



July 2016

FEDERAL WORKFORCE

Opportunities Exist to Improve Data on Selected Groups of Special Government Employees

GAO Highlights

Highlights of [GAO-16-548](#), Report to Chairman, Committee on the Judiciary, U.S. Senate

Why GAO Did This Study

The SGE category was created by Congress in 1962 to make certain ethics rules less restrictive than for other federal employees to overcome obstacles in hiring outside experts and other temporary employees for occasional service. SGEs are employees appointed to serve for not more than 130 days during any one year period.

GAO was asked to examine agencies' use of SGEs not serving on federal boards. This report: (1) describes what is known about the total number of SGEs not serving on federal boards; (2) assesses the extent to which OGE, OPM, and selected agencies identify, collect, and report data; (3) assesses how selected agencies appoint, use, and track SGEs; and (4) examines how OGE oversees and ensures compliance with ethics requirements.

GAO analyzed OGE, OPM, and agency data; reviewed agency documentation; and interviewed agency officials. GAO selected five agencies—the Departments of Health and Human Services, Justice, State, Nuclear Regulatory Commission and National Science Foundation—based in part, on the number of SGEs and ratio of SGEs not serving on federal boards to total employees.

What GAO Recommends

GAO recommends HHS take steps to improve the reliability of data on SGEs not serving on federal boards and OGE should determine whether other agencies are experiencing data challenges similar to HHS, State, and NRC and take appropriate action. HHS concurred. OGE partially concurred. GAO maintains that OGE should undertake the actions as discussed further in the report.

View [GAO-16-548](#). For more information, contact Yvonne D. Jones at (202) 512-6806 or jonesy@gao.gov.

July 2016

FEDERAL WORKFORCE

Opportunities Exist to Improve Data on Selected Groups of Special Government Employees

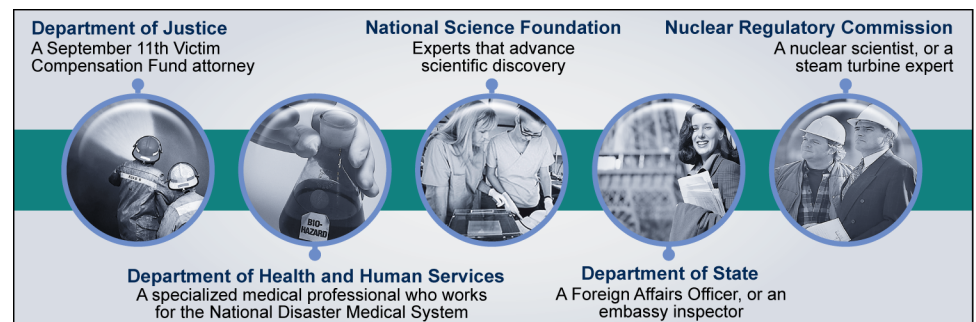
What GAO Found

Federal agencies made limited use of special government employees (SGE) not serving on federal boards. As of December 2014, approximately 3 percent of SGEs (1,138 of 40,424) were working as experts or consultants and not serving on federal boards, according to the Office of Government Ethics (OGE). Over a 10-year period (2005 to 2014), GAO found that agencies used an annual average of approximately 2,000 SGEs, with a peak of about 3,100 in 2009 and a low of about 500 in 2013.

Agencies are responsible for reporting on SGEs not serving on federal boards to OGE. The Office of Personnel Management (OPM) requires agencies to identify SGEs on an individual's personnel action. OGE's data reflected what agencies reported on SGEs not serving on federal boards. Three of the five agencies GAO reviewed had challenges reporting reliable data on SGEs not serving on federal boards. The Department of Health and Human Services (HHS) had difficulty distinguishing between SGEs not serving on federal boards and those who were, and HHS did not explain data discrepancies. GAO found instances of misidentified SGEs not serving on federal boards at the Nuclear Regulatory Commission (NRC) and the Department of State (State), but the agencies provided corrected data. Weak internal coordination and misunderstanding about the SGE designation contributed to the identification challenges. Stronger data would better position agencies to report on SGEs and provide the required ethics training. Moreover, accurate and complete data are important to allow OGE and Congress to provide informed oversight of agencies.

Three of the five selected agencies primarily used expert and consultant hiring authorities to appoint SGEs not serving on federal boards. The other two agencies generally used their agency-specific authorities. The agencies used these employees in specialized areas (see figure). Four of five agencies said supervisors are generally responsible for tracking SGEs' days of service. One agency permits SGEs to track their own days.

Special Government Employees Fill a Variety of Roles at Selected Agencies



Sources: GAO analysis of selected agencies' information; PhotoDisc and National Science Foundation (photos). | GAO-16-548

OGE has not found any issues specific to SGEs not serving on federal boards. GAO's analysis of 23 OGE reviews at Chief Financial Officers Act agencies and the Consumer Financial Protection Board for fiscal years 1998 to 2014 showed no issues specific to SGEs not serving on federal boards. Further, OGE had no outstanding recommendations related to SGEs at the selected agencies.

Contents

Letter		1
	Background	4
	Agencies' Use of SGEs Not Serving on Federal Boards Is Limited	10
	Four of Five Selected Agencies Had Reliable Data on SGEs Not Serving on Federal Boards While HHS Had Challenges Reporting Reliable Data	12
	Selected Agencies Appointed SGEs Primarily Using Expert and Consultant Hiring Authority and Utilized Them in Specialized Areas	16
	OGE Reviews Have Found No Issues for SGEs Not Serving on Federal Boards	23
	Conclusions	26
	Recommendations for Executive Action	27
	Agency Comments and Our Evaluation	27
Appendix I	Objectives, Scope, and Methodology	29
Appendix II	Legislative History of the Special Government Employee Designation	32
Appendix III	Ethics Provisions Applicable to Non-Special Government Employees Compared to Special Government Employees Not Serving on Federal Advisory Committees or Other Boards	34
Appendix IV	Government-wide and Agency-Specific Hiring Authorities Used to On-Board Special Government Employees by Selected Agencies	38
Appendix V	Use Of Special Government Employees At Chief Financial Officer Act Agencies And The Consumer Financial Protection Bureau, 2012-2013	41

Appendix VI	Comments from the Department of Health and Human Services	42
-------------	---	----

Appendix VII	Comments from the Office of Government Ethics	44
--------------	---	----

Appendix VIII	GAO Contacts and Staff Acknowledgments	46
---------------	--	----

Tables

Table 1: Ethics Provisions for Executive Branch Employees	35
Table 2: Government-wide Hiring Authorities Used at Selected Agencies	38
Table 3: Agency-Specific Hiring Authorities Used at Selected Agencies	40

Figures

Figure 1: Differences in Ethics Requirements for Other Government Employees Compared to Special Government Employees (SGE)	6
Figure 2: Special Government Employees Not Serving on Federal Boards, Calendar Years 2005-2014	10
Figure 3: Special Government Employees (SGE) Not Serving on Federal Boards at CFO Act Agencies and the CFPB, as a Portion of the Executive Branch SGEs Not Serving on Federal Boards, Calendar Years 2012 and 2013	11
Figure 4: Comparison of OGE and Selected Agency Data on Special Government Employees Not Serving on Federal Boards, 2012 and 2013	13
Figure 5: SGEs Not Serving on Federal Boards Fill a Variety of Roles for Short-Term Expertise at Selected Agencies	21

Abbreviations

CFO Act	Chief Financial Officers Act of 1990
CFPB	Consumer Financial Protection Bureau
CY	calendar year
DOJ	Department of Justice
EHRI	Enterprise Human Resources Integration
FACA	Federal Advisory Committee Act
FDA	Food and Drug Administration
GS	General Service
HHS	Department of Health and Human Services
NDMS	National Disaster Medical System
NRC	National Regulatory Commission
NSF	National Science Foundation
OGE	Office of Government Ethics
OPM	Office of Personnel Management
PRB	Program Review Branch
SGE	special government employee
State	Department of State
WAE	when actually employed

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.



July 15, 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

Congress established the Special Government Employees (SGE) category in 1962 to overcome obstacles in hiring outside consultants, experts, and other temporary employees by making certain ethics rules for these employees less restrictive than for regular federal government employees. SGEs are employees who are retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for not more than 130 days during a 1-year period.¹ SGEs may serve the government in a variety of ways, including working individually on discrete projects, or as members of federal advisory committees. At the end of 2014, all categories of SGEs made up approximately 1 percent, or 40,424, of the federal government's 4.2 million civilian and military personnel.²

Questions have been raised about the number of SGEs employed by federal agencies and how agencies use SGEs. For example, frequently, SGEs have substantial outside activities and financial interests that may raise difficult ethics questions.

¹An SGE is defined, in part, as "an officer or employee of the executive or legislative branch...who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis," under 18 U.S.C. §202(a). The full definition also includes employees and officers in certain miscellaneous positions who are deemed SGEs, without regard to the number of days of service. For example, a reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a SGE. SGEs may also be specified in an agency's organic legislation. See, e.g., 42 U.S.C. § 12651b(e) (members of Board of Directors, Corporation for National and Community Service).

²OPM reported the total civilian and military personnel was 4.2 million in 2014. We included military members since we identified military members who are classified as SGEs.

You asked us to review agencies' use and oversight of SGEs in the federal workforce for SGEs not serving on federal advisory or other committees, commissions, or boards³ at the 24 agencies covered under the Chief Financial Officers (CFO) Act of 1990, as amended, and the Consumer Financial Protection Bureau (CFPB).⁴ This review (1) describes what is known about the total number of SGEs not serving on federal boards in the executive branch, as well as CFPB; (2) assesses the extent to which the Office of Government Ethics (OGE), the Office of Personnel Management (OPM), and selected agencies identified, collected, and reported data on SGEs not serving on federal boards; (3) assesses how selected agencies appoint, utilize, and track SGEs not serving on federal boards, and describes the relevant hiring authorities and ethics requirements; and (4) examines how, if at all, OGE oversees and ensures compliance with ethics requirements for SGEs, including the proper identification of individuals as SGEs, consistent with 18 U.S.C. § 202(a).

To address these objectives, we reviewed the federal statutes, regulations, and guidance that address SGEs and the ethics restrictions applicable to SGEs. To help address our second and third objectives, we selected five case study agencies: Department of Health and Human Services (HHS), Department of Justice (DOJ), Department of State (State), National Science Foundation (NSF), and Nuclear Regulatory Commission (NRC). We based our selection on criteria such as the number of SGEs, the size of the agency, OGE ethics program review results, and the ratio of SGEs not serving on federal boards compared to

³For the purposes of this report, we will refer to this category as "SGEs not serving on federal boards." This category reflects the Expert/Consultant SGE category for reporting purposes. OGE breaks out and collects data on six categories of SGEs: (1) SGEs who serve on Federal Advisory Committee Act boards, committees, and commissions; (2) SGEs who serve on other boards, committees, and commissions; (3) expert/consultant SGEs; (4) board members; (5) commissioners; and (6) other SGEs.

⁴The 24 CFO Act agencies are listed at 31 U.S.C. § 901(b) and include: U.S. Departments of Agriculture, Commerce, Defense, Education, Energy, HHS, Homeland Security, Housing and Urban Development, the Interior, Labor, Transportation, the Treasury, Veterans Affairs, DOJ, and State, as well as the U.S. Agency for International Development, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, NSF, NRC, Office of Personnel Management, Small Business Administration, and Social Security Administration. These agencies account for a very high proportion of the total federal labor force. CFPB was included in our scope because the bureau reported employing SGEs.

the agency's 2-year on-board average of all employees, among other criteria. We analyzed OGE's, OPM's, and selected agencies' data on the number of SGEs at CFO Act agencies and CFPB between fiscal and calendar years 2005 and 2014. We compared OGE data on the total number of SGEs not serving on federal boards with selected agency data for the most recent years available—2012 and 2013. We examined OGE's process for reviewing agency data.

We also compared selected agency data on individual SGEs not serving on federal boards with OPM data for 2005 to 2014. We found the data from OGE and four selected agencies (DOJ, State, NRC, and NSF) sufficiently reliable to report annual totals of SGEs. For two agencies, we found several instances of misidentified SGEs and, after discussion with the agencies, they provided corrected data. We found that one of the selected agencies, HHS, provided unreliable effective dates for SGEs not serving on federal boards. We found that the OPM data did not have complete information that would allow us to report on annual totals of SGEs not serving on federal boards in the executive branch agencies.

To assess how selected agencies appoint, utilize, and oversee SGEs, we examined agency documentation and interviewed agency officials on the (1) process for designating and hiring SGEs not serving on federal boards; (2) hiring authorities used; (3) internal coordination among hiring, ethics, and general counsel offices; (4) types of roles and responsibilities SGEs performed; and (5) agency tracking of whether SGEs' stay within the 130-day service estimate. To examine how, if at all, OGE oversees and ensures compliance with ethics requirements for SGEs, we examined selected agency documentation and interviewed officials on OGE ethics program reviews and open recommendations. We also examined statutory and regulatory provisions covering OGE's roles and responsibilities. For more information on our objectives, scope, and methodology, see appendix I.

We conducted this performance audit in Washington, D.C., from January 2015 through July 2016 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

SGEs Serve Temporarily and Have Fewer Ethics Restrictions Than Other Employees

A SGE is an employee expected to perform temporary duties for no more than 130 days during a 1-year period.⁵ An individual hired under a temporary appointment can be designated a SGE where the employing agency makes a good-faith estimate that the individual is not expected to serve more than 130 days in the succeeding 1-year period.⁶ Under the executive branch's longstanding interpretation, while SGEs are expected to serve no more than 130 days in a 1-year period, if an individual was designated a SGE but unexpectedly exceeds the 130 days of service, that person is still considered a SGE for the current year.⁷ However, OGE advises that if the SGE is to serve beyond the 1-year period, the agency will need to make a new estimate for the following year, and the prior year's experience will have a bearing on whether the agency reasonably can conclude that the employee is likely to serve no more than 130 days in the next year (see appendix II for a legislative history of the establishment of the SGE status).⁸

SGEs are covered by most ethics rules, but the application of some of those rules to SGEs is less restrictive than for other employees and permits them to engage in more outside activities (see appendix III for a comparative overview of select ethics rules for SGEs and other

⁵SGEs are employees of the federal government and are distinguished from other individuals who provide services to the federal government as independent contractors. Independent contractors are not employees and therefore not covered under the ethics and conflict of interest provisions applicable to federal employees.

⁶An employee hired under an appointment that is not to exceed 130 days is also a SGE. 7 Op. Off. Legal Counsel 123, 126 (1983).

⁷3 Op. Off. Legal Counsel 321, 323 (1979) and 3 Op. Off. Legal Counsel 451, 454 (1979); OGE Informal Advisory Memorandum, 00 x 1, at 5 (Feb. 15, 2000) and OGE Informal Advisory Letter 05 x 7 (Nov. 1, 2005). As noted subsequently, this executive branch interpretation set forth in Office of Legal Counsel opinions and followed by OGE advisory documents dates back to shortly after enactment of the act establishing the SGE category. But compare *United States v. Baird*, 29 F.3d 647 (D.C. Cir. 1994) (in a case involving a reserve officer on active duty, the D.C. Circuit Court articulated a contrary interpretation under which an employee serving beyond 130 days could no longer be considered a SGE, but did so in dicta and therefore the court's decision would not serve to require the executive branch to depart from its long-standing interpretation).

⁸February 2000 OGE Informal Advisory Memorandum.

employees). Employees of the executive branch are covered under numerous prohibitions and requirements set forth under statute (criminal and noncriminal), executive order, and regulation. The criminal statutes establishing the foundation for acceptable conduct while serving the public include the bribery and illegal gratuities prohibitions (18 U.S.C. § 201) and the criminal conflict of interest prohibitions (principally 18 U.S.C. §§ 203, 205, 207, 208, and 209).

SGEs are covered by most, but not all, of these criminal statutes and in some instances are afforded distinct treatment from other employees. Like other employees, SGEs are subject to prohibitions on bribery and illegal gratuities,⁹ and prohibited from participating in matters that directly affect their own financial interests (or the financial interests of individuals or entities attributed to the employee).¹⁰ SGEs are generally not afforded special treatment under the various post-employment bans on the activities of former employees.¹¹ However, SGEs are subject to substantially narrower restrictions than other employees on their outside representational activities (including the receipt of compensation related to such activities).¹²

As illustrated in figure 1 below, SGEs are not covered under the ban on outside supplementation of government salaries.¹³ More specifically, a regular employee cannot receive compensation from anyone (other than the government) for performing government service. SGEs are subject to the standards of conduct regulations,¹⁴ which implement the principles of ethical conduct established under Executive Order No. 12674,¹⁵ and

⁹18 U.S.C. § 201.

¹⁰18 U.S.C. § 208.

¹¹18 U.S.C. § 207.

¹²18 U.S.C. §§ 203 and 205.

¹³18 U.S.C. § 209(c).

¹⁴Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635.

¹⁵Exec. Order No. 12674, *Principles of Ethical Conduct for Government Officers and Employees*, 54 Fed. Reg. 15159 (Apr. 12, 1989) as amended, Exec. Order No. 12731, 55 Fed. Reg. 42547 (Oct. 17, 1990).

prohibits SGEs from, among other things, receiving compensation for teaching, speaking, and writing that is undertaken as part of the employee’s official duties. While the treatment of SGEs is generally the same as for other employees under these standards of conduct, there are exceptions.

Figure 1: Differences in Ethics Requirements for Other Government Employees Compared to Special Government Employees (SGE)

Regular government employees	Special government employees
Supplementation of salary: Employees are prohibited from receiving supplementation of their Government salary. No source other than the Government can pay federal employees for performing their Government service.^a	Supplementation of salary: SGEs are exempt from this restriction but are subject to other restrictions under the standards of conduct regulations on receiving outside compensation.^c
Outside Compensation for Teaching, Speaking, or Writing: Employees are prohibited from receiving outside compensation for teaching, speaking, or writing that relates to the employee’s official duties by the standards of conduct.^b	Outside Compensation for Teaching, Speaking, or Writing: SGEs are covered under this prohibition but the definition of what is related to official duties is narrower. For example, a SGE is prohibited from receiving compensation where the activity is undertaken as part of his or her official duties but is not prohibited merely where the subject of the activity deals in significant part with an ongoing policy, program, or operation of the SGE’s agency.^d

Source: GAO analysis of SGE legislation. | GAO-16-548

Notes: There are also additional bans on the earning of outside income which are only applicable to certain noncareer political appointees. These bans do not apply to regular employees or SGEs.

^a18 U.S.C. § 209.

^b5 C.F.R. § 2635.807.

^c18 U.S.C. § 209(c).

^dNor would a regular employee be prohibited if the subject of the activity deals generally with a subject within the agency’s responsibility and is within the regular employee’s inherent area of expertise based on educational background or experience.

Apart from the government-wide ethics requirements, some agencies have developed supplemental agency-specific ethics requirements covering their employees, including SGEs.¹⁶ Four of the five selected agencies for this review have supplemental regulations covering ethics restrictions. For example, NRC has a list of prohibited securities that certain covered employees, including SGEs, cannot own, including stock, bonds, or other security interests in certain companies.¹⁷

Roles of OGE, OPM, and Agency Offices in SGE Oversight, Designation, and Hiring

OGE provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest with all employees, including SGEs. OGE established the standards of conduct regulations—covering issues such as gifts, conflicting financial interests, impartiality, seeking employment, misuse of position, and outside activities—which address not only actual conflicts of interest but also activities that give rise to the appearance of such conflicts.¹⁸ In addition, OGE issued regulations addressing the management of agency ethics programs, including procedures related to reviewing public and confidential financial disclosure.¹⁹ It also provides ethics training to agency officials.

OGE officials said there is no standardized way for agencies to approach the SGE designation process. However, OGE stated that pursuant to the executive branch's longstanding interpretation of 18 U.S.C. § 202, a proper designation requires a prospective good faith determination at the time of an appointment that the individual is not expected to perform

¹⁶As authorized by Executive Order 12674 and implemented by 5 C.F.R. § 2635.105, an agency may supplement the ethics standards, with the concurrence of OGE, to meet the particular needs of that agency. A supplemental agency regulation is issued jointly by the agency and OGE and is published in title 5 of the Code of Federal Regulations.

¹⁷See 5 C.F.R. § 5801.102. See also supplemental agency regulations for DOJ (5 C.F.R. part 3801), NSF (5 C.F.R. part 5301), and HHS (5 C.F.R. parts 5501 and 5502).

¹⁸5 C.F.R. part 2635.

¹⁹See 5 C.F.R. part 2638 (agency ethics program management) and part 2634 (financial disclosure, including certificates of divestiture). OGE has also issued regulations (with the concurrence of the Attorney General) interpreting certain of the conflicts of interest statutes. See 5 C.F.R. part 2640 (interpreting and implementing 18 U.S.C. § 208) and part 2641 (interpreting and implementing 18 U.S.C. § 207).

services for more than 130 days of the succeeding 1-year period.²⁰ OGE believes that a prospective determination is important so that employees are on notice with respect to the ethics laws and rules that will apply to them.

To help carry out its oversight role, OGE collects data on agency ethics programs. Executive branch agencies are required to submit an annual report to OGE concerning certain aspects of their ethics programs.²¹ OGE provides an annual questionnaire to each executive branch agency to assist agencies in fulfilling this requirement. The annual questionnaire covers a range of issues, including the agency's ethics program structure and staffing, as well as ethics education and training policies. According to agency officials, OGE also uses the annual questionnaire to gain knowledge about individual programs as well the overall program and to make informed decisions about agency resource allocations and priorities.

OPM provides guidance to agencies on government-wide hiring authorities to ensure that agencies properly utilize these authorities, such as the expert and consultant appointment authority, which may be used to on-board employees ultimately categorized as SGEs (see appendix IV for examples of government-wide hiring authorities used by selected agencies to hire SGEs). OPM requires all federal agencies to identify that an employee is a SGE on the government records documenting an individual's personnel action—Standard Form 50. Agencies also can identify an employee as a SGE by using a specific remark code—E21 on the personnel action form. OPM collects data on federal employees,

²⁰3 Op. Off. Legal Counsel at 454 (agency should make good faith designation in advance of appointment and if an agency does so, the employee will continue to be regarded as a SGE for the duration of the 1-year period even if the employee serves for more than 130 days). This Office of Legal Counsel opinion reflects the interpretation communicated shortly after enactment of the 1962 act in a presidential memorandum advising agencies on, among other things, the appropriate designation of SGE's under the new act. *Memorandum on Preventing Conflicts of Interest on the Part of Special Government Employees*, 28 Fed. Reg. 4539, 4541 (May 2, 1963).

²¹5 U.S.C. App. 4, § 402(e)(1).

including SGEs, from agencies that submit personnel data through the Enterprise Human Resources Integration (EHRI) Statistical Data Mart.²²

Some, but not all, of the information on the personnel action form is collected in OPM's EHRI. The use of the specific remarks code for SGE is not mandatory for agencies.

At individual agencies, multiple offices may play a role in on-boarding and designating SGEs. Those offices may include the hiring or appointing office, the human capital office, the ethics office, and the office of general counsel. Generally, the hiring office takes the lead role in identifying the skill set and length of service needs. The agency's human capital office advises on the appropriate use of hiring authorities, processes the personnel action to on-board the SGE, and enters the personnel action information into the personnel database. Agencies are required to identify the SGE designation on the personnel action Standard Form 50. The agency's ethics office is responsible for training employees, including SGEs, on their ethics requirements so that they are able to identify potential problems and seek the advice and counsel of ethics officials, when appropriate. Ethics offices may also provide technical assistance to the hiring office by advising on how to make a good faith service days estimate for the purposes of making a SGE designation, and evaluating whether the individual has potential conflicts of interest. At agencies where the ethics functions are not within the general counsel's office, then the agency's general counsel's office may also have a role in helping to ensure that ethics statutes and regulations are applied appropriately to a SGE.

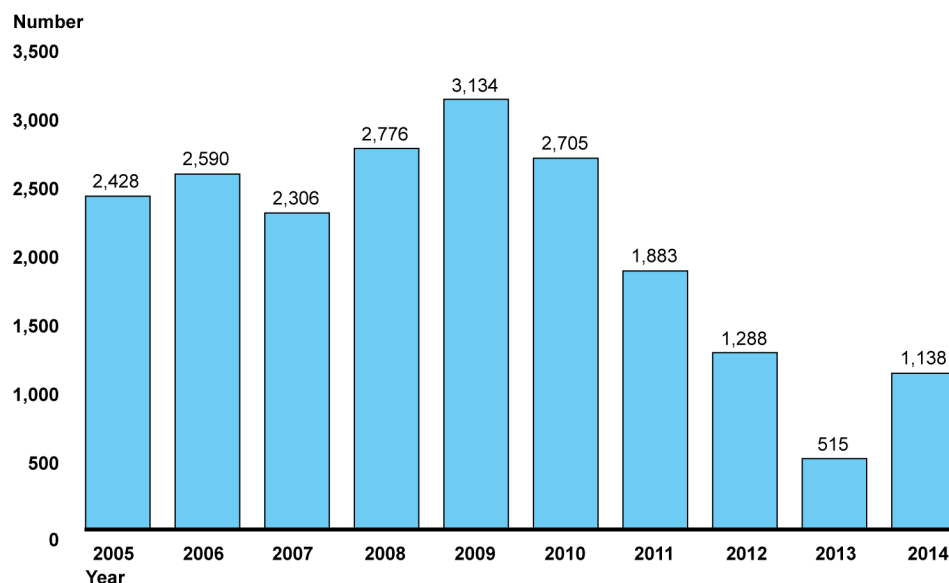
²²EHRI contains information on personnel actions and other data, and is the primary government-wide source for information on federal employees.

Agencies' Use of SGEs Not Serving on Federal Boards Is Limited

OGE data show SGEs not serving on federal boards make up a small portion of total SGEs in the executive branch. According to OGE data, federal agencies reported 40,424 total SGEs in the executive branch as of December 31, 2014.²³ As of that date, about 3 percent of those SGEs (1,138 of 40,424) were not serving on federal boards and employed as experts or consultants. At the end of 2013, that figure was about 1 percent (515 of 41,335). Over a 10-year period (from 2005 to 2014), we found that agencies generally reported more limited use in 2014 than in 2005, and used an annual average of approximately 2,000 SGEs not serving on federal boards, with a peak of about 3,100 in 2009 and a low of about 500 in 2013.

As shown in figure 2, OGE data show the numbers of SGEs not serving on federal boards in the executive branch varied over the 10-year period. According to OGE, agencies' use of SGEs not serving on federal boards varies depending on their need for particular expertise at any given time.

Figure 2: Special Government Employees Not Serving on Federal Boards, Calendar Years 2005-2014



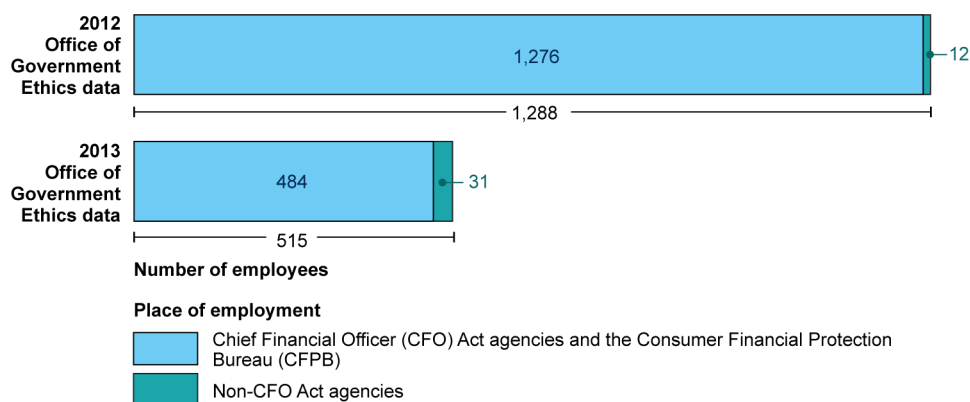
Source: GAO analysis of Office of Government Ethics data. | GAO-16-548

²³OGE asks agencies for snapshot data when reporting the number of SGEs. Therefore, it should be noted that these numbers represent a point in time assessment—the last day of the calendar year—and may not include individuals who were employed during the year, but were not employed on the last day of the calendar year.

Note: These are the required public and confidential financial disclosure report filers in the "expert/consultant" SGE category, reported in OGE's annual questionnaire.

As shown in figure 3, most SGEs not serving on federal boards were employed at the 24 CFO Act agencies and the CFPB—about 94 percent (484 of 515) at the end of 2013 and about 99 percent (1,276 of 1,288) at the end of 2012.²⁴ In 2012 and 2013, the selected agencies comprised 63 percent (805 of 1,288) and 29 percent (149 of 515) of SGEs in the executive branch, respectively (see appendix V for a complete breakout of SGEs not serving on federal boards at each of the 24 CFO Act agencies and CFPB).

Figure 3: Special Government Employees (SGE) Not Serving on Federal Boards at CFO Act Agencies and the CFPB, as a Portion of the Executive Branch SGEs Not Serving on Federal Boards, Calendar Years 2012 and 2013



Source: GAO analysis of Office of Government Ethics data. | GAO-16-548

Since 2012, OGE officials reported the agency has taken a number of steps to improve individual agency's reporting on SGEs. For example, in 2014, OGE began posting agencies' responses, unedited, and some of the results from its annual questionnaire on its website. OGE officials believe publicizing agency responses will increase reporting accountability. Also, in 2014, OGE officials convened focus groups with executive branch ethics officials to identify any challenges with

²⁴Our analysis was limited to those 2 years since OGE only had SGE data in a method that allowed agency matching for 2012 to 2013.

understanding ethics reporting requirements, including for SGEs, in the annual questionnaire. In 2015, OGE officials added a skip-ahead feature to its annual questionnaire to help streamline agencies' responses. This feature helps to prevent agencies from responding to questions that are not germane to their agency. OGE also directed executive branch agencies to centralize their annual reporting strategy by requiring that all submissions be sent to OGE directly from the CFO Act department, rather than from component agencies. Through these and other efforts, OGE officials said their goals are to expand the reach of ethics guidance for federal employees, and to increase both the consistency and the accuracy of ethics training across the executive branch. Officials at all five of the selected agencies we spoke with told us that OGE's oversight and guidance was effective, and that they felt comfortable contacting OGE if they had a SGE or ethics-related question.

Four of Five Selected Agencies Had Reliable Data on SGEs Not Serving on Federal Boards While HHS Had Challenges Reporting Reliable Data

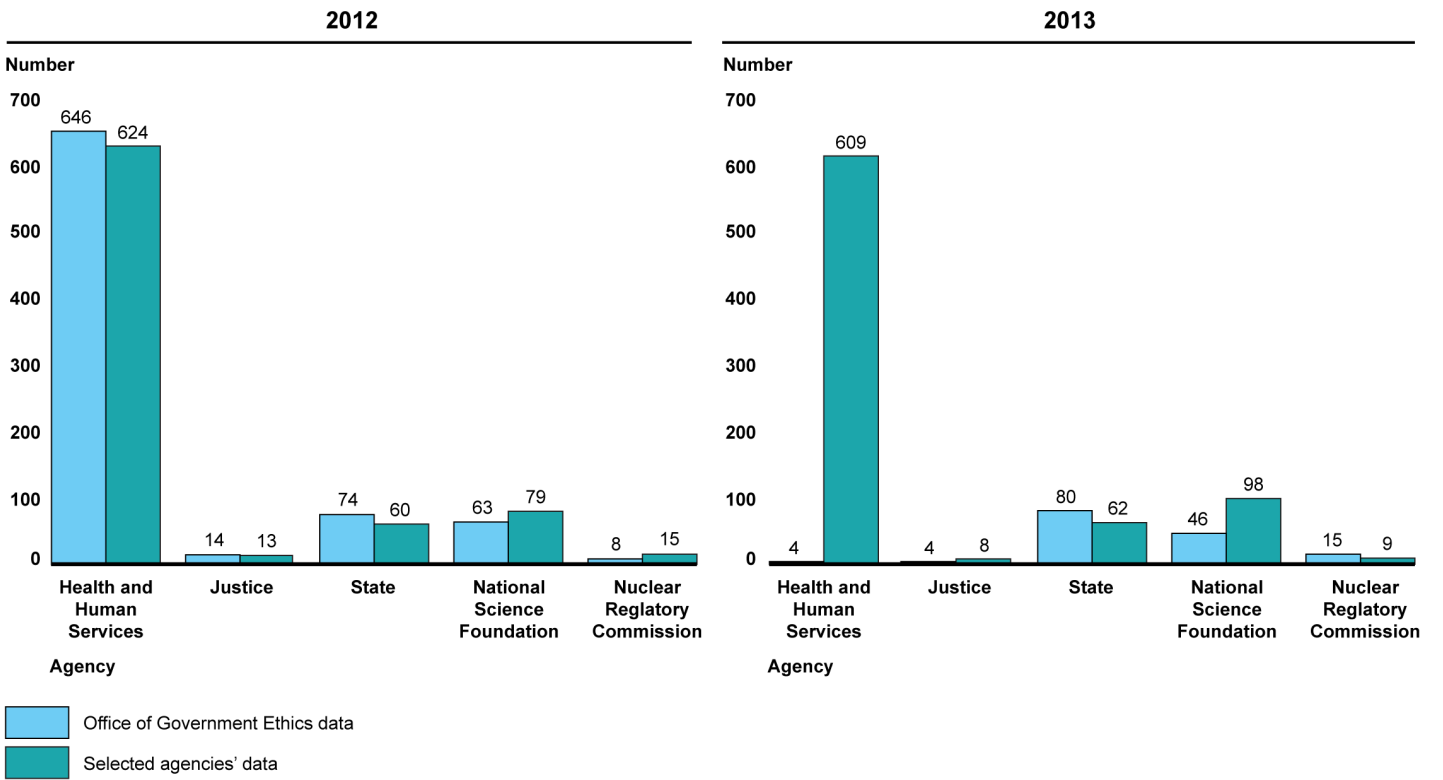
OGE Data Reflected Agency Reporting

Agencies are responsible for identifying SGEs and reporting these data to OGE (through its annual questionnaire) and OPM (through information on personnel actions in EHRI).

Generally, OGE's data reflected what agencies reported on SGEs not serving on federal boards. As part of our assessment of the reliability of OGE data on these SGEs not serving on federal boards, we compared OGE data with data from the selected agencies for 2012 and 2013—the most recent data available. In 2012, we found that the five selected agencies had data that closely matched OGE data. In 2013, we found data for three of the five selected agencies closely matched (see figure 4). We attribute most of the difference between OGE and NSF data in

2013 to differences in the reporting time frame (fiscal year versus calendar year). At HHS, we found a significant difference between OGE data and agency data. HHS told us it had 609 SGEs not serving on federal boards in 2013, but reported 4 to OGE. When we asked about the discrepancy, HHS said 609 was correct, but could not explain the discrepancy.

Figure 4: Comparison of OGE and Selected Agency Data on Special Government Employees Not Serving on Federal Boards, 2012 and 2013



Source: GAO analysis of OGE's and selected agencies' data. | GAO-16-548

Note: Agency data was for the fiscal year and OGE data was for the calendar year, which accounts for some of the differences between the datasets.

OGE has a process for reviewing agency submissions, but it does not verify the data for every agency. During the review of the responses to its Annual Agency Ethics Program Questionnaire, OGE officials follow up

with agencies for an explanation in instances where agencies reported data that represented a 20 percent increase or decrease compared to the prior year's submission. OGE officials conducted follow-up efforts with agencies when a submission showed a difference between the number of employees required to receive ethics training and the number of employees that received training, or the number of financial disclosure reports filed. OGE also conducts spot checks of some of the agencies' responses to determine the level of variance from year to year, according to agency officials.

Based on our assessment, OPM does not have complete data on SGEs not serving on federal boards in its EHRI database. We compared OPM data on individual SGEs with agency data for 2005 to 2014. Our comparison of selected agency data to OPM's EHRI database revealed close matches in two of the five selected agencies. NSF and DOJ data mostly matched OPM's EHRI database over the 10-year period of fiscal years 2005 to 2014. We experienced some challenges in attempting to match OPM's data on individual SGEs for the other three selected agencies (State, HHS, and NRC). For example, HHS officials provided inaccurate dates for when SGEs were hired. We found the OPM data had incomplete information on individual SGEs for the 10-year period. OPM officials said it is very difficult to reliably identify a complete list of SGEs in their database since agencies do not consistently identify SGEs in personnel data collected by OPM in the EHRI database. According to OPM, there is no policy or legal requirement for the agency to capture SGE data in its EHRI database.

Weak Coordination and Misunderstandings Can Contribute to Challenges in Identifying SGEs for Reporting Purposes

Four of the five selected agencies had data reliable enough for the purposes of reporting annual totals. Still, three of the selected agencies in our review—HHS, State, and NRC—encountered challenges in identifying SGEs not serving on federal boards due to weak coordination and misunderstandings about SGE designations. At HHS, we found that staff in the agency's human capital office did not coordinate with its ethics office before providing the agency's SGE totals, which contributed to challenges in identifying and reporting on their SGEs.

After submitting an initial list of SGEs, State and NRC required additional meetings to clarify our request for their SGE totals. At State, human resources and ethics officials disagreed about which individuals should be identified as SGEs not serving on federal boards for SGEs hired prior to 2008. Both agencies ultimately provided corrected data.

All the selected agencies generally had a designation and on-boarding process that involved some degree of coordination between a hiring office, a human capital office, and an ethics or general counsel office (or both) before on-boarding a SGE. Some of the selected agencies operate in a more structured and formal way than others. State recently instituted a formal coordination process and, in April 2014, issued written guidance and procedures on the process, including explicit instructions for coordinating among the hiring office, the human capital office, and the ethics office.

Conversely, HHS had a less structured coordination process for identifying SGEs not serving on federal boards. HHS experienced difficulty identifying employees categorized as SGEs not serving on federal boards, in part, because the departmental human capital office is not consistently coordinating with human capital offices in its components or with the Office of the General Counsel, Ethics Division to ensure that SGEs not serving on federal boards are appropriately identified. In addition, HHS's human capital officials misunderstood the SGE designation and, at times during our audit, could not distinguish between SGEs not serving on federal boards and SGEs who serve on federal advisory boards, committees, or commissions. For example, the HHS human capital office provided data that showed 500 to 600 SGEs not serving on federal boards at one of its components, the Food and Drug Administration (FDA), every year between fiscal years 2005 and 2014.

However, FDA human capital officials disagreed and said they were only aware of one SGE not serving on federal boards at FDA for that period. A FDA human capital official told us that most of the SGEs at FDA are serving on advisory boards or are committee members. The FDA human capital official said it generally only has a few experts or consultants, and those individuals may be hired on indefinite appointments or not to exceed 5-year appointments.

When asked about the reason for the discrepancy, HHS provided no explanation. According to the HHS Office of General Counsel Ethics staff, the office relies on data provided by components and staff offices, and takes no additional steps to verify data for the annual OGE ethics survey.

In Internal Control Standards for the Federal Government, we have previously reported that information should be recorded and communicated in a form that enables entities to carry out their internal control and other responsibilities.²⁵ HHS's Human Resource Manual instructions on the appointment of experts and consultants contains guidance on identification of expert and consultants, for instance, but no guidance on appropriately identifying an expert or consultant as a SGE not serving on federal boards. Additionally, the instructions do not include any mention of the circumstances under which experts and consultants may be considered a SGE or when coordination among the hiring, human capital, or ethics offices is appropriate. Without clarifying guidance on identifying SGEs not serving on federal boards, HHS cannot be assured that the agency is reporting reliable data to OGE and OPM.

We did not review whether these issues are occurring at other executive branch agencies. However, issues such as these reduce the reliability of the government's data on SGEs. By strengthening data, agencies will be better positioned to identify SGEs not serving on federal boards, perform the appropriate ethics review for their SGEs not serving on federal boards, and provide the appropriate ethics training. Moreover, accurate and complete data are important to allow OGE and Congress to provide informed oversight of agencies using SGEs not serving on federal boards.

Selected Agencies Appointed SGEs Primarily Using Expert and Consultant Hiring Authority and Utilized Them in Specialized Areas

²⁵GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

Most Selected Agencies Use the Expert and Consultant Hiring Authority and Have Guidance or Require Documentation for the Designation Process

Three of the five selected agencies hired most of their SGEs not serving on federal boards under the government-wide expert and consultant hiring authority, 5 U.S.C. § 3109. Section 3109 permits agencies to appoint experts or consultants without regard to the competitive service hiring rules. Additional government-wide temporary hiring authorities were used, but to a lesser degree. State officials, for example, said the agency also uses government-wide temporary hiring authorities under which retired former Foreign Service or civil service retirees, among others, would be eligible for noncompetitive appointment for on-boarding SGEs.²⁶ Two of the five agencies, NSF and NRC, more often used their own agency-specific hiring authorities when on-boarding SGEs.²⁷ NSF officials use an agency-specific hiring authority under the National Science Foundation Act of 1950, as amended, to on-board most of their SGEs.²⁸ Similarly, NRC officials said they primarily use their hiring authority under section 161d of the Atomic Energy Act of 1954, as amended, to hire SGEs (see appendix IV for more information on hiring authorities used by the selected agencies, including government-wide and agency-specific authorities).²⁹

Four of the five selected agencies had written policies specifically for SGEs or experts and consultants, while one—DOJ—did not. As mentioned earlier, in 2014, State issued written guidance and procedures on the on-boarding and designation process for SGEs not serving on boards. The written guidance included critical questions for managers to consider when determining SGE status, the primary hiring authorities to use, roles and responsibilities for the appropriate offices, and instructions for documenting appointments. The guidance is explicit about preparing the personnel action and including the use of the appropriate OPM

²⁶5 C.F.R. § 316.402(b)(1) and (3).

²⁷It should be noted that not all experts or consultants or individuals hired under agency-specific hiring authorities are SGEs.

²⁸This provision, codified at 42 U.S.C. § 1873(a), authorizes NSF to make temporary or limited term appointments without regard to the competitive hiring rules for the competitive service.

²⁹This provision, codified at 42 U.S.C. § 2201(d), permits NRC to appoint its employees without regard to the civil service laws. NRC has implemented this authority to appoint individuals consistent with 5 U.S.C. § 3109 (and 5 C.F.R. part 304).

remark code indicating the individual is a SGE. For example, the contents of State's SGE on-boarding package include

- electronically completed OGE 278 or OGE 450 in the agency's Financial Disclosure Management system;
- conflict of interest clearance request checklist from State's Legal Office of Ethics and Financial Disclosure;
- individual's position description;
- hiring manager's certification that it is not anticipated that the employee's duties will require more than 130 days of service;
- individual's acknowledgement of ethics guidance review by signing and dating the last page of the seven page document on Government Ethics Guidance;
- individual's resume; and
- in certain cases, a signed Ethics Agreement, if required by State's Legal Office of Ethics and Financial Disclosure.

Specifically, State's human capital staff circulates a SGE ethics clearance and request package to the hiring bureau's human capital as well as to the ethics office, housed in State's office of general counsel. HHS, NSF, and NRC had written guidance on human capital policies and procedures for experts and consultants that agency officials said was applicable to SGEs not serving on federal boards. DOJ's Departmental Ethics office had no written guidance on human resources policies specifically for SGEs not serving on federal boards.

Three of the five selected agencies (NRC, NSF, and State) required documentation for the SGE on-boarding. For example, at NRC, the hiring office must submit a justification for on-boarding an expert/consultant that is a SGE not serving on federal boards. The justification required an explanation of why the expertise is needed, what projects the expert will work on, and why the expertise is not already available in house. NRC also has a checklist for the steps that should be followed by the appropriate offices that play a role in on-boarding a SGE. Conversely, NSF has requirements for documenting expert/consultants in its internal guidance, but nothing specific for SGEs is required on the personnel manual.

In addition to SGEs that are individuals hired from outside (including those reemployed retired federal employees who are SGEs), three of our

selected agencies identified examples of an employee who became a SGE after a conversion (or change) in the individual's appointment. Selected agencies said such conversions are infrequent. Generally, a conversion is a change of appointment (under either the same or a different appointment authority) in the same agency without a break in service.³⁰ Conversions are appointment actions taken according to the rules related to the appointment into which the conversion results. Appointment rules would prescribe, among other things, the process required for making the appointment, eligibility, and qualification requirements. For example, a conversion action into an expert position under section 3109 would have to comply with the requirements under that authority, including that the expert position requires the services of a specialist with skills superior to those of others in the same activity, and that the individual to be appointed is regarded as an authority or practitioner of unusual competence and skill in a professional, scientific, technical, or other activity.³¹ These conversions included:

- DOJ officials reported that a senior noncareer employee, who wished to return to academia, resigned and the following day was appointed to an intermittent consultant position. The consultant appointment was not to exceed 5 months and therefore since the employee would be in a temporary appointment that would not exceed 130 days, the employee was a SGE. Agency officials explained that the conversion was justified because there were a number of pending matters for which the office had a continuing need for the employee's expertise, which they viewed as essential for program stability.
- NRC officials reported two instances when regular employees became SGEs through conversion actions. In both instances, retired NRC employees had been reemployed as regular (non-SGE) employees. Subsequently, both employees' appointments were converted to consultant appointments (in conformance with NRC's guidance on consultants), resulting in the employees becoming SGEs. NRC said the conversions resulted from changes to the work assignments and responsibilities of both individuals.

³⁰A break in service of 3 days or less is permitted in conversion actions in the excepted service.

³¹See OPM regulations implementing 5 U.S.C. § 3109 at 5 C.F.R. part 304.

-
- State officials reported that a senior presidential appointee, who intended to retire, was appointed to an expert/consultant position, resulting in the employee becoming a SGE. The department justified the appointment because the employee had deep expertise on foreign policy issues (he had served in the Foreign Service for decades) and the appointment would enable the department to call upon him from time to time to provide expert advice to the foreign affairs community.

SGEs Work in Highly Specialized Areas and Supervisors Generally Track Days

The selected agencies used SGEs not serving on federal boards for their expertise in a variety of policy areas: science, health care, foreign affairs, legal, and inspections, as shown in figure 5.

Figure 5: SGEs Not Serving on Federal Boards Fill a Variety of Roles for Short-Term Expertise at Selected Agencies



Sources: GAO analysis of selected agencies' information; PhotoDisc and National Science Foundation (photos). | GAO-16-548

Officials from the selected agencies said SGEs not serving on federal boards are typically used for short-term needs and often in response to unforeseen events such as natural disasters, terrorist attacks, a resignation, or an increase of work on issues requiring specific scientific expertise. Some SGEs were hired to fill administrative positions, as well; for example, NRC hired a budget specialist and NSF employed a SGE with expertise in organizational equal employment issues.

Selected agency officials told us that their SGEs provide services in a variety of ways, including the following:

- At NSF, SGEs provided scientific expertise on specific initiatives, conducting evaluations and advising on NSF programs, including international programs, and providing oversight of cross-directorate programs. NSF SGEs may also advise and assist in the development of short- and long-range plans, and assist in establishing goals and objectives for research programs.
- At DOJ, SGEs served on the September 11th Victim Compensation Fund initiative. For example, DOJ SGEs included the Special Master who presided over the Compensation Fund proceedings and staff who supported the Special Master.³² Other SGEs at DOJ provided quick turnaround assistance to the agency in preparing for congressional testimonies or other very narrowly tailored needs.
- At HHS, SGEs often served as intermittent employees who worked for the National Disaster Medical System (NDMS).³³ For example, many NDMS SGEs provided support to the Federal Emergency Management Agency after a disaster. HHS also used SGEs not serving on a federal board to 1) advise and consult on acquiring materials for its medical library to administer health coaching programs, 2) develop and implement a health coaching program, and 3) advise on a strategy to achieve accreditation for one of its operating divisions.
- At NRC, SGEs often served in areas such as engineering, scientific, and other technical (professional) occupational series. NRC SGEs roles and responsibilities included providing services related to

³²The September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, title IV, 115 Stat. 230, 237 (Sept. 22, 2001). The Fund was reactivated and amended under title II of the James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623, 3659 (Jan. 2, 2011). Title II of the Act reactivated the September 11th Victim Compensation Fund that operated from 2001 to 2004 and requires a Special Master, appointed by the Attorney General, to determine eligibility and provide compensation for any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the debris-removal efforts that took place in the immediate aftermath of those crashes.

³³NDMS is a section of HHS responsible for managing the federal government's medical response to major emergencies and disasters.

security administration, human factors, budget analysis, technical writing and editing, and visual information.

- At State, SGEs most often served as Foreign Affairs officers, senior advisors, management analysts, and physical scientists. For example, State officials highlighted initiatives and issues that require quick action in hiring appropriate experts, such as a public outreach position for the Arab community.

Officials from four of the selected agencies told us that supervisors are generally responsible for tracking whether the SGE stays within the 130-day service estimate. DOJ officials permit their SGEs to track their own days of service. State officials reported that they have examples of SGEs exceeding the 130-days in 1 year and human resources reevaluating their status for the next year. NSF has built a feature into its personnel system that alerts the supervisor and human resources office when a SGE is approaching the end of expected days of service for the agency.

OGE Reviews Have Found No Issues for SGEs Not Serving on Federal Boards

OGE reviews of executive branch agencies' ethics programs have found few issues specific to SGEs and none for SGEs not serving on federal boards. We issued two SGE-related reports since 2004 where we discuss guidance and policies available to agencies and potential conflicts of interest of individuals who serve on advisory committees and boards.³⁴

Our analysis of 23 OGE reviews conducted at the CFO Act and Consumer Financial Protection Bureau for fiscal years 2005 to 2014 showed no issues specific to SGEs not serving on federal boards. According to OGE and officials at our selected agencies, at the time of our review, there were no outstanding OGE recommendations at the five agencies.

OGE primarily conducts two types of ethics program reviews: plenary reviews and inspections. During a plenary review, OGE generally examines all elements of an agency's ethics program, including its

- structure and general administration;

³⁴GAO, *FDA Advisory Committees: Process for Recruiting Members and Evaluating Potential Conflicts of Interest*, [GAO-08-640](#) (Washington, D.C.: Sept. 30, 2008) and *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, [GAO-04-328](#) (Washington, D.C.: Apr. 16, 2004).

-
- public and confidential financial disclosure process;
 - ethics training, advice, and counseling program;
 - enforcement of ethics-related statutes and regulations, including supplemental standards of conduct regulations; and
 - administration of its ethics program as it applies specifically to advisory committees and SGEs.

As part of the plenary reviews, OGE evaluates whether an agency made an affirmative determination as to whether or not a member of an advisory committee is a SGE rather than a representative. OGE officials said this helps ensure that those advisory committee members who will be expected to provide advice to the government (rather than on behalf of a group or industry the member represents) are designated as SGEs and therefore appropriately covered by ethics and conflicts of interest provisions. In 2015, OGE's Program Review Branch examined all ethics program review reports issued from January 1, 2009, through September 30, 2015, to determine how they addressed issues involving SGEs.³⁵ The examination covered 238 review reports and identified model practices related to SGEs and recommendations, and suggestions regarding management of SGEs during the specified period.

According to OGE officials, the majority of the recommendations OGE makes about SGEs following plenary reviews are focused on the determinations agencies made between designating an advisory committee member as a representative or as a SGE. According to OGE officials, an agency that fails to properly designate a member of an advisory committee as a SGE, but rather designates the member as a representative, poses a risk to the government because that member is not subject to ethics and conflicts of interest provisions (including agency reviews for conflicts of interest). Based on its reviews and the results from its annual questionnaire, OGE officials said they believe agencies are more routinely properly designating advisory committee members as SGEs in recent years.

According to OGE, its inspections are a streamlined version of the plenary review process. Inspections focus on the core elements of an

³⁵OGE Compliance Division, *Summary Report: Special Government Employees* (October 2015).

agency's ethics program, which include overall program administration, public and confidential financial disclosure systems, ethics training, and ethics advice and counseling. Inspections do not focus specifically on advisory committees or SGEs. However, if a concern specific to SGEs was to be identified during the inspection, the issue would be addressed and noted in the inspection report. Alternatively, according to OGE's procedures, if the issue was of sufficient magnitude, OGE would initiate a more comprehensive plenary review of the agency's ethics program.

OGE is responsible for ordering action it deems necessary to correct deficiencies in agency ethics programs.³⁶ If OGE orders corrective action and the agency does not comply, OGE may notify the President and Congress.³⁷ Additionally, OGE is responsible for ordering action it deems necessary with respect to individual employees and, to do so, is authorized (among other things) to recommend that an agency investigate possible violations of any rule, regulation, or Executive order relating to conflicts of interest or standards of conduct.³⁸ OGE officials said that agency Inspectors General are better positioned to investigate potential ethics or conflicts of interest violations by individual employees. OGE does not review or intervene in ongoing agency investigations; however, it may provide the agency with technical assistance if requested.

³⁶ 5 U.S.C. app. 4, § 402(b)(9) and (f)(1). OGE orders corrective action under the procedures set forth under 5 C.F.R. part 2638, subpart D. Under these procedures, initially OGE will issue a notification to the agency of any programmatic deficiency and request the agency report relevant information back to OGE concerning those deficiencies. Based on the agency's report, if OGE determines that a deficiency is not being corrected by the agency, OGE will issue an order to the agency specifying, in part, the corrective action required to be taken to remedy the deficiency and any agency reporting required to establish that the corrective action has been accomplished (or plans for doing so). 5 C.F.R. part 2638, subpart D.

³⁷ 5 U.S.C. app. 4, § 402(f)(1). If the agency fails to comply with this order, OGE will report the noncompliance to the President and Congress, after providing the agency with notice of such action and the opportunity to provide comments. 5 C.F.R. §§ 2638.403-404.

³⁸ 5 U.S.C. app. 4, § 402(b)(9) and (f)(2). This authorization does not extend to making a finding that a criminal statute relating to conflicts of interest has been violated. Neither OGE nor individual agencies have authority to make such findings. 5 U.S.C. app. 4, § 402(f)(5). 5 C.F.R. § 2638.501(c). Suspected violations of criminal conflicts of interest statutes are to be referred for possible prosecution to the Attorney General pursuant to 28 U.S.C. § 535. OGE requires that an agency concurrently notify it when making such a referral. 5 C.F.R. § 2638.603.

Conclusions

Given the enormous complexity involved in delivering the wide array of services the federal government provides to U.S. citizens daily, agencies need the ability to obtain temporary outside skills, opinions, and expertise for improvement of government services and operations. The SGE category helps to ensure that the government can satisfy recruitment needs while ensuring integrity of government service. While agencies are overwhelmingly using SGEs for federal advisory committees and boards, a very small number of SGEs not serving on federal boards is filling a niche for short-term, unique, or unforeseen situations requiring specific skillsets.

Agencies are responsible for reporting on SGEs not serving on federal boards to OGE and OPM requires agencies to identify SGEs on an individual's personnel action. However, agencies may have reporting challenges as a result of weak internal coordination among offices with a role in designating and identifying SGEs not serving on boards and misunderstandings about which individuals are in this category. Although OGE has taken recent steps to improve agencies' reporting, the reliability of agencies' data is dependent on how well they coordinate internally and how well agencies understand the SGE designation. Given the misunderstanding about SGEs that we found at selected agencies, additional research may be needed to determine whether other agencies are experiencing challenges similar to those we identified at selected agencies. Stronger internal coordination among offices that maintain SGE data would strengthen the SGE data that agencies report to OGE and OPM. In particular, unless HHS takes steps to reconcile differences between data held by components and its headquarters, and reconcile differences in data held by its ethics office with data held by its human capital office, the agency cannot be assured of the reliability of its data on SGEs not serving on federal boards. By strengthening data, agencies will be better positioned to report reliable data on SGEs not serving on federal boards to OGE and OPM. Moreover, OGE and Congress may provide better oversight of agencies using SGEs not serving on federal boards.

Recommendations for Executive Action

To help ensure HHS has reliable data on SGEs not serving on federal boards, we recommend that the Secretary of HHS take steps to improve the reliability of data on SGEs not serving on boards. For example, the agency could reconcile human capital data with general counsel and ethics office data, or issue clarifying guidance to human capital staff on appropriately identifying SGEs in human capital databases.

To help ensure that agencies report consistent and reliable data, the Director of OGE should determine (e.g., through a survey of Designated Agency Ethics Officials and/or by analyzing agency data) whether other executive branch agencies are experiencing data challenges similar to HHS, State, and NRC. If they are, the Director should take steps to help the agencies strengthen their data.

Agency Comments and Our Evaluation

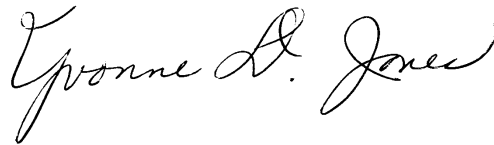
We provided a draft of this report to the Directors of OGE, OPM, and NRC; the Secretaries of HHS and State; the Senior Staff Associate of NSF; and the Assistant Attorney General for Administration at DOJ for review and comment. OGE and HHS provided us with written comments (reproduced in appendixes VI and VII). In its written comments, HHS concurred with our recommendations. In OGE's written comments, it partially concurred with our recommendation to determine whether other executive branch agencies are experiencing data challenges similar to HHS, State, and NRC. OGE said it concurs with the emphasis on ensuring that agencies report consistent and reliable data and that it will survey ethics officials or otherwise analyze agency data as recommended. However, OGE stated it has no authority to direct human resources offices to collect or share data or to otherwise coordinate with agency ethics offices. We maintain that OGE has the inherent authority to require agencies to ensure that their reported information is reliable. We did not suggest that OGE direct agency human resources officials to take specific steps regarding SGE data. Rather, we believe that through collaborative actions between agency ethics and human resources officials, agencies can ensure reported information on SGE is reliable.

Although none of the other agencies provided comments on the report's findings, conclusions, or recommendations, all of the agencies provided technical comments that were incorporated, as appropriate.

As agreed with your office, 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 to the Director of the Office of Government Ethics, the Director of the Office of Personnel Management, as well as to the appropriate congressional committees and other interested parties. In addition, the report will be 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) 512-6806 or jonesy@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 VIII.

Sincerely yours,

A handwritten signature in black ink that reads "Yvonne D. Jones". The signature is written in a cursive style with a large, stylized "Y" and "J".

Yvonne D. Jones
Director, Strategic Issues

Appendix I: Objectives, Scope, and Methodology

The objectives of this engagement were to review agencies' use and oversight of the special government employee (SGE) designation in the federal workforce for SGEs not serving on federal boards at the 24 agencies covered under the Chief Financial Officers (CFO) Act of 1990, as amended, and the Consumer Financial Protection Bureau (CFPB). This report (1) describes what is known about the total number of SGEs not serving on federal boards in the executive branch as well as at CFO Act agencies and CFPB; (2) assesses the extent to which the Office of Government Ethics (OGE), Office of Personnel Management (OPM), and selected agencies identify and report data on SGEs not serving on federal boards; (3) assesses how selected agencies appoint, utilize, and oversee SGEs not serving on federal boards, and describes the relevant hiring authorities and ethics requirements; and (4) examines how, if at all, OGE oversees and ensures compliance with ethics requirements for SGEs, including the proper identification of individuals as SGEs, consistent with 18 U.S.C. § 202(a).

To address these objectives, we reviewed the federal statutes, regulations, and agency guidance that address ethics requirements for federal executive branch employees, including the proper designation of SGEs and statutes and regulations related to hiring authorities that agencies use to on-board SGEs, and we interviewed agency officials responsible for ensuring compliance with ethics and hiring requirements for SGEs.

We selected five agencies—the Department of Health and Human Services (HHS), Department of Justice (Justice), Department of State (State), National Science Foundation (NSF), and Nuclear Regulatory Commission (NRC)—to provide case illustrations of agencies' use of SGEs not serving on federal boards. We selected the agencies based on the following factors: (1) number of SGEs, (2) ratio of non-Federal Advisory Committee Act (FACA) SGEs compared to the agency's 2-year on-board average of all employees over the period of fiscal years 2014 to 2015, (3) agency size, (4) OGE ethics program review results, and (5) agency responses to OGE on the amount of time the agency indicated it spends overseeing SGEs.

To describe what is known about the total number of SGEs not serving on federal boards in executive branch agencies, as well as at CFO Act agencies and CFPB, we examined agency use of SGEs reported by OGE for calendar years 2005 through 2014. Each executive branch agency is required to submit an annual report to OGE on the agency's ethics program including, among other things, data on agency use of SGEs. To

assist agencies in fulfilling this requirement, OGE provides an annual questionnaire to each executive branch agency that covers the preceding year. OGE's data represent a point in time assessment—the last day of the calendar year—and may not include individuals who were employed during the year but were not employed on the last day of the calendar year. We also reviewed documentation and interviewed OGE officials about recent steps the agency took to improve OGE's reporting on SGEs.

To assess the extent to which OGE, OPM, and selected agencies identify, collect, and report data on SGEs not serving on federal boards, we analyzed OGE's, OPM's, and selected agencies' data related to the number of SGEs not serving on federal boards at CFO Act agencies and CFPB for fiscal years 2005 through 2014. We assessed the reliability of OGE's, OPM's, and selected agencies' data on SGEs not serving on federal boards. We compared OGE's data on the total number of SGEs not serving on federal boards with selected agencies' data for the most recent years available—2012 and 2013. We also compared data on individual SGEs not serving on federal boards from the five selected agencies with records for SGEs for these agencies in OPM's Enterprise Human Resources Integration (EHRI) system using the effective date of the SGE appointment and other variables, such as grade, step, and gender, which is a method we have used in previous reports. Generally, we found OGE's and four of the selected agencies' data sufficiently reliable (State, NSF, NRC, and DOJ) to report annual totals of SGEs not serving on federal boards. We also found that one of the selected agencies, HHS, provided unreliable effective dates for SGEs not serving on federal boards. Specifically, the SGE on-board dates provided by HHS were invalid when compared to effective dates of personnel actions in EHRI, which are reliable for this field. For two agencies, we found several instances of misidentified SGEs not serving on federal boards, and after discussion with the agencies, they provided corrected data. We found that OPM data did not have complete information that would allow us to identify SGEs not serving on federal boards.

To assess how selected agencies appoint, utilize, and oversee SGEs, we examined agency documentation and interviewed agency officials on the (1) process for designating and hiring SGEs not serving on federal boards, (2) hiring authorities used, (3) types of roles and responsibilities SGEs performed, and (4) agency tracking of whether SGEs stay within the 130-day service estimate. We examined internal coordination on SGEs not serving on federal boards among hiring, ethics, and general counsel offices by interviewing agency officials at the department level and component/sub-agency level, reviewing agency documentation, and

comparing human resource data maintained by department level human resource offices with data maintained at the component or sub-agency level on SGEs not serving on federal boards.

To examine how, if at all, OGE oversees and ensures compliance with ethics requirements for SGEs, we examined statutes and regulations covering OGE's role and responsibilities. We examined 23 OGE reviews of agency level ethics programs at 24 CFO Act agencies and the CFPB for fiscal years 2005 to 2014 to determine whether OGE identified issues relating to SGEs not serving on federal boards and whether OGE had any related open recommendations. Since the Department of Defense did not have a review during that period, we included reviews conducted at component agencies (Army, Navy, and Air Force). We also examined agency documentation such as the Summary Report: Special Government Employees, October 2015, and interviewed officials on OGE's roles, responsibilities, and compliance activities.

We conducted this performance audit from April 2015 to July 2016, 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: Legislative History of the Special Government Employee Designation

Congress created the special government employee (SGE) category in 1962 when revising the criminal laws relating to bribery, graft, and conflict of interest prohibitions.¹ With regard to conflict of interest prohibitions, the 1962 law was intended, in part, to establish more appropriate prohibitions for a category of employees consisting of consultants and other temporary employees to facilitate the government's recruitment of such persons from outside the government.

The 1962 act was the culmination of years of study by groups inside and outside of government concerning how best to assure high ethical standards in the conduct of the federal government.² Their work revealed, in part, that the existing conflict of interest laws had an unnecessarily harsh impact on temporary employees and made it harder for agencies to obtain temporary service of persons with specialized knowledge and skills, advisers who provide essential counsel, and highly skilled technicians. During congressional testimony, examples were provided concerning the impact the existing conflict of interest laws had on agency recruitment. For example, an attorney declined a position on an advisory committee concerning the civil service system because he was concerned that to serve he would have to resign from his firm, which represented individuals in their dealings with federal agencies (such as the Internal Revenue Service). In another example, an individual who had served full time in the Department of State but left was asked to return as a part-time consultant to leverage the considerable knowledge he had acquired while employed with the department overseas. He declined

¹Act of October 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119.

²One of the most notable studies conducted was by a special committee on Federal Conflict of Interest Laws of the New York City Bar Association which culminated in a report published in 1960. One of the key recommendations of this Bar Association report was to recognize in statute a distinction between full-time and intermittent employees. Roswell B. Perkins, Chairman, Special Committee on Federal Conflict of interest laws, Association of the Bar of the City of NY, testified before congressional committees regarding this study's findings and recommendations. The report was published by Harvard University Press. Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960).

because the application of the law would have exposed him to criminal liability.³

Prior to the act, most of the existing laws originated in the 19th Century, at a time when persons outside the government rarely served as consultants or advisers. Therefore, the laws were aimed at the activities of regular full-time employees, rather than at a consultant or other temporary employee whose main work was performed outside the government. While Congress had recognized the adverse impact these laws had on temporary employees and granted specific statutory exemptions from time to time, this approach created an inconsistent range of exemptions.⁴ To address this issue, Congress created a uniform means of imposing special rules on all temporary employees expected to serve within specified time limits. In doing so, Congress aimed to balance efforts to ensure integrity of government service with recruitment needs.⁵

³Federal Conflict of Interest Legislation; Hearings Before the Antitrust Subcommittee. of the House Comm. on the Judiciary, 86th Cong. 406-407 (1960) (testimony of Roswell B. Perkins, Chairman, Special Committee on federal conflict of interest laws, Association of the Bar of New York).

⁴H.R. Rep. No. 87-748, at 2-8 and S. Rep. No. 87-2213, at 4-7.

⁵H.R. Rep. No. 87-748, at 2 (1961) and S. Rep. No. 87-2213, at 4 (1962).

Appendix III: Ethics Provisions Applicable to Non-Special Government Employees Compared to Special Government Employees Not Serving on Federal Advisory Committees or Other Boards

A special government employee (SGE) is an employee of the federal government and therefore generally subject to ethics rules applicable to employees. SGEs must be distinguished from individuals that work for the federal government as independent contractors (rather than employees), who would not be covered by federal employee ethics rules. While some ethics rules apply differently to SGEs (or in fewer instances, do not apply at all), most ethics provisions apply to SGEs.

The following is an overview of selected government-wide ethics provisions for executive branch employees and how they apply to SGEs that are not serving on Federal Advisory Committee Act (FACA) committees. Under the heading “Non-SGEs” is a general description of each provision. Under the heading “SGEs (Non-FACA)” is a general description of modifications to SGE coverage (if any). This is not a comprehensive listing of ethics provisions.¹ Moreover, we have excluded differences in coverage which are exclusively applicable to SGEs serving on FACA committees as these SGEs are outside the scope of this report.

¹This summary does not reflect any agency-specific ethics provisions applicable to our case study agencies.

**Appendix III: Ethics Provisions Applicable to
Non-Special Government Employees
Compared to Special Government Employees
Not Serving on Federal Advisory Committees
or Other Boards**

Table 1: Ethics Provisions for Executive Branch Employees

Ethics Provisions for Executive Branch Employees	
Non-Special Government Employees (SGE)	SGEs (Non-Federal Advisory Committee Act)
Financial Disclosure	
Public ^a : Generally, employees above GS-15 (or equivalent) are required to file a public disclosure form which is available to the public. ^b Employees are required to file within 30 days of assuming their position, annually, and by 30 days after termination of employment.	
Employees may not be required to file a new entrant, annual, or termination report where the employee is not expected to perform (or does not perform) services for more than 60 days during the relevant period.	Public: Same rules apply
Confidential ^c : Generally, employees at the GS-15 level or below (or equivalent) do not file a confidential disclosure form unless their duties involve the exercise of discretion (e.g., contracting, administration of grants). Employees are required to file within 30 days of assuming position and annually, except where the employee is not expected to perform (or does not perform) services for more than 60 days during the relevant period.	Confidential: Generally, SGEs who are not required to file a public disclosure form are to file a confidential form without regard to their length of service, unless it is determined that the duties of the position make the possibility of a real or apparent conflict of interest remote. This includes SGEs who were excluded from filing a public disclosure form due to the short period of expected service. SGEs do not file annual reports, rather must file new entrant reports (covering the preceding 12 months) upon each appointment or reappointment due to the temporary nature of their appointments.
Financial Conflicts of Interest	
Employees are prohibited under the criminal statute, 18 U.S.C. § 208, from personally and substantially participating in any particular matter that would have a direct and predictable effect on the employee's financial interest or the financial interest of those imputed to the employee (e.g., financial interests of spouse, minor child, an outside organization with whom employed or negotiating for employment).	Same rule applies.
While section 208 would require disqualification from participating in those matters referenced above, it authorizes waivers of the disqualification requirement, either by regulation under subsection (b)(2) (where the financial interest is too remote or inconsequential to affect the integrity of an employee's service) or by individual agency determinations under subsection (b)(1) (where the financial interest is not so substantial as to affect the integrity of the employee's service).	Same rules apply.
In addition to waivers under section 208(b)(1), an employee may be able to participate if he divests himself of the disqualifying financial interest.	Same rule applies.
An employee may obtain a certificate of divestiture allowing more favorable tax treatment under these circumstances.	SGEs are not eligible to receive a certificate of divestiture if required to sell property to resolve a conflict of interest. ^d

**Appendix III: Ethics Provisions Applicable to
Non-Special Government Employees
Compared to Special Government Employees
Not Serving on Federal Advisory Committees
or Other Boards**

Limits on Representational Activities of Current Employees

Employees are prohibited under the criminal provision, 18 U.S.C. § 205(a)(2), from personally representing another (with or without compensation) before any court, federal agency (or other federal entity) in connection with any particular matter in which the United States is a party or has a direct and substantial interest.

SGEs are prohibited only concerning certain particular matters involving specific parties (such as contracts, grants, requests for rulings, litigation, investigations). SGEs are not prohibited where the particular matter is of general applicability, such as broad policies, rulemaking proceedings, and legislation which do not involve specific parties.

The prohibition applies to those matters involving specific parties (1) which are pending in the SGE's agency or (2) in which the SGE participated (as a government employee or SGE).

For those who have served no more than 60 days (during preceding year), the prohibition on matters involving specific parties pending in the SGE's agency does not apply. 18 U.S.C. § 205(c).

Employees are prohibited under the criminal provision, 18 U.S.C. § 203(a), from receiving compensation related to representational services provided in connection with any particular matter in which the United States is a party or has a direct and substantial interest, including when those services are provided either personally or by another.

Same differences in application noted above (for section 205(a)(2)).

Misuse of Position

Employees are prohibited under the standards of conduct (5 C.F.R. part 2635, subpart G) from

- using their public office for their own private gain, including the private gain of friends and those with whom they are affiliated,
- using nonpublic information to further their own private interest or that of another, and
- using government property for unauthorized purposes.

Same rules apply.

Outside Payments, Income, and Gifts

Employees are subject to the criminal bribery and illegal gratuity statute which prohibits employees, under specified circumstances, from receiving anything of value in connection with official acts. 18 U.S.C. § 201(b), (c).

Same rules apply.

Employees are prohibited from receiving supplementation of their government salary under the criminal statute 18 U.S.C. § 209. No source other than the government can pay for performing government service.

SGEs are not covered under 18 U.S.C. § 209, but are subject to other restrictions in the standards of conduct regulations on receiving outside compensation. See below.

Employees are prohibited from receiving outside compensation for teaching, speaking, or writing that relates to their official duties by the standards of conduct. 5 C.F.R. § 2635.807.

SGEs are covered under this prohibition but the definition of what is related to official duties is narrower.

SGEs are still prohibited from receiving outside compensation where the activity is undertaken as part of a SGE's official duties.

Employees above GS-15 (or equivalent), in covered noncareer positions, are prohibited from receiving outside earned income in any calendar year (attributable to that calendar year) in excess of 15 percent of the annual rate of basic pay for level II of the Executive Schedule under the non-criminal statute 5 U.S.C. app. 4, § 501.^e

SGEs are not covered under this restriction.^f

**Appendix III: Ethics Provisions Applicable to
Non-Special Government Employees
Compared to Special Government Employees
Not Serving on Federal Advisory Committees
or Other Boards**

Employees who are appointed by the President to certain full-time noncareer positions are under a total ban on outside earned income during the individual's presidential appointment, pursuant to section 102(a) of Executive Order No. 12674, <i>Principles of Ethical Conduct for Government Officers and Employees</i> . ^g	SGEs are not covered under this restriction. ^h
Employees are prohibited from accepting gifts from certain prohibited sources or given because of the their position pursuant to 5 U.S.C. § 7353 unless permitted under an exception set forth in the standards of conduct. 5 C.F.R. part 2635, subpart B.	Same rule applies.
Limits on Representational Activities of Former Employees	
Former employees are under a lifetime (of a particular matter) ban on making contact with the intent to influence a federal employee on behalf of another concerning a particular matter involving specific parties in which the former employees were personally and substantially involved as an employee under criminal provision 18 U.S.C. § 207(a)(1).	Same rule applies.
Former employees are under a 2-year ban on making contact with the intent to influence a federal employee on behalf of another concerning a particular matter (involving specific parties) that was pending under the former employees' official responsibility during their last year of service under criminal provision 18 U.S.C. § 207(a)(2).	Same rule applies.
Former employees may not represent, aid, or advise another on the basis of nonpublic information in connection with trade or treaty negotiations in which the former employees were personally and substantially involved during the last year of the former employees' service under criminal provision 18 U.S.C. § 207(b).	Same rule applies.
Former senior employees are under a 1-year ban on making contact with their former agency on any matter seeking official action on behalf of another under criminal provision 18 U.S.C. § 207(c).	Former senior SGEs who serve less than 60 days in the year before terminating service are not covered by this ban. 18 U.S.C. § 207(c)(2)(B).

Source: GAO analysis. | GAO-16-548.

^a5 U.S.C. app. 4 § 101; 5 C.F.R. subpart B of part 2634.

^bAn individual who is not under the GS, but is in a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 is required to file a public disclosure form.

^c5 U.S.C. app. 4 § 107; Exec. Order No. 12674; 5 C.F.R. subpart I of part 2634.

^d26 U.S.C. § 1043(b)(1)(A).

^eCovered noncareer employees include certain presidential appointees, noncareer members of the Senior Executive Service, and Schedule C appointees, among others. Implementing regulations are contained in 5 C.F.R. part 2636, subpart C.

^f5 U.S.C. app. 4, § 505(2).

^gExecutive Order No. 12674, *Principles of Ethical Conduct for Government Officers and Employees*, 54 Fed. Reg. 15159 (Apr. 12, 1989) as amended, Exec. Order No. 12731, 55 Fed. Reg. 42547 (Oct. 17, 1990), at 5 U.S.C. § 7301 note.

^hExecutive Order No. 12674, § 102(a); and OGE Informal Advisory Memorandum, 00 x 1 (Feb. 15, 2000), at 18.

Appendix IV: Government-wide and Agency-Specific Hiring Authorities Used to On-Board Special Government Employees by Selected Agencies

Agencies in our review used a number of government-wide and agency-specific hiring authorities to on-board SGEs. The selected agencies frequently designated as SGEs individuals who had been appointed to serve as experts or consultants (under 5 U.S.C. § 3109, or a similar agency-specific authority). Under the government-wide authority 5 U.S.C. § 3109, agencies may appoint experts and consultants, as needed, for temporary or intermittent work when authorized by an appropriation or other statute. Tables 2 and 3 show government-wide and agency-specific hiring authorities that our selected agencies reported using when hiring SGEs.¹

Table 2: Government-wide Hiring Authorities Used at Selected Agencies

Government-wide hiring authority	Purpose	Selected agencies using this authority
Experts and Consultants 5 U.S.C. § 3109, 5 C.F.R. part 304	An agency may appoint (without regard to competitive examination requirements) a qualified expert or consultant to an expert or consultant position that requires only intermittent and/or temporary employment. OPM regulations provide criteria for circumstances in which it is appropriate to employ an expert or consultant, including defining who is a consultant or expert and what is a consultant or expert position.	HHS, DOJ, NSF, and State
Temporary Limited Appointments 5 C.F.R. part 316, subpart D	An agency may fill a short-term position or meet an employment need that is scheduled to terminate (for such reasons as abolishment, reorganization, contracting of the function, anticipated reduction in funding, or completion of a specific project or peak workload).^a - Under 5 C.F.R. § 316.402(b)(1), an agency may noncompetitively appoint a qualified individual who would be eligible for reinstatement (including a person who was previously employed under a career appointment). - Under 5 C.F.R. § 316.402(b)(3), an agency may noncompetitively appoint a qualified individual who would be eligible for a career-conditional appointment, including current or former career Foreign Service officers or employees.	State
Reinstatement Authority 5 C.F.R. § 315.401	An agency may reinstate (competitively or noncompetitively) a person who was previously employed under a career appointment. Reinstatements may be made noncompetitively when, for example, it is to a position having no greater promotion potential than a position previously held by the person.	HHS

¹As noted below, this appendix may not contain all the relevant agency-specific hiring authorities used by HHS.

Appendix IV: Government-wide and Agency-Specific Hiring Authorities Used to On-Board Special Government Employees by Selected Agencies

Schedule A Appointments 5 C.F.R. part 213, subpart C	The Office of Personnel Management (OPM) has authorized excepted service appointment authorities under Schedule A when it is not practicable to use competitive examining (including application of qualification standards).	DOJ (Under 5 C.F.R. § 213.3102(d), an agency may hire an attorney under excepted service hiring rules.) HHS (Under 5 C.F.R. § 3102(i)(3), an agency may fill temporary and less than full-time positions under excepted service hiring rules where OPM has determined that examination is impracticable.)
Direct Hire 5 U.S.C. § 3304(a)(3), 5 C.F.R. part 337, subpart B	An agency may fill a permanent or nonpermanent position in the competitive service without following the competitive service hiring rules if it provides public notice of the opening and OPM determines that there is either a severe shortage of candidates or a critical hiring need for such a position.	HHS
42 U.S.C. § 5149	This authority provides a federal agency, when performing disaster relief efforts, the authority to appoint (1) temporary personnel without regard to competitive examining requirements, and (2) experts and consultants in accordance with 5 U.S.C. § 3109.	HHS

Legend:

HHS = Department of Health and Human Services

DOJ = Department of Justice

State = Department of State

NSF = National Science Foundation

NRC= Nuclear Regulatory Commission

Source: GAO analysis of data provided by selected agencies. | GAO-16-548

^aState uses these authorities for its Reemployed Annuitant Program. Individuals under this program work on a “when actually employed” schedule and are commonly referred to as WAEs. Specifically, WAEs work on an intermittent basis for no more than 1040 hours during a one year period.

Appendix IV: Government-wide and Agency-Specific Hiring Authorities Used to On-Board Special Government Employees by Selected Agencies

Table 3: Agency-Specific Hiring Authorities Used at Selected Agencies

Specific hiring authority	Purpose	Agency
42 U.S.C. § 1873(a)	This hiring authority permits NSF to appoint technical and professional employees without regard to competitive examining requirements, including scientists and engineers (on leave of absence from academic, industrial, or research institutions) for a limited term or on a temporary basis.	NSF
42 U.S.C. § 209(f)	This authority authorizes appointment (without regard to the civil-service laws) of special consultants to assist and advise in the operation of the Public Health Service.	HHS
42 U.S.C. § 5149	This authority provides a federal agency, when performing disaster relief efforts, the authority to appoint (1) temporary personnel without regard to competitive examining requirements, and (2) experts and consultants in accordance with 5 U.S.C. § 3109.	HHS
42 U.S.C. § 284(c)(3)	This authority authorizes national research institute directors to appoint members of technical and scientific peer review groups, in consultation with the advisory council for the Institute and with the approval of the Director of the National Institutes of Health. ^a	HHS
42 U.S.C. § 2201(d)	This authority permits NRC to appoint employees without regard to the civil service laws and NRC has implemented this authority to hire individuals consistent with the government-wide expert and consultant authority.	NRC
§ 404(a) of the September 11 th Victim Compensation Fund of 2001	This provision authorized the Attorney General to appoint a Special Master to administer the September 11 th Victim Compensation Fund. ^b	DOJ

Legend:

HHS = Department of Health and Human Services
DOJ = Department of Justice
NSF = National Science Foundation
NRC= Nuclear Regulatory Commission

Source: GAO analysis of data provided by selected agencies. | GAO-16-548

^aHHS provided additional agency-specific hiring authorities, including several which appeared to involve hiring for advisory committees, boards, or councils and therefore outside the scope of this report. We were unable to obtain clarification from HHS regarding its list and excluded these authorities from our report. As a result this appendix may not contain all the agency-specific hiring authorities which HHS used in hiring its SGEs not serving on federal boards.

^bSeptember 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, title IV, 115 Stat. 230, 237 (Sept. 22, 2001). The Fund was reactivated and amended under title II of the James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623, 3659 (Jan. 2, 2011).

Appendix V: Use Of Special Government Employees At Chief Financial Officer Act Agencies And The Consumer Financial Protection Bureau, 2012-2013

Agency	Special Government Employees (SGE) on 12/31/12	SGEs on 12/31/13
Agency for International Development	1	0
Consumer Financial Protection Bureau	2	5
Department of Agriculture	0	0
Department of Commerce	20	11
Department of Defense	112	83
Department of the Air Force	33	29
Department of the Army	115	96
Department of the Navy	29	0
Department of Education	6	9
Department of Energy	7	8
Department of Health and Human Services	646	4
Department of Homeland Security	17	10
Department of Housing and Urban Development	10	6
Department of Justice	14	4
Department of Labor	0	0
Department of State	74	80
Department of the Interior	0	0
Department of the Treasury	0	1
Department of Transportation	8	3
Department of Veterans Affairs	0	0
Environmental Protection Agency	111	74
General Services Administration	0	0
National Aeronautics and Space Administration	0	0
National Science Foundation	63	46
Nuclear Regulatory Commission	8	15
Office of Personnel Management	0	0
Small Business Administration	0	0
Social Security Administration	0	0
Non-Chief Financial Officers Act agency and Consumer Finance Protection Bureau experts/consultants required to file public or confidential disclosure reports	12	31
Total	1,288	515

Source: GAO analysis of Office of Government Ethics annual ethics questionnaire. | GAO-16-548

Appendix VI: 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 29 2016

Yvonne D. Jones
Director, Strategic Issues
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Ms. Jones:

Attached are comments on the U.S. Government Accountability Office's (GAO) report entitled, *"Federal Workforce: Opportunities Exist to Improve Data on Selected Groups of Special Government Employees"* (GAO-16-548).

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

Sincerely,

A handwritten signature in cursive script, reading "Jim R. Esquea", is positioned above the printed name and title.

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 DRAFT REPORT ENTITLED: FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENTS EMPLOYEES (GAO-16-548)

The U.S. Department of Health and Human Services (HHS) appreciates the opportunity from the Government Accountability Office (GAO) to review and comment on this draft report.

General Comment

To help ensure HHS has reliable data on Special Government Employees (SGEs) not serving on federal boards, we recommend that the Secretary of HHS take steps to improve the reliability of data on SGEs not serving on boards. For example, the agency could reconcile human capital data with general counsel and ethics office data or issue clarifying guidance to human capital staff on appropriately identifying SGEs in human capital database.

HHS Response

HHS concurs that data reliability regarding SGEs not serving on boards is valuable. HHS will review internal processes and procedures in an effort to identify areas that may warrant improvement.

Appendix VII: Comments from the Office of Government Ethics

UNITED STATES OFFICE OF GOVERNMENT ETHICS



JUN 23 2016

Yvonne D. Jones
Director, Strategic Issues
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Draft Report GAO-16-548, "FEDERAL WORKFORCE: Opportunities Exist to Improve Data on Selected Groups of Special Government Employees"

Dear Ms. Jones:

Thank you for the opportunity to comment on the U.S. Government Accountability Office's (GAO) draft report, "Federal Workforce: Opportunities Exist to Improve Data on Selected Groups of Special Government Employees." The Office of Government Ethics (OGE) appreciates GAO's work in planning and conducting its review and issuing this report.

The draft report contains one recommendation for OGE, with which we partially concur. Specifically, GAO recommended that the Director of OGE take the following actions:

To help ensure that agencies report consistent and reliable data, the Director of OGE should determine (e.g., through a survey of Designated Agency Ethics Officials and/or by analyzing agency data) whether other executive branch agencies are experiencing data challenges similar to HHS, State, and NRC. If they are, the Director should take steps to help the agencies strengthen their data.

OGE concurs with the emphasis on ensuring that agencies report consistent and reliable data on special Government employees (SGEs) not serving on federal boards. Consistent and reliable data collection fosters the proper designation of SGEs for ethics purposes, such as providing SGEs with special training and counseling. Likewise, consistent and reliable data better enables OGE to monitor and oversee agency ethics programs. To help determine whether other executive branch agencies are experiencing data challenges that could potentially affect the administration of their ethics programs, OGE will survey ethics officials or otherwise analyze agency data as recommended.

At the same time, information regarding the hiring of SGEs is within the control of human resources officials, over whom OGE has no authority. Although OGE can request that

1201 New York Avenue, NW, Suite 500 | Washington, DC 20005
www.oge.gov

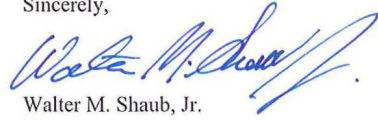
Yvonne D. Jones
Page 2

agency ethics officials report difficulties in obtaining data from agency human resources officials on SGEs not serving on federal boards, the data challenges cannot be resolved without human resources officials collecting and sharing data in the first place.

OGE has taken steps to promote coordination between agency ethics officials and human resources officials to fulfill certain ethics program requirements. *See, e.g.*, Executive Branch Ethics Program Amendments, 81 Fed. Reg. 36193, 36195, 36198-99 (proposed June 6, 2016) (to be codified at 5 C.F.R. pt. 2638) (describing the Government ethics responsibilities of lead human resources officials). OGE will continue to encourage such coordination, which will help agencies strengthen their data. However, OGE has no authority to direct human resources offices to collect or share data or to otherwise coordinate with agency ethics offices. Ultimately, the development of mechanisms for tracking appointments, including the hiring of SGEs, is within the authority of agency human resources officials and the agency that oversees them, the Office of Personnel Management.

Again, thank you for the opportunity to comment on this draft report. Technical comments were previously provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you in the future.

Sincerely,



Walter M. Shaub, Jr.
Director

Appendix VIII: GAO Contacts and Staff Acknowledgments

GAO Contact

Yvonne D. Jones, (202) 512-6806 or Jonesy@gao.gov.

Staff Acknowledgments

In addition to the individual name above, Signora J. May, Assistant Director; Anthony Patterson, Analyst-in-Charge; Jessica Lewis, Sara Daleski, Karin Fangman, Amanda Miller, Susan Sato, and Robert Gebhart made major contributions to this report.

GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (<http://www.gao.gov>). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to <http://www.gao.gov> and select "E-mail Updates."

Order by Phone

The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, <http://www.gao.gov/ordering.htm>.

Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.

Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.

Connect with GAO

Connect with GAO on [Facebook](#), [Flickr](#), [Twitter](#), and [YouTube](#).
Subscribe to our [RSS Feeds](#) or [E-mail Updates](#).
Listen to our [Podcasts](#) and read [The Watchblog](#).
Visit GAO on the web at www.gao.gov.

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Website: <http://www.gao.gov/fraudnet/fraudnet.htm>

E-mail: fraudnet@gao.gov

Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Katherine Siggerud, Managing Director, siggerudk@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548

Public Affairs

Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, DC 20548



Please Print on Recycled Paper.