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United States General Accounting Office
Washington, DC 20548

B-290233

October 22, 2002

The Honorable Jeff Bingaman
Chairman, Committee on Energy and Natural Resources
United States Senate

Subject: Appointment of Department of the Interior Associate Deputy Secretary

Dear Chairman Bingaman:

This responds to your request for our opinion on issues relating to the responsibilities, authorities, and manner of appointment of the incumbent Associate Deputy Secretary of the Department of the Interior (DOI). You have expressed concern that the Associate Deputy Secretary might be exercising all of the authorities of the Secretary of the Interior but, unlike the Secretary, he was not nominated by the President and confirmed by the Senate. In particular, you have asked whether the incumbent Associate Deputy Secretary: (1) exercises "significant authority pursuant to the laws of the United States," as the Supreme Court has used that term; (2) is a *de facto* "Officer of the United States" based on the exercise of such authority, potentially requiring nomination by the President and confirmation by the Senate under the Constitution's Appointments Clause; and (3) appears to have been properly appointed to his position.

Based on information and documentation we received from DOI and other agency officials, and for the reasons discussed below, we conclude that the incumbent in this position: (1) does not exercise "significant authority pursuant to the laws of the United States;" (2) is therefore not a *de facto* "officer" subject to Appointments Clause procedures, including but not limited to Presidential appointment and Senate confirmation (a so-called "PAS appointment"); and (3) appears to have been properly appointed to his position as a Non-Career Senior Executive Service federal employee.

Background

The position of DOI Associate Deputy Secretary, which Department officials advised has existed since at least the mid-1970's, is classified as a Senior Executive Service (SES) "general" position.[1] An SES "general" position may be filled through either a career or a

[1] As originally created, the position had the title of "Deputy Under Secretary," because the title of the official to whom this person reported was "Under Secretary." When the Under Secretary's title was changed in 1990 to "Deputy Secretary," by Pubic Law No. 101-509, a corresponding change was made to the subordinate's title to

non-career appointment. DOI non-career appointees serve at the will of the Secretary, and the current Associate Deputy Secretary, as well as his immediate predecessor, have both served under non-career appointments.[2] The appointment process for the incumbent DOI Associate Deputy Secretary position involved clearances by the White House, the Office of Personnel Management and the Office of the Secretary, as well as approval by DOI's Executive Resources Board. DOI officials do not recall that the position has ever been treated as a PAS position.

According to the current Position Description, the incumbent Associate Deputy Secretary reports to the Deputy Secretary and is the Deputy Secretary's principal aide. (By statute, the position of Deputy Secretary must be filled through a PAS appointment.[3]) The Associate Deputy Secretary provides advice and assistance in the administration of the Deputy Secretary's responsibilities, by managing internal and program activities of the office. The incumbent's specific duties include acting as the focal point for review of proposed policies, regulations, and legislation, in order to ensure coordination within DOI and with other agencies, Congress, public interest groups, and state, local, and tribal governments. The incumbent also alerts the Deputy Secretary to matters requiring his attention, and performs a host of other duties. These include managing staff, coordinating and monitoring project planning and assignments, and attending high level DOI meetings on behalf of the Deputy Secretary to ensure that the Deputy Secretary's views are represented and that views expressed by others are reported back to the Deputy Secretary accurately. In addition, the Associate Deputy Secretary is the Deputy Secretary's liaison to DOI's legislative and communications directors, and he coordinates sensitive discussions between the Deputy Secretary and other high-level DOI officials.[4]

The foregoing responsibilities appear consistent with the authority given to the Associate Deputy Secretary by DOI's internal delegations. Under the delegations, the Deputy Secretary is "authorized to exercise all of the authority of the Secretary," subject to certain limitations, but the Associate Deputy Secretary is authorized to exercise only certain of these authorities and then only "in the absence of, and under conditions specified by the [Deputy Secretary . . .."[5] The most notable of the Associate Deputy Secretary's delegated authorities (when the Deputy is absent) is that he may sign proposed and final rulemakings and other

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the current "Associate Deputy Secretary." According to DOI officials, the Associate Deputy Secretary position has not always been filled, and certain Under/Deputy Secretaries have had more than one deputy.

[2] The current Associate Deputy Secretary, James E. Cason, was appointed by Secretary Norton in August 2001. His immediate predecessor, Donald R. Knowles, was appointed by Secretary Lujan and served from December 1989 until 1994. We understand the position was vacant between 1994 and 2001.

[3] *See* 43 U.S.C. § 1452.

[4] Comparing the Position Description for the incumbent with that of his immediate predecessor, the incumbent advises the Deputy Secretary while his predecessor advised both the Secretary and the Deputy Secretary. In both cases, however, the Associate Deputy Secretary reported to the Deputy Secretary.

[5] *See* DOI Departmental Manual Part 209, Sec. 2.1, 2.3 (updated in 1982 and thus referring to the Deputy Secretary as the Under Secretary and the Associate Deputy Secretary as Deputy Under Secretary) (emphasis added). Similar delegations of the Secretary's authorities have been made to the DOI Assistant Secretaries and their respective deputies. The Assistant Secretaries have been given "all of the authority of the Secretary" with certain limitations, while their deputies have been given only certain of these authorities and then only "in the absence of, and under conditions specified by" the Assistant Secretaries. *See, e.g.,* DOI Departmental Manual at Sec. 6.1, 6.3 (1994 ed.) (Assistant Secretary and Deputy Assistant Secretary for Fish and Wildlife and Parks), Sec. 7.1, 7.3 (2001 ed.) (Assistant Secretary and Deputy Assistant Secretary for Land and Minerals Management) (emphasis added). Like the Deputy Secretary, the Assistant Secretaries are statutory PAS officers. *See* 43 U.S.C. §§ 1453, 1453a.

"amendments of and additions to the materials in the Code of Federal Regulations."[6]

DOI officials confirmed that the above-described Position Description and delegated authorities reflect the actual responsibilities and activities of the incumbent Associate Deputy Secretary. They stated that the Associate Deputy Secretary functions as an assistant to the Deputy Secretary, not as a second Deputy Secretary. Although the Associate Deputy Secretary sometimes fills in for the Deputy Secretary in meetings and in other limited ways, he only rarely makes significant policy decisions and, in accordance with the DOI delegations, does so only in the Deputy's absence. For example, as noted in your request, the Associate Deputy Secretary occasionally signs notices of proposed or final rulemaking as the "Acting Deputy Secretary." DOI officials advised that two of the three rulemaking actions cited in your request[7] involved situations where the Deputy Secretary was effectively "absent" because he had recused himself from the proceedings. (He had represented businesses affected by these proceedings prior to joining the Department and wished to avoid any possible conflict of interest.) In the third example,[8] DOI officials explained that the Deputy Secretary was out of town. DOI officials also advised that the Associate Deputy Secretary is considered the "first assistant" to the Deputy Secretary for purposes of the Vacancies Act. The Vacancies Act generally provides that if a PAS position becomes vacant because of the death, resignation or disability of the incumbent, the incumbent's first assistant (or certain other officials) shall temporarily assume the duties of the office for up to 210 days, in an acting capacity and without undergoing PAS review and approval.[9]

Discussion

Determining whether the DOI Associate Deputy Secretary has been properly appointed under the Appointments Clause depends on whether he is an "officer of the United States" or instead is a non-officer employee. As explained below, if he is an officer, the Appointments Clause requires that he must either have been appointed under the PAS process or, if he is an "inferior officer" and Congress elects not to require PAS approval, under a statute vesting the power of his appointment solely in the DOI Secretary. On the other hand, if he is an employee, his appointment was not subject to the Appointments Clause but only to general federal civil service requirements.

The Appointments Clause[10] mandates that "officers of the United States" whose appointments are "established by Law" be nominated by the President and confirmed by the Senate. The only exception, which the Framers of the Constitution added for "administrative

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[6] DOI Departmental Manual, Sec. 2.1.A (1982 ed.).

[7] *See* 67 Fed. Reg. 1862 (Jan. 15, 2002) (final rule on royalty relief for oil and gas producers on the Outer Continental Shelf); 67 Fed. Reg. 6454 (Feb. 12, 2002) (proposed rule clarifying rules on oil and gas royalty suspension volume determinations on the Outer Continental Shelf).

[8] *See* 67 Fed. Reg. 1171 (Jan. 9, 2002) (proposed rule on suspension of oil and gas operations on the Outer Continental Shelf). The Associate Deputy signed this proposed rule as "Acting Assistant Secretary, Land and Minerals Management," but this was subsequently corrected to read "Acting Deputy Secretary." *See* 67 Fed. Reg. 3632 (Jan. 25, 2002).

[9] *See* 5 U.S.C. §§ 3345, 3346.

[10] The Appointments Clause provides that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President Alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II. § 2, cl. 2 (emphasis added).

convenience,"[11] is that "inferior officers" may instead be appointed by an agency head, the President, or the courts if Congress provides for such appointment by statute. The Constitution thus divides "officers" into two categories: "principal" or "superior" officers, whose appointment requires nomination by the President and confirmation by the Senate, and "inferior" officers, whose appointment Congress may vest in certain others.[12]

Who is a "principal" versus an "inferior" officer, and who is an "officer" versus an employee, are subjects of considerable debate. As Chief Justice Marshall observed in 1823, "[a]lthough an office is 'an employment,' it does not follow that every employment is an office,"[13] and many of the decisions on these issues contain little analysis. The leading modern case addressing the distinction between officers and employees is the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court declared an "officer" to be an appointee who exercises "significant authority pursuant to the laws of the United States"[14] or "perform[s] a significant governmental duty exercised pursuant to a public law."[15] In *Buckley*, members of the Federal Election Commission had powers to investigate and disseminate information, to administer the FEC's organic act by issuing regulations and advisory opinions, and to enforce the statute through administrative hearings and civil suits. The Court found that the administration and enforcement powers constituted "significant authority" and thus held that the Commissioners were, "at the very least," inferior officers.[16] Because the Commissioners had not been appointed pursuant to Appointments Clause procedures, the Court declared the statute providing such powers to be unconstitutional.

In determining that the FEC Commissioners were "at least" inferior officers, *Buckley* looked to two early Supreme Court decisions holding that positions which today would be considered relatively low-level – a federal district court clerk and a local postmaster – were inferior officers for purposes of removal.[17] The decisions contain no analysis, however, and thus are of limited utility in identifying the characteristics of an inferior officer.[18] *Buckley* also addressed "employees of the United States" by way of comparison, explaining that "[e]mployees are lesser functionaries subordinate to officers" and are "subject to the control or direction of . . . other executive, judicial, or legislative authorit[ies]."[19] As examples, *Buckley* cited two nineteenth-century Supreme Court decisions, *Germaine* and *Hedden*, holding that certain part-time officials did not rise to the level of officers.[20] In both of those

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[11] *See Edmond v. United States*, 520 U.S. 651, 660 (1997), *citing United States v. Germaine*, 99 U.S. 508, 510 (1878) ("[F]oreseeing that when offices became numerous, and sudden removals necessary, this [Presidential nomination, Senate confirmation] mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.").
[12] *See Germaine*, note 11 above, 99 U.S. at 509-11.
[13] *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, Circuit Justice).
[14] 424 U.S. at 126 (emphasis added).
[15] *Id.* at 141 (emphasis added).
[16] *Id.* at 126.
[17] *See Ex parte Hennen*, 38 U.S. 225 (1839), and *Myers v. United* States, 272 U.S. 52 (1926), respectively.
[18] It has been suggested the cases might be explained by the fact that these government positions were previously of greater significance. *See* U.S. Department of Justice, Office of Legal Counsel, Opinion for the General Counsels of the Federal Government, 1996 OLC LEXIS 60 (May 7, 1996), at *57.
[19] 424 U.S. at 126 n. 162.
[20] The two cases cited by *Buckley* were *Germaine*, see note 11 above, *id.* at 512, where the Court held that a surgeon who periodically examined pension applicants, at the request of the Commissioner of Pensions, was not an officer because his duties were only "occasional and intermittent" rather than "continuing and permanent," and *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), where the Court held that a merchant appraiser who

cases, the Court had applied the standard announced in *United States v. Hartwell*: "[a]n office . . . embraces the ideas of tenure, duration, emolument, and duties."[21] Other cases of that era,[22] as well as the original Vacancies Act,[23] likewise recognized that exercising all of a PAS officer's authorities, if done temporarily, does not necessarily transform an employee into an officer.

More recent cases distinguishing between officers and employees have likewise focused on the nature and scope of an official's authority. In *United States v. Clarridge*, 811 F. Supp. 697, 701 (D. D.C. 1992), for example, a subordinate to an Independent Counsel was held to be an employee rather than an officer because, although the Independent Counsel "delegate[d] particular tasks to various employees," it was the Independent Counsel who "made the decision to seek an indictment . . . and [who] also signed that indictment" and who "retained ultimate authority over indictments and plea bargains." (The Independent Counsel had previously been found to be an inferior rather than a principal officer.[24]) Similarly, in *United States v. Cisneros*, 26 F. Supp. 2d 13, 24 (D. D.C. 1998), Deputy and Associate Independent Counsels were held to be employees rather than officers because, although they presided over much of an investigation and trial, "the ultimate prosecutorial decisions still rest[ed] with the Independent Counsel himself."

Applied to the present facts, we believe the foregoing case law indicates that the DOI Associate Deputy Secretary is an employee rather than an officer, either principal or inferior, and thus was not subject to the Appointment Clause's PAS or statutory delegation procedures.[25] Like the subordinates to the Independent Counsels in *Cisneros* and *Clarridge*,

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periodically valued merchandise for duty purposes, at the request of the Collector of Customs, was not an officer (or even a government civil service employee) because "[h]is position is without tenure, duration, continuing emolument or continuous duties, and he acts only occasionally and temporarily."

[21] 73 U.S. 385, 393 (1867) (emphasis added).

[22] In *United States v. Eaton*, 169 U.S. 331 (1898), for example, a non-officer served temporarily as a non-PAS inferior officer. Because the non-PAS officer served as the principal PAS officer in the latter's absence, the net effect was that the non-officer served temporarily – for 10 months – as a PAS officer without undergoing PAS scrutiny. The Supreme Court found this arrangement consistent with the Appointments Clause, because Congress had vested appointment authority for the non-PAS officer's position in the head of the relevant agency, and because without provision for temporary service under "special and temporary conditions," "the discharge of administrative duties would be seriously hindered." *Id.* at 343.

[23] As enacted in 1868, the Vacancies Act allowed a non-officer to fill a vacant PAS office for up to 10 days. This time period has been lengthened over the last century to 30 days (in 1891), 120 days (in 1988) and the current 210 days (in 1998). *See generally* M. Rosenberg, "The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative," CRS 98-892A (Nov. 2, 1998).

[24] *See Morrison v. Olson*, 487 U.S. 654 (1988). As acknowledged in your request, "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." *Id.* at 671. In declaring the Independent Counsel to be an inferior officer, *Morrison* focused on the Independent Counsel's "temporary" tenure (limited to a specific mission), limited duties (investigation and prosecution of only certain crimes and no policymaking power), limited jurisdiction, and removability by a principal officer (the Attorney General). While there is no definitive list of distinctions between principal and inferior officers, courts look to these and other factors such as the continuing versus intermittent nature of an officer's responsibilities (*e.g.*, *United States v. Eaton*, see note 22 above and cited with approval in *Morrison*) and the identity of the person with removal power over the officer (*e.g., Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991), holding that Postmaster General, removable by Board of Governors, was inferior officer). *See also Edmond v. United States*, note 11 above, at 652 ("Generally speaking, 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senates advice and consent.").

[25] The incumbent's appointment appears to have been made consistent with federal civil service requirements. As an executive branch agency, DOI has authority under 5 U.S.C. § 3101 to employ persons in the various

who had received authority from the Independent Counsels to run investigations and trials but who did not make ultimate prosecutorial decisions, the DOI Associate Deputy Secretary performs highly important – but limited – tasks. Virtually all of the Associate Deputy Secretary's functions involve coordination and management rather than ultimate decision-making on policy issues. To be sure, the issues he coordinates and manages are complex, sensitive and substantial, and his position is undoubtedly a critical one requiring a high degree of expertise and skill. But as the Supreme Court found in *Steele v. United States*, 267 U.S. 505 (1925), officials can exercise substantial judgment and discretion and yet not qualify as constitutional officers.[26] In addition, like the part-time officials in *Germaine* and *Hedden*, the DOI Associate Deputy Secretary's most "officer"-like authority – his rulemaking authority – exists only "occasionally and temporarily." Thus in the words of *Buckley*, the DOI Associate Deputy Secretary is one of the "lesser functionaries subordinate to officers . . . [and] subject to the control or direction of . . . other executive . . . authorit[ies]."[27]

We believe the situation of the DOI Associate Deputy Secretary is substantially different from the facts addressed in the two Attorney General opinions cited in your request. In both of those opinions, the deputy determined to be an "officer" was assumed, based on his title alone, to hold all of the powers of his PAS-appointed peer or superior.[28] By contrast, there is no dispute that the DOI Associate Deputy Secretary exercises only some of his superior's authorities and does so only in the superior's absence. He does not, as in one of the opinions, act as a "Second Deputy."

For the same reason, this is also different from the situation addressed in a Department of Justice Office of Legal Counsel (OLC) opinion, where the Secretary of Housing and Urban Development had made so-called "concurrent" delegations of authority to a series of HUD principal officers and their deputies.[29] Under such delegations, the non-Presidentially

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classes recognized by 5 U.S.C. Chapter 51, including SES positions established and approved by the Office of Personnel Management (OPM). *See* 5 U.S.C. § 5108 (a). OPM approved the appointment of the incumbent DOI Associate Deputy Secretary on August 9, 2001.

[26] *Steele* held that a deputy U.S. marshal "called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States" was an employee rather than an officer. 267 U.S. at 508.

[27] 424 U.S. at 126 n. 162.

[28] In the 1908 opinion, "Second Deputy Comptroller of the Currency – Appointment," 26 Op. Atty. Gen. 627, the so-called "Second Deputy Comptroller" of the Currency was determined to be an inferior officer who, based on the Treasury Secretary's lack of statutory appointment authority, had to be appointed under the PAS process. By statute, the so-called First Deputy assumed all of the Comptroller's powers when the Comptroller was absent or disabled, and the Attorney General determined that the Second Deputy (once properly appointed) could assume the same powers as the First Deputy when both the First Deputy and the Comptroller were absent or disabled. The Attorney General based his expansive views of the Second Deputy's authority solely on his title; he believed that "[g]enerally speaking, a deputy has power to do every act which his principal may do . . . Doubtless it was on account of this general rule . . . that Congress did not deem it necessary to prescribe specifically the duties of the additional [Second] Deputy Comptroller." *Id*. at 630 (emphasis added).

In the 1911 opinion, "Appointments in the Department of Commerce and Labor," 29 U.S. Op. Atty. Gen. 116, the Deputy Commissioner of Fisheries was determined to be a "*de facto*" inferior officer who, based on the Secretary of Commerce and Labor's lack of statutory authority to appoint such officers, had to be appointed under the PAS process. *Id*. at 119. As in the 1908 opinion, the Attorney General concluded that the Deputy was an officer based entirely on the title of the position, which he believed "necessarily implies a power to perform all the duties which might be performed by the Commissioner of Fisheries," a statutory PAS position. *Id.* at 118 (emphasis added).

[29] *See* U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion for the General Counsel, Department of Housing and Urban Development, 2 Op. O.L.C. 87 (April 19, 1978).

appointed deputies received authority identical to that of their Presidentially appointed and Senate confirmed superiors, and could exercise this authority at any time, even when the superiors were not "absent." In response to a Senator's challenge to the constitutionality of one of these delegations,[30] OLC essentially agreed that it would be unconstitutional for a non-PAS official to exercise all of the authorities of a PAS officer, but determined that the HUD situation was constitutional because in practice, the PAS officers remained legally accountable for and in control of their respective units.[31] Even assuming the validity of such a distinction in the HUD situation, that is not this case. The DOI Associate Deputy Secretary's powers, both as delegated and as exercised, are far more modest than the Deputy Secretary's in both scope and duration.[32] The Associate Deputy Secretary can perform only certain of the Deputy Secretary's functions, and only in the absence and at the pleasure of the Deputy Secretary.

Finally, our conclusion that the DOI Associate Deputy Secretary is an employee rather than an officer is supported by comparison with the Associate Deputy Secretary at the Department of Transportation, the position cited in your request. Based on the current Position Description for that position, the duties appear far more significant than those of the DOI Associate Deputy Secretary Interior. In our judgment, they rise to the level of a constitutional officer exercising "significant authority pursuant to the laws of the United States,"[33] and, consistent with this level of responsibility, Congress has designated it as a PAS position.[34]

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[30] Senator Eagleton challenged the legality of the HUD Secretary's delegation of identical authority to both the HUD Federal Insurance Administrator and his deputy, asserting that the confirmation process was being "vitiate[d]" and made "a mockery" because, after the Senate's inquiry into the qualifications of the person nominated by the President, all of the same functions could be exercised by someone "about whom Congress and the public know nothing." 124 Cong. Rec. 4929, 4929 (Feb. 28, 1978). Such an arrangement "creates a shadow government," the Senator declared, "over which Congress has little control." *Id.*

[31] "While both parties may have the same apparent powers with respect to outsiders," OLC stated, "there is no doubt that in the internal relations between the Assistant Secretary and his deputy, the former is the superior." 2 Op. O.L.C. at 88.

[32] As Senator Eagleton acknowledged in the HUD case, "I can understand a situation where a deputy exercises powers of an office in the absence of the incumbent. I have no problem either with a deputy carrying out certain functions at the pleasure of his boss. Those are normal, every day administrative arrangements." 124 Cong. Rec. at 4929.

[33] According to the DOT Position Description, the Associate Deputy Secretary is the senior advisor to both the Secretary and the Deputy Secretary on major policies and programs, and reports directly to both officers. The Secretary assigns responsibility to the Associate Deputy Secretary for major actions requiring the direct and ongoing supervision of a senior official. The Associate Deputy Secretary evaluates program initiatives and directs changes when necessary, and ensures the participation of administration officials in major planning and operating studies, conveying the Secretary's views in the process. He also acts as the Secretary's representative and speaks authoritatively for the Secretary at congressional hearings, meetings, and conferences concerning departmental policies and programs.

[34] *See* 49 U.S.C. § 102(d). DOT officials advised us that before the Associate Deputy Secretary position became a statutory PAS position in 1985, it existed in much the same form as an SES position.

Conclusion

In summary, we conclude that the incumbent DOI Associate Deputy Secretary does not exercise "significant authority" for purposes of the Appointments Clause and therefore is not an officer of the United States. The incumbent's appointment thus was not subject to the PAS process, and he appears to have been appointed consistent with federal civil service requirements. If you would like to discuss this matter further, please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Doreen Feldman, Assistant General Counsel, at (202) 512-8264, or Robert Crystal, Deputy Assistant General Counsel, at (202) 512-8209.

Sincerely yours,

Anthony H. Gamboa
General Counsel