

**MAY 16 2005**

TO: IC Directors

FROM: Director, NIH

SUBJECT: Implementation of New Title 42 (f) Policy Requirements

In the fall of 2004, the Department of Health and Human Services (HHS) issued departmental policy on the use of 42 USC 209(f) (see Attachment 1, HHS Instruction 42-1, "Appointment of 42 USC 209(f) Scientists"). The intent of the new policy is to standardize practices related to pay increases, performance management, pay caps, base salary limitations, incentives, and benefits and awards, as well as to establish minimum qualification and eligibility standards among the OPDIVs for scientists under Title 42 (f) appointments. At NIH, scientists covered by the new HHS policy include Senior Investigators in the intramural programs, and extramural and other IC and NIH scientists who meet appointment criteria (including certain Health Scientist Administrators, Scientific Review Administrators, Program Administrators, Program and Project Officers, Division Directors, senior Institute/Center (IC) and/or NIH Office of the Director (OD) staff, etc.).

At my request, a committee composed of representatives of the NIH intramural, extramural, senior administrative, and human resources communities was established to consider issues related to implementation of the Department's policy. The principle goal was to bring NIH into compliance with Departmental requirements, while at the same time preserving maximum flexibility in our usage of this invaluable appointing authority. While the committee's efforts remain ongoing, it reached consensus on a number of implementing provisions and recommendations that were then considered by the NIH Steering Committee. (Additional recommendations, including development of policies and mechanisms to facilitate appropriate Title 42 usage in the extramural programs, will follow as the committee continues its work.) After thorough consideration, the NIH Steering Committee has made a number of recommendations to me which I have now approved and which are described below.

1. APPROPRIATE USAGE:

HHS Requirement: Appointments under 42 USC 209(f) will only be made when documented recruitment and retention efforts under other systems, including Title 5, Commissioned Corps, and the Senior Biomedical Research Service (SBRS), have failed to yield candidates with critical scientific expertise.

NIH Implementation:

As an exception to the HHS requirement that all other hiring mechanisms must be exhausted before appointments are made under Title 42, and based on documentation demonstrating that other employment mechanisms are not realistic alternatives for these specific positions, I have authorized direct use of Title 42 (f) to appoint Senior Investigators in the intramural programs (provided the Deputy Director for Intramural Research, NIH, does not recommend the SBRS as an appropriate alternative), and IC Directors, IC Deputy Directors, Scientific Directors, Clinical Directors, Directors of extramural programs who report directly to an IC Director, and scientific program heads in the OD (IC or NIH) who report to the IC Director or Director, NIH. Such authorization will constitute an exception to the HHS requirement that all other hiring mechanisms must be “exhausted” before appointments are made under Title 42 (f).

ICs are cautioned, however, that, consistent with current NIH policy and provisions of the Pay Model, Title 42 should not be used as a replacement for Title 5 mechanisms when those mechanisms can be appropriately used to satisfy programmatic needs. Except for the senior scientific positions specifically identified above, appointments under Title 42 (f) to other NIH positions remain subject to the HHS requirement, unless and until it can be demonstrated that other appointment mechanisms are not viable options (i.e., Title 42 (f) may not be used until other appointment mechanisms have been “exhausted”). When use of Title 42 (f) is approved for other positions, base pay and total compensation must be appropriately reflective of the duties, responsibilities, and special expertise required of the position, and these must be thoroughly and clearly documented.

In some instances, ICs may have initiated recruitment activities for positions that otherwise meet Title 42 (f) criteria without first “exhausting” other appointment mechanisms. To avoid undue disruptions and delays in filling mission-critical positions, these ongoing recruitment activities may continue. However, as of the date of this memorandum, no new Title 42 (f) recruitments may be initiated, except for the specific positions listed above, unless and until other mechanisms are “exhausted.”

2. CONVERSIONS:

HHS Requirement: Conversions from other pay systems to Title 42 (f) should only occur under exceptional circumstances, and only when a scientist has been appropriately peer-reviewed and determined to meet a set of specified criteria.

NIH Implementation:

To avoid future questions and confusion, I have documented for the record that conversion of intramural scientists from Investigator (Tenure-Track) (appointed under Title 42 (g)) to tenured Senior Investigator (appointed under Title 42 (f)) and conversions of Senior Investigators employed under other appointment mechanisms to Title 42 (f) comply fully with all HHS Title

42 (f) peer-review conversion requirements and criteria. Conversions from other positions to Title 42 (f) will require that a peer review process be established.

3. PAY INCREASES:

HHS Requirement: Performance-based pay increases will normally be limited to a maximum of 6 percent, although OPDIV heads may authorize higher increases where performance clearly warrants. All pay increases must be fully justified and documented. Authority for OPDIV heads to grant annual across-the-board comparability increases has been eliminated.

NIH Implementation:

Based on the authority granted to me by HHS, and as provided in the attached delegation of authority (see Attachment 2), I have granted the following pay authorities to IC Directors. These authorities must be exercised in full compliance with all requirements and limitations of the NIH Title 42 Pay Model, and governing NIH intramural and extramural programmatic policies, requirements and procedures.

- a. Authority to approve performance-based increases for individual Title 42 (f) scientists of up to 6 percent, provided the IC average of all increases for Title 42 (f) scientists does not exceed 4 percent and individual base pay does not exceed \$212,000. This is not a 4 percent pool of money, but rather an average of the percentage increase awarded to each eligible Title 42 (f) scientist.

Annual pay increases must be consistent with the employee's annual performance appraisal. Furthermore, 6 percent is the maximum that can be granted. I expect IC Directors to be judicious in their pay decisions, to use the full range allowable (i.e., between 0 and 6 percent), and to grant pay increases in varying amounts reflective of distinctions in performance.

- b. Authority to grant quadrennial increases of greater than 6 percent to Senior Investigators in the intramural programs.

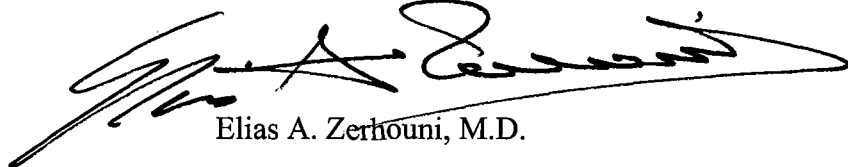
Because a rigorous NIH peer review process (i.e., Board of Scientific Counselor reviews) exists in the intramural programs, I have approved a blanket exception authorizing quadrennial increases for Senior Investigators. Because a formal peer review process does not exist outside the intramural programs, quadrennial increases proposed for non-intramural scientists will continue to be considered on a case-by-case basis. The effect for both Senior Investigators and non-intramural scientists is to preserve unchanged current provisions of the NIH Title 42 Pay Model.

The NIH Offices of Intramural Research, Extramural Research, and Human Resources will carefully monitor pay decisions that are made under these delegations as well as compliance with provisions of the NIH Title 42 Pay Model and the HHS Instruction. I expect full adherence to all

requirements. Actions and practices occurring in contravention of requirements will result in a reassessment of delegations and governing NIH policies.

Guidance on granting performance-based “spring” pay increases for scientists appointed under both Title 42 (f) and (g) has been delayed pending decisions regarding NIH implementation of HHS Title 42 (f) requirements. Now that relevant decisions have been made, IC Directors may proceed to grant “spring” increases in accordance with provisions of the Title 42 Pay Model and the guidance provided in Attachment 3. (Separate guidance is provided for Title 42 (f) and (g). The Title 42 Pay Model will be revised and reissued shortly to reflect new Title 42 (f) requirements.) Provided review by the NIH Compensation Committee is not required, “spring” annual adjustments will be made effective as of April 3, 2005; “spring” quadrennial adjustments will be made effective at the beginning of the pay period following their approval by the Office of Human Resources.

Should your staff have any questions regarding HHS Title 42 (f) policies, NIH implementing decisions, or Title 42 “spring” increases, they may call Mimi Blitz, Jane Spencer, or Helen Lee, on 301-402-9254, 301-402-9251, or 301-402-9350 respectively.



Elias A. Zerhouni, M.D.

Attachments

cc:

NIH Deputy Directors
IC Scientific Directors
IC Executive Officers
Acting Director, OHR
Division Directors, OHR
Branch Chiefs, OHR