



# THE COMMITTEE ON ENERGY AND COMMERCE

## MEMORANDUM

September 12, 2012

To: Health Subcommittee Members

From: Majority Staff

Re: Hearing on Title 42

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

### **I. Witnesses**

Mr. Robert Goldenkoff  
Director, Strategic Issues  
Government Accountability Office

Mr. Robert Cramer  
Managing Associate General Counsel  
Government Accountability Office

### **II. Background on Title 42**

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

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

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

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

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

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

### **GAO Reports on Title 42**

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

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

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

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

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

### **III. Federal Legislation**

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

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

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

### **IV. Staff Contacts**

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