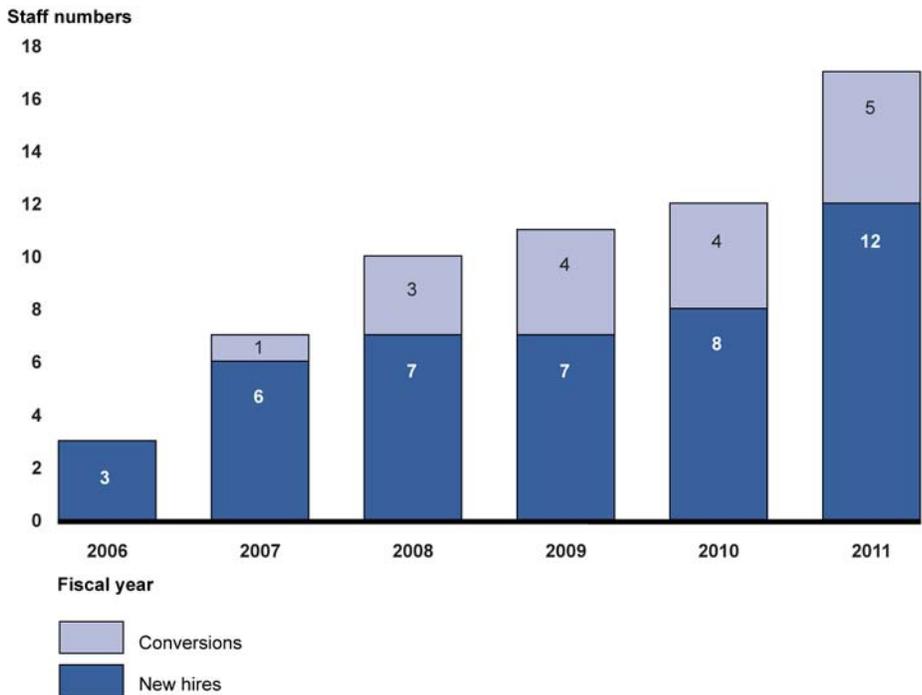
EPA Employs a Limited Number of Title 42 Fellows, Primarily in Leadership Roles

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.

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

²⁹EPA 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:

³⁰In 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.

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- 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

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

³²Grade 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.

³³National 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.

^aIn 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

³⁴We 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.

³⁵Section 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.

³⁶5 C.F.R. § 2640.101.

³⁷The 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

³⁸Waivers 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.

A handwritten signature in black ink that reads "Robert Goldenkoff". The signature is written in a cursive, flowing style.

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,

A handwritten signature in black ink that reads "Jim R. Esquea".

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.

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.

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.

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."

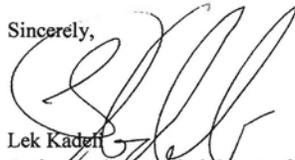
EPA respectfully disagrees with this statement. On February 17, 2012, we sent a letter to your staff outlining plans EPA has recently implemented or will soon implement that will address ethics issues that arise after appointment and ensure previously agreed upon ethics requirements are followed. As 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 Kaden
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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