

Letter to a Designated Agency Ethics Official
dated July 31, 2007

This responds to your letter of May 22, 2007, in which you request our opinion concerning the scope of the "cooling-off" requirement of 18 U.S.C. § 207(c) as it applies to certain positions in the Department of the Treasury. Your question concerns three positions listed in the Executive Schedule, but which do not require a Presidential appointment with Senate confirmation (PAS) and which your Department treats as Senior Executive Service (SES) positions. You ask whether former incumbents of these positions may benefit from component designations, pursuant to 18 U.S.C. § 207(h), notwithstanding the restriction in section 207(h)(2) on positions for which the rate of pay is specified in or fixed according to the Executive Schedule. We conclude that former incumbents of these three positions may rely on the component designations for your Department.¹

One of the Treasury positions, Chief Information Officer, is listed in level IV of the Executive Schedule, 5 U.S.C. § 5315. The other two positions, Fiscal Assistant Secretary and Internal Revenue Service Deputy Commissioner, are listed in level V of the Executive Schedule, 5 U.S.C. § 5316. However, you explain that all three positions "are not actually paid on the Executive Schedule." Rather, these non-PAS positions "are treated as Senior Executive Service (SES) positions." By way of explanation, your letter quotes a draft guidance document from the Office of Personnel Management (OPM): "'positions listed in U.S.C. sections 5315 (Executive Level IV) and 5316 (Executive Level V) that do not require Senate confirmation but do meet the SES criteria are placed in the SES. Their titles will be deleted from these sections of the statute when it is next revised.'" Neither your letter nor the portion of the draft

¹ We note that your letter requests that OGE issue a "formal" opinion. While OGE does have the authority to issue formal advisory opinions, we have considered the criteria set forth in subpart C of 5 C.F.R. part 2638 and have determined that a formal opinion is not appropriate in this case. Nevertheless, we hope the advice set out in this letter will prove useful.

OPM document that you enclosed cites the legal authority for treating such Executive Schedule positions as SES positions.

Section 207(c) generally prohibits former senior officials from making representational contacts with their former department or agency for one year. The law specifies five categories of senior officials subject to this "cooling-off" period. 18 U.S.C. § 207(c)(2)(A)(i)-(v). Senior officials in certain categories benefit from a provision that permits OGE to designate discrete components within a larger department or agency as being separate departments or agencies for purposes of the cooling-off restriction. 18 U.S.C. § 207(h). However, section 207(h)(2) makes these component designations inapplicable to senior officials "referred to in subsection (c)(2)(A)(i)." The reference here is to persons "employed at a rate specified in or fixed according to subchapter II of chapter 53 of title 5," which pertains to the Executive Schedule, 5 U.S.C. §§ 5311-5318. 18 U.S.C. § 207(c)(2)(A)(i).² For those positions, the one-year cooling-off period applies to the entire department or agency, not just the designated component in which the individual actually served.

The question, therefore, is whether the positions described in your letter are positions for which the rate of pay is specified in or fixed according to the Executive Schedule. See OGE Informal Advisory Letter 98 x 4 (focus on pay prescribed for position). Clearly, each of the positions is listed in one of the relevant provisions in subchapter II of chapter 53 of title 5 pertaining to levels of the Executive Schedule. One position is included in the list of positions following the introductory text of 5 U.S.C. § 5315, which states: "Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318." Likewise, the other two positions are included in the list following the introductory text of 5 U.S.C.

² As described in OGE's implementing regulations, component designations will not benefit "those who were senior employees by virtue of having been . . . [e]mployed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311-5318 (the Executive Schedule)." 5 C.F.R. § 2641.201(e)(2)(i); see also 5 C.F.R. § 2641.101 (definition of "senior employee")("employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311-5318 (the Executive Schedule)").

§ 5316, which includes similar language with respect to Level V of the Executive Schedule. Based solely on the text of sections 5315 and 5316, one would assume that each of the listed positions is a position for which the rate of pay is specified in or fixed according to the Executive Schedule.

These provisions, however, cannot be read in isolation from other provisions in title 5 pertaining to certain non-PAS positions in the Executive Schedule. Subchapter II of chapter 31, title 5, establishes the Senior Executive Service (SES). See 5 U.S.C. § 3131 et seq. For these purposes, certain non-PAS positions in levels IV and V of the Executive Schedule are actually SES positions. Specifically, the term "Senior Executive Service position" includes "any position . . . in level IV or V of the Executive Schedule . . . which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate," provided that other SES criteria are met. 5 U.S.C. § 3132(a)(2).³ As described in the legislative history of the Civil Service Reform Act of 1978, which created the SES, "[m]ost senior positions in grades GS-16 through Executive Level IV will be assigned to SES." S. Rep. 69, 95th Cong., 2d Sess. 10-11 (1978); see also *id.* at 69-70 (positions in the Executive Schedule below level III, other than PAS, will be SES positions).

SES pay is governed by subchapter VIII of chapter 53 of title 5. See *id.* at 82 ("the purpose of the new subchapter VIII is to provide a pay system for the Senior Executive Service which would be established under amended subchapter II of chapter 31 of title 5, United States Code"). Specifically, as the law currently reads, "there shall be established a range of rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates within the range." 5 U.S.C. § 5382(a). The minimum rate of pay for SES

³ These non-PAS positions in levels IV or V of the Executive Schedule will be deemed Senior Executive Service Positions if the position is one "in which an employee—(A) directs the work of an organizational unit; (B) is held accountable for the success of one or more specific programs or projects; (C) monitors progress toward organizational goals and periodically evaluated and makes appropriate adjustments to such goals; (D) supervises the work of employees other than personal assistants; or (E) otherwise exercises important policy-making, policy-determining, or other executive functions." 5 U.S.C. § 3132(a)(2).

positions is 120 percent of the minimum rate of basic pay for GS-15, and the maximum rate is the rate for either level III or level II of the Executive Schedule (depending on whether the agency has a certified performance appraisal system). See 5 U.S.C. § 5382(a), (b); 5 U.S.C. § 5376 (cross-reference for minimum rate).⁴ Individual pay is set, within these limits, by the appointing authority, in accordance with OPM criteria. 5 U.S.C. § 5383.

It appears, therefore, that the pay for non-PAS positions described in 5 U.S.C. § 3132(a)(2) is not specified in or fixed according to subchapter II (Executive Schedule), but rather subchapter VIII (SES pay rates), of chapter 53 of title 5. This conclusion is reinforced by 5 U.S.C. § 5311, which introduces subchapter II as follows: "The Executive Schedule, which is divided into five pay levels, is the basic pay schedule for positions, *other than Senior Executive Service positions* and positions in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, to which this subchapter [5 U.S.C. § 5311 et seq.] applies" (emphasis added). To the extent that certain non-PAS positions at levels IV or V of the Executive Schedule are defined as SES positions, such positions are excluded from the pay schedule established by subchapter II. Consequently, we would have to conclude that such positions are not included in 18 U.S.C. § 207(c)(2)(A)(i) and are not subject to the limitation on component designations in section 207(h)(2).

⁴ The mere fact that the maximum rate of pay for the entire SES is capped by reference to levels III or II of the Executive Schedule does not mean that the pay for any of those SES positions is "specified in or fixed according to" the Executive Schedule. See Memorandum of John C. Harrison, Deputy Assistant Attorney General, OLC, to Kristine Marcy, Associate Deputy Attorney General, December 18, 1990 (statute providing authority to fix salaries "'at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Level'" did not mean that pay for those positions was specified in or fixed according to the Executive Schedule, within the meaning of section 207(c)(2)(A)(i))).

As you know, section 207(c)(2)(A)(ii), rather than 207(c)(2)(A)(i), generally governs whether an individual paid under the SES system is covered by section 207(c).⁵ See, e.g., 5 C.F.R. § 730.104 (required notice to senior executives of coverage under section 207(c)(2)(A)(ii)). Section 207(c)(2)(A)(ii), which was amended in 2003 specifically to reflect contemporaneous amendments to the SES pay system, provides that section 207(c) applies to a person "employed in a position which is not referred to in clause (i) and for which that person is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule." See P.L. 108-136, § 1125 (November 24, 2003). If the incumbent of any of the positions described in your letter meets this pay rate threshold (currently \$145,320 for 2007), then he or she would be subject to the restriction of section 207(c). However, any component designations made under section 207(h) would apply to those persons.

Note that we have consulted informally with OPM concerning the application of relevant provisions in Title 5. If you have any questions about this matter, please contact my Office.

Sincerely,

Robert I. Cusick
Director

⁵ One exception is discussed in OGE 98 x 4. That opinion dealt with an individual who, although her position clearly was compensated at Executive Level IV, made a personal election under 5 U.S.C. § 3392 to continue receiving the SES pay and benefits she had been receiving prior to her appointment to the Executive Schedule position. In that case, we determined that the pay for the "position" still was fixed according to the Executive Schedule, even though the individual employee exercised a personal option to retain pay and benefits "as if" she remained in the SES. Consequently, we determined that she was covered by section 207(c)(2)(A)(i), rather than (ii), and therefore could not take advantage of any component designation under section 207(h). The situation described in your letter is readily distinguished because, pursuant to 5 U.S.C. § 3132(a)(2), the positions themselves are placed in the SES, without any action personal to the particular incumbent, and are not subject to any Executive Schedule pay level at all.