

GAO

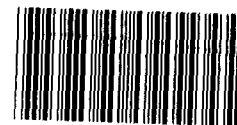
Testimony

For Release  
on Delivery  
Expected at  
9:30a.m. EDT  
Thursday  
June 25, 1987

Agency Compartmentalizations and  
Senior Employee Designations Under the  
Ethics in Government Act

Statement of  
Rosslyn S. Kleeman, Senior Associate Director  
General Government Division

Before the  
Subcommittee on Oversight of Government  
Management  
Governmental Affairs Committee  
United States Senate



133291

039268

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss federal agency compartmentalization and senior employee designation under the Ethics in Government Act of 1978 (Public Law 95-521). In requesting our testimony, you noted that we recently issued a report on the Compartmentalization of Agencies Under the Ethics in Government Act (GAO/GGD-87-25, February 11, 1987). This report responded to Representative Gerry Sikorski's request that we describe (1) the basis and administration of regulations which limit the application of certain postemployment conflict of interest restrictions to designated components of agencies and departments and (2) the application of the regulations to the Executive Office of the President (EOP). Today, I will discuss that report and the other issues in which you expressed interest.

Let me first briefly describe what compartmentalization is. Under the Ethics in Government Act, former senior-level employees are prohibited from contacting their former agencies on particular matters either before the agency or in which the agency has a direct and substantial interest for 1 year after their employment ceases (18 U.S.C.207[c]). Compartmentalization is the process by which agencies are divided into designated subunits for application of the 1-year no-contact restriction.

In passing this legislation, Congress stated its intention that the 1-year no-contact restriction should not apply agencywide to former officials who worked in wholly distinct and separate bureaus of an agency. Thus, the act, together with its 1979 amendment, allow the Director of the Office of Government Ethics (OGE) to designate statutory and nonstatutory subagencies or bureaus as separate components for purposes of the 1-year no-contact restriction. (Generally, a statutory subagency or bureau is created by statute; nonstatutory subagencies or bureaus are created administratively.) The act also authorizes the OGE Director to designate certain positions as "senior-level" positions subject to the no-contact restrictions if they involve significant decisionmaking or supervisory responsibility, even though their salary grades are below the level automatically considered to be held by senior employees.<sup>1</sup>

#### STATUTORY/NONSTATUTORY DIFFERENCES

You asked us to address the different ways in which the no-contact restriction is applied in the compartmentalization of statutory and nonstatutory agencies. The regulations state that, notwithstanding the designation of a statutory subagency or

---

<sup>1</sup>This level is defined in 18 U.S.C. 207(d)(1)(A) and (B) as "at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority; or on active duty as a commissioned officer of a uniformed service assigned to pay grade of 0-9 or above as described in section 201 of title 37, United States Code."

bureau, the former head of the subagency or bureau is prohibited from contacting officials of the parent department or agency. However, former employees of the subagency or bureau who are automatically considered senior employees and who are not heads of subagencies are permitted to make such contacts.

In designations of nonstatutory subagencies and bureaus, though, the prohibitions are reversed. There, the regulations state that former heads of subagencies and bureaus and others who have been designated as senior employees by the Director of OGE are permitted to contact the parent department or agency. However, senior officials are not permitted to contact the parent department or agency if they are automatically considered senior employees because of their pay or grade level.

OGE officials told us that this difference in the coverage of the statutory and nonstatutory designations results from an anomaly in the wording of the two statutory provisions authorizing those designations. According to 18 U.S.C. 207(e), statutory designations are to be made "(f)or the purposes of subsection (c)," thereby relating such designations to all officials covered by the 1-year no-contact restriction. Nonstatutory designations under 18 U.S.C. 207(d)(1)(c), however, are to be made "(a)s to persons in positions designated under this subparagraph," which technically applies only to senior employees designated by OGE, not to those high-level officials who are automatically covered

because of their executive rate of pay or uniformed service grade. The coverage of the statutory and nonstatutory designations would have been the same had the word "subsection" been used instead of "subparagraph." OGE officials said that they notified congressional staff of the difference in the coverage of the provisions but no action was taken.

#### SENIOR EMPLOYEE DESIGNATION

You also asked us to address the accuracy and timeliness of the senior employee designation process. In that process, agencies request OGE to designate certain of their positions as "senior," and therefore covered by the 1-year no-contact restriction. Two assignments in the last 3 years have addressed this issue directly or indirectly. In April 1984, we reported that the Ethics in Government Act provided no criteria to determine which positions below the specified grade levels have "significant decision-making or supervisory responsibility" (Designation of Senior Employees Subject to Post-employment Restrictions Under the Ethics in Government Act, GAO/GGD-84-62, April 26, 1984). OGE established their own designation criteria through regulations which state that

"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."

Although the discretion that OGE and the agencies exercise in the designation process may have resulted in some inconsistencies, we concluded that the process conformed to the intent of the Ethics in Government Act. We also did not believe that more precise governmentwide criteria could be developed because of the variety of agency missions, structures, and traditions across the government.

In a review we conducted last year of a former Deputy Assistant Secretary of Commerce's compliance with ethics laws, we found that his position had been dropped from the OGE listing of senior employee positions because of what Commerce officials described as an "administrative error" on their part. As a result, the official was not covered by the 1-year no-contact restriction. However, even if he had been designated as a senior employee, we did not believe that he would have violated this section of the law. We presented our findings in testimony before the House

Government Operations Committee's Subcommittee on Commerce,  
Consumer and Monetary Affairs on July 31, 1986.

ADMINISTRATION OF THE  
NO-CONTACT RESTRICTION

The first part of our Compartmentalization report analyzed OGE's administration of the no-contact restriction. In brief, we found that OGE (1) relied on the agencies to request designation of components, (2) did not document how they reviewed agency requests for compartmentalization designation, and (3) published inaccurate lists of designations in the Federal Register.

Reliance on Agency Requests  
for Compartmentalization

Although the statutes (18 U.S.C. 207[c] and 207[d][1][C]) allow the OGE Director to make compartmentalization decisions unilaterally, OGE decided shortly after passage of the Ethics Act that it would designate separate subagencies and bureaus only at the request of departments and agencies. Some departments and agencies have requested such designations; many have not. As a result, some large agencies, such as the Department of Agriculture, which has over 100,000 employees, have not been compartmentalized. Meanwhile, some small agencies, such as the National Credit Union Administration, have had units with as few

as four full-time equivalent employees designated as separate agencies. Thus, a senior-level employee who leaves the Department of Agriculture may not contact any of the over 100,000 employees in that department but a senior-level employee who leaves the National Credit Union Administration's Central Liquidity Facility is prohibited only from contacting the other employees in that Facility.

Undocumented Review of  
Designation Requests

OGE officials told us their reviews of agency requests for compartmentalization designation depend on the sufficiency of supporting materials provided. We could not confirm this because our review of OGE records on subagency designations indicated that the process was largely undocumented. None of the files indicated the basis on which the designations were approved. Some of the files contained only the agency letters requesting designations and some had only the request letters and the approval letters. No documentation of any kind was available for other designations. OGE officials said they did not know whether the missing documentation had been lost or if it ever existed.



## Some Errors in Published

### Agency Designations

We also found that the published lists of subagency designations contained errors. For example, five entities designated as subagencies no longer existed. Other entities were misnamed or designated under the wrong department and some approved designations were never published. Although not a specific objective of our work, we found no indication that these designation errors have affected enforcement of or compliance with the postemployment prohibitions in 18 U.S.C. 207(c). Nevertheless, the errors indicate that the required review and updating of agency designations were not being properly conducted by either the agencies or the OGE Director or that the OGE Director was not fulfilling his responsibility to publish those designations accurately. OGE officials said that all of the errors would be corrected when the 1987 designations are published, and that they would periodically review the published designations to ensure that they are accurate and current.

### COMPARTMENTALIZATION OF THE EXECUTIVE OFFICE OF THE PRESIDENT

We also described the process by which the Executive Office of the President was compartmentalized into nine separate entities in our report. The process began on January 16, 1981, when an

Assistant to the President in the Carter Administration notified the OGE Director at that time that the Administration believed that OGE subagency designations for EOP would be unnecessary. He explained that the Administration considered EOP to be several separate agencies, akin to independent agencies, because certain components, such as the Office of Management and Budget, had been separately created by statute and were each covered by laws, such as the Administrative Procedure Act, the Privacy Act, and the Freedom of Information Act, which generally apply to agencies. He also expressed the Administration's view that other EOP components, such as the White House Office and the Office of the Vice President, were to be functionally intertwined to be considered separate agencies and that they should collectively be treated as a single agency for purposes of the 1-year no-contact restriction.

On March 31, 1981, the Director of OGE notified the White House Chief of Staff in the Reagan Administration of OGE's conclusion that the EOP constituted one "umbrella agency," composed of units whose responsibilities changed from time to time, rather than a group of separate agencies. The Director said the fact that a given EOP entity was created by statute was of "no particular relevance one way or the other" in determining whether the entity constituted a separate agency for purposes of 18 U.S.C. 207(c), and that the coverage of an entity by statutes such as the Administrative Procedure Act, the Privacy Act, or the Freedom of

Information Act also would be "of no particular significance." Characterizing the EOP as a "single agency not yet broken out into component parts," OGE invited the Chief of Staff to request statutory compartmentalization.

On December 6, 1982, the Counsel to the President requested that the new Acting Director of OGE designate 9 entities of the EOP as separate and distinct units for purposes of the 1-year no-contact restriction:

- Office of Management and Budget
- Council of Economic Advisers
- National Security Council
- United States Trade Representative
- Council for Environmental Quality
- Office of Science and Technology Policy
- Office of Administration
- White House Office and the Office of Policy Development
- Office of the Vice President

The Counsel to the President requested statutory compartmentalization based on criteria similar to that which the White House had presented OGE in 1981 in support of the argument that EOP components were already separate agencies for purposes of applying 18 U.S.C. 207(c). Specifically, the Counsel to the President argued that compartmentalization should be granted

because each of the nine units had distinct statutory responsibilities and was considered an "agency" under other statutes such as the Administrative Procedure Act, the Privacy Act, and the Freedom of Information Act. The Counsel also enclosed with his request descriptions of each of the units within EOP.

By a letter dated March 7, 1983, the Acting Director of OGE notified the Counsel to the President that the nine requested subdivisions of the EOP met the requirements for designation as statutory subagencies under 18 U.S.C. 207(e). OGE stated its conclusion that each of the EOP units exercised functions which were distinct and separate from the rest of EOP, as required for statutory compartmentalization under 18 U.S.C. 207(e). However, OGE offered no explanation for its decision.

In the absence of any explanatory analysis by OGE, we concluded in our report that the descriptions of some of the nine entities within EOP provided by the Counsel to the President did not themselves appear to establish conclusively that the EOP units exercise functions that are distinct and separate from one another. For example, the Counsel to the President described the Office of Administration as being authorized "to provide administrative support services to all units within the EOP except those services which are in direct support of the President." This description did not indicate how the Office of

Administration can be functionally distinct and separate from all units within EOP while providing support services to those units. Also, the Counsel to the President's description of the National Security Council did not explain how that body is separate from the Office of the Vice President, since the Vice President is described as being a member of the National Security Council.

At the time our report was issued in February 1987, the OGE Director said he did not know why his predecessor had approved the EOP designation. He said OGE was reexamining the designation because of public concerns raised as a result of former Deputy Chief of Staff and Assistant to the President Michael K. Deaver's contacts with the Director of the Office of Management and Budget within 1 year of Mr. Deaver's leaving the White House Office. Subsequently, OGE concluded that the EOP designations were proper based solely on the description of functions found in organic legislation for each of the components.

However, the statutes authorizing certain EOP components, such as the White House Office and the Office of the Vice President, simply authorize the appointment of employees and do not contain any description of the functions or responsibilities they will be performing (3 U.S.C. 105 and 106). Also, OGE pointed out in its 1981 letter to the Counsel for the President that the functions and responsibilities of EOP units do not remain static but change

from time to time. Accordingly, while we understand that the Director of OGE is vested with the responsibility for determining whether components of an agency exercise distinct and separate functions, we question whether a meaningful determination of the separability of functions exercised by EOP components can be made solely on the basis of a review of underlying statutory authorities.

-----

That concludes my prepared statement, Mr. Chairman. I would be glad to answer any questions you might have.