



Testimony

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

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HUMAN CAPITAL

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

Statement of

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G A O

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

Why GAO Prepared This Testimony

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

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

What GAO Recommends

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

View [GAO-12-1035T](#). For more information, contact Robert Goldenkoff at (202) 512-2757 or goldenkoffr@gao.gov, or Robert Cramer at (202) 512-7227 or cramerr@gao.gov.

HUMAN CAPITAL

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

What GAO Found

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

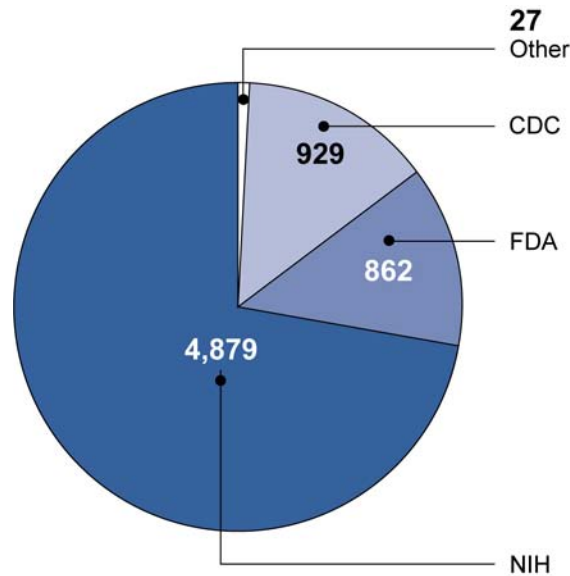
HHS Has Increased Its Use of Title 42, but More Reliable Data Could Improve HHS's Oversight

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

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

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

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



Source: GAO analysis of HHS data.

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

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

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

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

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

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

Title 42 Employees Serve in Various Functions

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

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

Occupation (number of Title 42 employees in 2010)	Characteristics	Salary ^a
Staff Scientist (1,103)	Supports the long-term research of a senior investigator and independently designs experiments, but does not have responsibilities for initiating new research programs	<ul style="list-style-type: none"> • Base salary range: \$82,000-200,000 • Average base salary: \$118,000 • Median base salary: \$114,000
Research Fellow (666)	Scientists obtaining experience in biomedical research while providing a service relevant to the NIH's program needs	<ul style="list-style-type: none"> • Base salary range: \$45,000-112,000 • Average base salary: \$70,000 • Median base salary: \$69,000
Senior Investigator (521)	Has been granted tenure. ^b Some senior investigators are assigned organizational responsibilities in the institute or center, that is, section or branch chief	<ul style="list-style-type: none"> • Base salary range: \$117,000-350,000 • Average base salary: \$192,000 • Median base salary: \$195,000
Clinical Research Nurse (347) ^c	Specializes in the care of research participants and is responsible for assuring participant safety, formulating patient care plans, integrity of protocol implementation, accuracy of data collection, and recording	<ul style="list-style-type: none"> • Base salary range: \$62,000-96,000 • Average and median base salary: \$78,000
Clinical Fellow (249)	Participates in protocol-based clinical research (i.e., research with people serving as volunteer participants) as well as laboratory research	<ul style="list-style-type: none"> • Base salary range: \$57,000-137,000 • Average base salary: \$84,000 • Median base salary: \$82,000

Source: GAO analysis of HHS data and documents.

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

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

^cAs part of the sunseting of the Clinical Research Support pilot, NIH is currently phasing out Title 42 appointments for nurses.

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

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

Some Title 42 Employees Are Paid Above Executive Salary Levels

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

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

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

Source: GAO analysis of HHS data.

^aThe remaining 5,236 Title 42 employees had salaries below Executive Level IV (\$155,500)

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

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

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

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

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

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

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

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

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

In August 2010, HHS's Office of Human Resources reviewed the agency's use of section 209(f) authority and found two issues similar to those found in our review. Recommendations from the audit report became the basis for a new 209(f) policy, which was issued in February 2012.⁸ Significant changes to the 209(f) policy include a definition of "scientific position"; a requirement that the same recruitment plan be used for both Title 5 and Title 42 employees to demonstrate that other available personnel systems failed to yield qualified candidates, and identifies specific positions and/or categories of positions at NIH that may be filled through section 209(f) without "exhausting" other recruitment mechanisms or authorities.

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

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

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

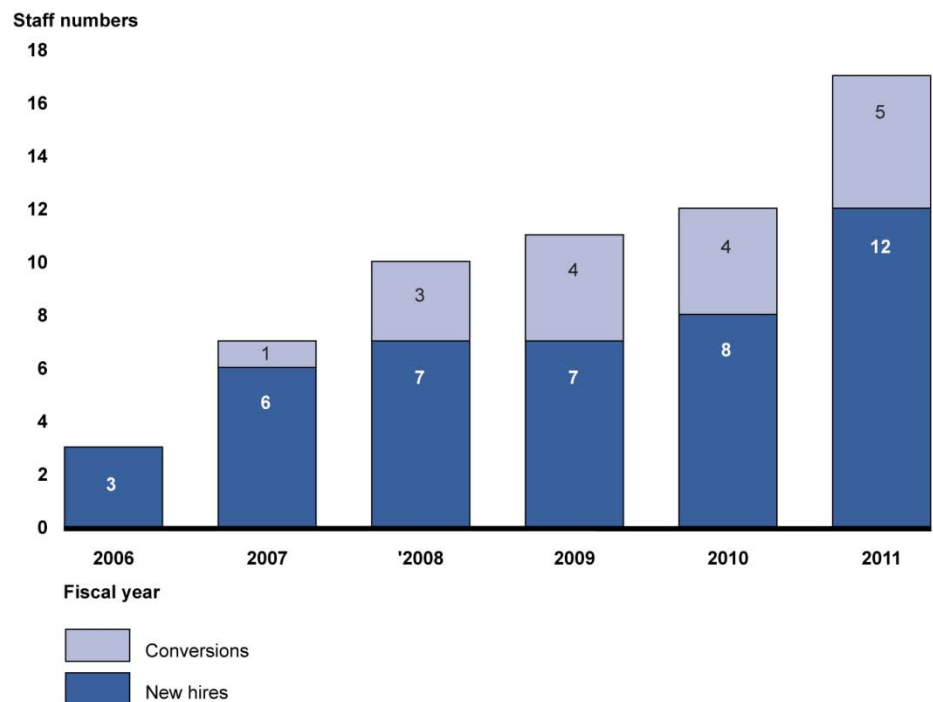
Therefore, we recommended that HHS, as part of its ongoing effort to develop agencywide policy for appointing and compensating employees hired under section 209(g), ensure the policy requires and provides guidance for documenting the basis for employee compensation. HHS agreed with our recommendation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

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

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

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

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



Source: GAO analysis of EPA data.

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

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

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

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

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

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

Source: GAO analysis of EPA data.

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

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

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

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

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

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

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

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

¹²B-323357, July 11, 2012.

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

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

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

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

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

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

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

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

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

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

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

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

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

Concluding Observations

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

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

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

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

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

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