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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION



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B-103987

APRIL 26, 1984

The Honorable William S. Cohen
Chairman, Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Subject: Designation of Senior Employees Subject to
Post-employment Restrictions Under the Ethics in
Government Act (GAO/GGD-84-62)

In your November 8, 1983, letter, you asked us to review several aspects of the administration of section 501 of the Ethics in Government Act to determine whether it could be streamlined. Section 501 concerns the annual designation of senior federal employees who are thereby restricted from certain representational activities once they leave federal employment.

After reviewing the issues raised in your request, we believe that, currently, it is unlikely the designation process can be further streamlined. Inconsistencies may occur because positions are selectively and judgmentally designated since the act provides limited guidance on the standards or criteria to be used. Furthermore, since the first list of designated positions was developed in 1979, few resources have been used annually to update it.

BACKGROUND

The post-employment restrictions of 18 U.S.C. 207, as amended by section 501 of the act, which specifically apply to designated senior employee positions include, among others (1) a 2-year ban on representing or assisting in representing, in person, anyone at a proceeding involving a particular matter which a designated former senior employee handled personally and substantially while a federal employee; and (2) a 1-year ban against oral or written attempts to influence the former senior employee's agency on behalf of anyone on any matter whatsoever. High-level (grade 0-9 and above) military officials and federal

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officials in executive level positions, as well as others in designated senior employee positions, are subject to these bans. As amended in 1979, the act requires that the Director of the Office of Government Ethics (OGE) designate annually those senior executive service (SES), GS-17 and above, and grades 0-7 and 0-8 active duty commissioned officer positions which the Director determines have "significant decision-making or supervisory responsibility." Employees in designated positions are then subject to the 1- and 2-year bans in their post-employment activities.

OBJECTIVE, SCOPE, AND METHODOLOGY

You requested that we review the administration of section 501 to determine whether any procedural, administrative, or statutory changes are needed. In particular, you suggested that we examine the criteria used by OGE to determine which positions should be designated, the consistency of their application, the resources used in the annual designation process, and indications of any need to simplify or streamline this process.

We did not conduct an extensive audit of the present designation process because of the minimal effort needed annually to update the list of designated positions and the discretion the Director, OGE, has in designating positions. We did examine and discuss with OGE officials (1) the criteria for designating senior employees pursuant to 18 U.S.C. 207 as published in 5 C.F.R. 737, (2) historical statistics on annual designations for 1979-82, and (3) the congressional intent and interpretations of 18 U.S.C. 207, as amended by section 501 of the act and further amended by Public Law 96-28 in 1979. We obtained estimates of resources expended in the annual designation process by OGE and seven departments (Agriculture, Energy, Health and Human Services, Housing and Urban Development, Justice, Transportation, and Treasury.) We also examined lists of specific designated and exempted (non-designated) senior employee positions of the Department of Agriculture to see if there were any apparent inconsistencies in the designation of positions. We conducted this audit work during December 1983 and January 1984 and in accordance with generally accepted government audit standards.

CRITERIA FOR DESIGNATING SENIOR EMPLOYEES

Other than specifying that the Director designate those SES, GS-17 and above, and grades 0-7 and 0-8 active duty commissioned officer positions which have "significant decision-making or supervisory responsibility," the act itself provides no further guidance on the standards or criteria that should be used

in such decisions. The Director, therefore, exercises considerable discretion in defining what constitutes significant decision-making or supervisory responsibilities.

In 1979, when both the act and the Civil Service Reform Act (CSRA) were undergoing initial implementation, some consideration was given to the question of whether all SES positions should be automatically designated since the statutory definitions of SES positions under the CSRA and "senior employee" positions under the act were very similar. However, Public Law 96-28 clarified this question later in 1979 by defining SES positions as a part of the universe of senior employees from which the Director would make the designations.

According to the act, the post-employment restrictions shall apply to a person employed in a position which involves "significant decision-making or supervisory responsibility," as designated by the Director. Although the legislation does not define the term "significant," the OGE has established designation criteria. Under 5 C.F.R. 737.25, "Standards and Procedures for Designating Senior Employees Pursuant to 18 U.S.C. 207(d)," the roles of the Director and the federal agencies in the process are described and general standards for designating and exempting senior employee positions are provided. According to these standards,

". . . classes of positions which may be considered for exemption are those in which decision-making responsibility does not regularly extend to major policy issues within the agency or in which supervisory responsibility extends to less than all of a directorate, bureau or department which has major policy or operational responsibility."

According to an OGE official, the key phrase which guides the Director's decisions is "extends to less than all of a directorate." This phrase is used to distinguish between a "significant level" and "some involvement" in decision-making and supervision.

CONSISTENCY OF DESIGNATIONS

Our comparison of OGE statistics, as well as our examination of the list of designated positions published annually in the Federal Register, indicates that OGE and the agencies exercise considerable discretion in the designation process. Although this discretion may have resulted in some inconsistencies, we believe that the present process conforms to the intent of section 501.

We believe that the Congress intended for the Director, in consultation with the agencies, to be selective in designating senior employee positions. In a December 18, 1979, letter to the Chairman of the Senate Committee on Governmental Affairs, the Director explained that, contrary to arguments for designating all SES positions, this was neither the intent of the law nor was this issue overlooked by the legislators. He pointed out, for instance, that it would have been easy for the Congress to write language making designations either (1) automatic or (2) presumed, absent exclusionary factors, had it not intended for the Director to exercise discretion in consultation with agencies involved.

From a universe of approximately 10,000 governmentwide positions in 1982, the Director, in consultation with the heads of agencies involved, designated 3,827 positions, or about 38 percent of those which potentially might be designated. SES positions account for about 80 percent of the designations. Almost half of the remainder were grades 0-7 or 0-8 commissioned officer or Foreign Service officer positions.

One hundred and three agencies were included in the 1982 designation process. Among the major departments, the proportion of designated positions ranged from 17 percent at the Department of the Navy to 69 percent at the Department of Justice. A larger percentage of senior employee positions are generally designated among the smaller agencies, according to an OGE official, because decision-making and supervisory responsibilities are delegated among fewer positions, and incumbents in these positions generally exercise greater control over the agency's activities. For many of these agencies, 100 percent of their senior employee positions are designated annually.

Because agencies have different missions, structures, and traditions, they vary markedly in how they delegate authority. Therefore, we do not believe that more precise criteria, easily applicable governmentwide, could be developed.

STAFF RESOURCES REQUIRED
FOR THE DESIGNATION PROCESS

An OGE official advised us that substantial resources were required to develop the first governmentwide list of designated positions which was published in 1979. An inventory of senior employee positions had to be conducted, definitional questions had to be resolved, and decisions to exempt or designate each considered position had to be made. However, few resources are

now needed annually to maintain a current list. The annual update involves a review of additions or deletions to the previously established list of designated positions. Occasionally, more review work is required when there are major reorganizations which change the duties and responsibilities of numerous senior employee positions. Although the designation process may span a 7-month period, an OGE official estimated that approximately 80 staff days are devoted annually by OGE to the process. Seven of the eight departments we contacted provided estimates of the resources required annually to update the list of designated positions. The estimates ranged from 5 days at the Departments of Agriculture and Housing and Urban Development to 90 days at the Department of Health and Human Services which had the largest number of designated positions of any department. The average estimate was 25 staff days, largely dependent on recent reorganization activity.

NEED FOR STREAMLINING THE PROCESS

In view of our findings regarding the appropriateness of the Director's use of discretion and the relatively small amount of resources now expended by OGE and selected agencies for this effort, we believe it is unlikely that major efficiencies could be realized by further streamlining this process. Because the delegation of agency control varies by agency, it would be difficult to prescribe more precise standards that could be applied governmentwide, particularly since many designations are influenced by reorganizations which are episodic and somewhat unpredictable in nature. Statutory or regulatory designation of senior employee positions by levels or ranks would simplify the designation process. This alternative, however, is contrary to the prevailing SES concept that rank is not determined by or dependent on the position an individual SES member holds.

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As requested by your office, we did not obtain agency comments on this report. As arranged with your office we are sending copies of this report to the Director, Office of Government Ethics and other interested parties. We will make copies available to others upon request.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director