Senate Committee on the Judiciary
Questions for the Record from Senator Grassley
To Steven Cook, President
National Association of Assistant United States Attorneys

1. **Special Assistant United States Attorneys**

Mr. Cook, the Department of Justice's prepared testimony gave as one of its reasons for supporting sentencing reform legislation to shift resources to other pressing needs such as law enforcement. However, it appears that even without potential new funding sources, the Department is hiring new Assistant United States Attorneys around the country. The Department's advertising for these positions makes clear that no additional funding is necessary, since the positions are unpaid.

1. Are unpaid Assistant United States Attorneys subject to the Fair Labor Standards Act? Should they be?

Mr. Cook: Thank you for recognizing the importance of this issue. Bringing uncompensated SAUSAs in on short term appointments has raised a number of concerns one of which is whether the program is within the letter or spirit of the law. I have attached as attachment 1 to this response a series of letters between NAAUSA and DOJ culminating with a June 4, 2013, letter to then Attorney General Eric Holder. In that correspondence we address these concerns.

2. Why is the Department of Justice hiring Assistant United States Attorneys to work without compensation?

Mr. Cook: Presumably the Department is hiring uncompensated SAUSAs to ensure the litigation responsibilities of the United States Attorneys' Offices are met during restricted budget years. Meeting these responsibilities is of course critical to the enforcement of our criminal laws and national security. That said, there have been no similar programs in the Federal Bureau of Investigations, Bureau of Prisons, Bureau of Alcohol, Tobacco, Firearms and Explosives, Drug Enforcement Administration, or any other DOJ component although they have been subject to the same budget restrictions.

3. Does the placement of unpaid Assistant United States Attorneys within the Department raise the risk that such uncompensated individuals might be more susceptible to corruption, such as by taking bribes, than those who are paid at historic civil service rates?

Mr. Cook: People attracted to serving as Assistant U.S. Attorneys are by their nature very loyal, dedicated, and patriotic. Although there is no reason to believe that those who accept uncompensated SAUSA positions are any less so, the risk that they might feel wronged for any number of reasons (that they were not compensated, that they were not offered permanent employment at the end of their term etc.) legitimately increases that concern and not just during the period of uncompensated employment. Again, although this risk is low among people sharing these personality characteristics, a sense that one is being fairly compensated for their work is critical to furthering a sense of loyalty and respect and a healthy working relationship between employer and employee. Working for a year (the typical commitment term) is bound in all but the most wealthy candidates to create financial stress which is exactly what domestic organizations (for example crime syndicates) and hostile foreign governments look to exploit. Moreover, since many of the uncompensated SAUSAs later become AUSAs, the fact that the Department took advantage of them by depriving them of fair compensation for a year, can only work to plant seeds of discontent that sprout later in their career.

4. Does the practice of not paying Assistant United States Attorneys send a message to those who are paid in that position that they should not question any decision made in the United States Attorney's office, with respect to the conduct of a case, or policy, or in situations of waste, fraud, or abuse, because they can be replaced with someone who will work for nothing?

Mr. Cook: Yes. Using uncompensated SAUSAs sends many negative messages and creates divided loyalties. To begin, the program undermines the very nature of the professional and independent workforce that Congress intended to create by protecting career AUSAs from removal for political reasons. In order for the federal criminal justice system to have credibility, it must be free from outside influences. Career AUSAs are insulated from outside influences while uncompensated SAUSAs are not. In fact, the opposite is true: uncompensated SAUSAs, although vested with all of the power of a career AUSAs, are subject to removal at the whim of the presidentially appointed U.S. Attorney. Likewise, uncompensated SAUSAs working on one year terms have to keep an eye on their post-government appointment employment prospects and thus are susceptible to divided loyalties.

5. Are you concerned that only attorneys who graduate from law school with little or no debt will be able to serve as unpaid Assistant United States Attorneys?

Mr. Cook: The uncompensated SAUSA system creates a class system that eliminates all but the wealthy. Since only individuals who can work without compensation (i.e., without salary, health insurance, or any other benefits) for a year are eligible, those

with student loan debt, family obligations, or other financial responsibilities are as a practical matter disqualified. This, in turn, presumably has a disparate impact on minorities.

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June 4, 2013

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Uncompensated Special Assistant United States Attorneys

Dear Attorney General Holder:

I write to you on behalf of the National Association of Assistant United States Attorneys ("NAAUSA") to express our concerns about the legal permissibility of hiring uncompensated Special Assistant United States Attorneys ("SAUSAs") within United States Attorney Offices.

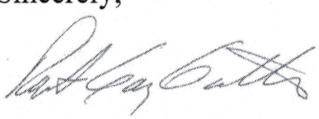
We have been advised by the Executive Office for United States Attorneys, per its correspondence of May 23, 2013 (enclosure 1), that the Office considers the Department's hiring of uncompensated SAUSAs as legally permissible. As we pointed out to the Deputy Attorney General in our letter of November 26, 2012 (enclosure 2), the hiring of uncompensated SAUSAs violates the general principle of appropriations law that the government cannot accept the voluntary services of persons for work that otherwise would have been performed by paid employees in positions for which their pay has been established by law. In justifying the Department's policy to hire uncompensated SAUSAs, the Executive Office noted in its response of May 23, 2013 that the authority given to the Attorney General to appoint SAUSAs, pursuant to 28 U.S. Code §§ 543 and 548, empowers the Attorney General "to appoint SAUSAs at a gratuitous rate of pay (i.e., $0))."

As we explained in our letter to the Deputy Attorney General, we believe the Executive Office's interpretation of that authority is overbroad and inconsistent with the Antideficiency Act, interpretations thereof by the courts and the Government Accountability Office, as well as the Department's own administratively-determined ("AD") pay system covering Assistant United States Attorneys.

While the AD pay system is more flexible than the General Schedule and confers greater discretion to the Department of Justice, it nonetheless constitutes a pay system fixed by or pursuant to statute, i.e. 28 U.S. Code § 543. Reasonable interpretations of that statutory authority do not permit the Department to expand it so far as to allow the Department to devise an AUSA pay rate as low as zero. The courts and the Government Accountability Office have recognized that such a waiver of compensation would undermine public policy because the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress. Moreover, the current AD pay plan does not recognize a "zero" pay rate, as the lowest level (AD-21 for an AUSA with 0-3 years experience) is set at $44,581.

These considerations and concerns cause us to urge the Department of Justice to discontinue the practice of hiring uncompensated SAUSAs and to refrain from further action inconsistent with the Antideficiency Act. Thank you for your consideration of our views.

Sincerely,



Robert Gay Guthrie
President

Enclosures

cc: Sylvia Matthews Burwell, Director
Office of Management and Budget

James M. Cole
Deputy Attorney General

H. Marshall Jarrett, Director
Executive Office for United States Attorneys

Loretta E. Lynch, U.S Attorney, Chair, Attorney General's Advisory Committee
Sally Quillian Yates, U.S Attorney, Vice Chair, Attorney General's Advisory Committee

ENCLOSURE 1

U.S. Department of Justice

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MAY 23 2013

Robert Gay Guthrie
President
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Lake Ridge, VA 22192-1715

Dear Mr. Guthrie:

It was good seeing you at our recent meeting. This letter responds to the National Association of Assistant United States Attorneys' (NAAUSA) letter to Deputy Attorney General James Cole, dated November 26, 2012, regarding the use of uncompensated Special Assistant United States Attorneys (SAUSAs) in United States Attorneys' Offices.

Your letter requests that the Department of Justice (Department) discontinue its hiring of uncompensated SAUSAs based on NAAUSA's concern that such hiring "arguably violates" general principles of appropriations law. We respectfully disagree that the Department's use of uncompensated SAUSAs contradicts appropriations law principles. In fact, we continue to believe that the Department's long standing use of uncompensated SAUSAs is legally permissible.

As you correctly point out in your letter, there is an important distinction in this context between "volunteer services" and "gratuitous services." Opinions issued over the years by the United States Supreme Court, the Attorney General, the Comptroller General, and the Department's Office of Legal Counsel consistently have distinguished between the provision of voluntary services to an agency, which generally is not permissible under the Antideficiency Act, and the provision of gratuitous services, which generally is permissible. This long standing precedent has established that it is generally not a violation of the Antideficiency Act for an agency to accept gratuitous services from individuals who agree to waive entitlement to compensation.

With respect to SAUSAs in particular, Title 28 U.S. Code § 543 grants the Attorney General authority to appoint SAUSAs to assist United States Attorneys. Attorneys appointed under 28 U.S.C. § 543 are subject to a salary fixed by the Attorney General with a specified maximum amount, but there is no mandatory minimum salary. As a result, the Department is

authorized, pursuant to 28 U.S.C. §§ 543 and 548, to appoint SAUSAs at a gratuitous rate of pay (i.e., $0). A gratuitous rate of pay distinguishes uncompensated SAUSAs from mere providers of volunteer services. Uncompensated SAUSAs thus legally may provide gratuitous services to the Department.

We have concluded that, because 28 U.S.C. §§ 543 and 548 give the Department specific authority to appoint SAUSAs at a gratuitous rate of pay, the Department's long standing use of uncompensated SAUSAs is legally permissible under the Antideficiency Act and does not result in an impermissible augmentation of its appropriations. Consequently, we do not believe that appropriations law principles require the Department to discontinue its use of uncompensated SAUSAs, as you request in your letter. Again, thank you for sharing NAAUSA's concerns regarding this issue.

Sincerely,

H. Marshall Jarrett

H. Marshall Jarrett
Director

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November 26, 2012

The Honorable James M. Cole
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Uncompensated Assistant United States Attorneys

Dear Deputy Attorney General Cole:

I write to you on behalf of the National Association of Assistant United States Attorneys ("NAAUSA") to express our concerns about the legal permissibility of hiring uncompensated Special Assistant United States Attorneys ("SAUSAs") within United States Attorney's Offices.

As explained below, the hiring of uncompensated SAUSAs arguably violates the general principle of appropriations law that the government cannot accept the voluntary services of persons for work that otherwise would have been performed by paid employees in positions for which their pay has been established by law. While the administratively-determined ("AD") pay system covering Assistant United States Attorneys ("AUSAs") is more flexible than the General Schedule and confers greater discretion to the Department of Justice, it nonetheless constitutes a pay system fixed by or pursuant to statute. Reasonable interpretations of that statutory authority do not permit the Department to expand it so far as to allow the Department to devise an AUSA pay rate as low as zero. The courts and the Government Accountability Office ("GAO") have recognized that such a waiver of compensation would undermine public policy because the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress. Moreover, the current AD pay plan does not recognize a "zero" pay rate, as the lowest level (AD-21 for an AUSA with 0-3 years experience) is set at $44,581.

The Antideficiency Act Prohibits the Acceptance of Voluntary Services

The Antideficiency Act prohibits federal agencies from accepting voluntary services without specific statutory authority. 31 U.S.C. § 1341. Violations of this prohibition constitute a criminal offense. 31 U.S.C. § 1350. Generally, the Antideficiency Act prohibits federal employees from:

- making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

- involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).

- **accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.** (Emphasis added).

- making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

The third prohibition above – the bar upon the acceptance of voluntary services for the United States, or employing personal services not authorized by law – is the key operative limitation on the Department of Justice's ability to secure the services of SAUSAs.

The prohibition on the acceptance of voluntary services was enacted over a century ago. There are several reasons for this Congressional prohibition. First, it reinforces Congress' constitutional "power of the purse," and forces agencies to operate within the amounts provided by Congress, without the supplementation of voluntary services. B-309301, June 8, 2007; B-322832, March 30, 2012. Second, it recognizes that certain government activities may not be suitable or lawful for non-federal employees to perform. Third, the purposes of federal conflict of interest statutes in Title 18 may be frustrated by permitting voluntary services. This can draw into play the opportunity for self-dealing and abuse of governmental position that the federal conflict of interest laws are intended to prevent.

These policy motivations have led to the broad understanding that the Antideficiency Act prohibits a contract between a federal agency and an individual for voluntary services for which no payment is required. Nonetheless, over time, the voluntary services prohibition has been limited in certain circumstances. Case law has distinguished between "voluntary services" prohibited by the Antideficiency Act, and "gratuitous services" which are performed pursuant to an advance agreement or contract in which the provider of services has agreed to serve without compensation. In such cases, the services are not "voluntary" within the meaning of the prohibition.

The Attorney General has held that services rendered "gratuitously" in an official capacity under a regular appointment to a position otherwise permitted by law to be non-salaried are acceptable. 30 Op. Atty'. Gen 51 (1913). See also subchapter 1-4.d of *The Federal Personnel Manual*, chapter 311. Subchapter 1-4 of Chapter 311 of The Federal Personnel Manual defines "gratuitous service" as that offered and accepted without pay under an appointment to perform duties the pay for which has not been established by law. [Emphasis added].

Even if the services are gratuitous, compensation may not be waived, by advance agreement or otherwise, where Congress has fixed by law the rate or amount of the compensation sought to be waived. *Glavey v. United States*, 182 U.S. 595, 609 (1901). The Supreme Court in *Glavey* warned that, if waiver of compensation fixed by Congress were permitted, it would defeat the express will of Congress. Congress would be ceding its express will to the Executive Branch. Otherwise, "the subject of salaries for public officers would be under the control of the Executive Department of the Government." See also 58 Comp. Gen. 383 (1979); 54 Comp. Gen. 393 (1974); 27 Comp. Gen. 194, 195 (1947).

A desk reference book on federal appropriations law has suggested that the underlying philosophy of the "voluntary" versus "gratuitous" distinction is best conveyed by the Justice Department's Office of Legal Counsel statement: "Although the interpretation of [section] 1342 has not been entirely consistent over the years, the weight of authority does support the view that the section was intended to eliminate subsequent claims against the United States for the compensation of a "volunteer," rather than to deprive the government of the benefit of truly gratuitous services. 5 Op. Off. Legal Counsel 160, 162 (1982). The reference book cites in further support a 1982 decision involving the American Association of Retired Persons and its desire to volunteer services to assist in crime prevention activities (distribute literature, give lectures, etc.) on Army installations. The GAO found no Antideficiency Act problem as long as the services were agreed to in advance and, so documented, were gratuitous. B-204326 (July 26, 1982). The desk reference goes on to suggest that subsequent interpretations by GAO have resulted in the following principle: If compensation is not fixed by statute, i.e., if it is fixed administratively, or if the statute merely prescribes a maximum but no minimum, it may be waived as "gratuituous." Jensen, John E., *Quick Reference to Federal Appropriations Law*, 150 (2006).

At the same time, the GAO has devoted attention to how far an agency can go in asserting its independence from the Antideficiency Act, by virtue of the discretion embodied in Congressionally-authorized compensation arrangements that allow the agency to administratively fix pay. There are limits on that independence. Time and again, the GAO has accorded primacy to the Antideficieny Act's prohibition on the acceptance of waivers by an official or employee when the rate of compensation is fixed by statute. *Glavey v. U.S., supra*. *See also* B-322832 (March 30, 2012); 58 Comp. Gen. 383 (1979); 54 Comp. Gen. 393 (1974); 27 Comp. Gen. 194, 195 (1947).

In one case, the Comptroller General has concluded that, even when an agency has broad discretion in evaluating and fixing the compensation of AD positions, that compensation cannot be waived when the positions and their rates of compensation were fixed pursuant to statute. 57 Comp. Gen. 423, B-190455. That 1978 decision involved the U.S. Agency for International Development ("AID") and its AD pay plan. There the Comptroller General ruled that, although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation were fixed pursuant to statute, and therefore the compensation for AD officers and employees could not be validly waived.

The AD-Pay Plan Covering AUSAs Is Fixed Pursuant to Statute

In ruling upon the AID pay system, the Comptroller General took note of the role that Congress played in shaping the system and its connection to civil service appointment and General Schedule grade structures which were determined by law.

As the Comptroller General stated:

> The AID regulations covering appointments under this authority provided for each position to be evaluated and assigned an appropriate administratively determined (AD) grade. The AD grades assigned were based on the responsibilities, duties and compensation rates of General Schedule grades. Each AD position was evaluated prior to the appointment of an individual to the position. The compensation of the appointee was made at any rate within the range of rates for the position which was filled depending on the appointee's qualifications. Also each position could be reevaluated without reference to civil service laws whenever changed responsibilities and duties indicated the necessity therefor.

This led the Comptroller General to conclude that, although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation nonetheless were fixed pursuant to statute, and therefore could not be validly waived. The same conclusion may arguably be applied to the Department of Justice and the AD pay plan covering AUSAs: rates of compensation for AUSAs are fixed pursuant to statute and may not be validly waived.

The AD pay plan covering AUSAs is fixed pursuant to statute at 28 U.S.C. § 548, which provides:

> § 548. Salaries
> Subject to sections 5315 through 5317 of title 5, the Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 543 of this title at rates of compensation not in excess of the rate of basic compensation

> provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.

NAAUSA requested the legal justification for uncompensated SAUSAs during a meeting with officials of the Executive Office for United States Attorneys ("EOUSA") on June 29, 2012. In response, EOUSA provided the Department of Justice Office of Legal Counsel ("OLC") memorandum entitled "Uncompensated Voluntary Services," dated November 28, 1994.

The OLC memorandum addresses the permissibility of a range of services performed voluntarily by persons for the Department of Education, specifically, the completion of services for the Department by once-employed persons after they have retired, and the voluntary provision of a computer needs assessment by a private entity for the Department. The memorandum concludes that the performance of uncompensated services by retired Department employees, or the uncompensated and voluntary provision of a computer needs assessment by a private entity, are legally objectionable only to the extent that those services or projects encompass official work for the Department that would otherwise have been performed by paid government employees as part of their regular duties. The memorandum continues by noting that, "assuming the volunteer services in question are not objectionable on that basis, we do not believe those performing them must be appointed to an office or formal position, because in that case the restrictions of the Anti-Deficiency Act would not apply." However, the memorandum continues, "in order to minimize possible legal problems, the persons performing the services could be appointed as uncompensated consultants under the provisions of 5 US.C. 3109 to assure compliance with a more restrictive interpretation of the ADA." The memorandum concludes that "[i]n any case, we would also recommend that the persons performing the volunteer services sign agreements confirming that they are to receive no compensation."

The 1994 OLC Opinion Does Not Apply to Uncompensated SAUSA Hiring

The work to be performed by SAUSAs is work that otherwise would have been performed by paid AUSAs as part of their regular duties, a primary point identified by OLC in testing the viability of the Department of Education arrangement. Therefore, the guidance provided by the 1994 OLC memorandum to the question of the permissibility of non-payment of SAUSAs is nonbinding and dicta, at best. Reliance upon OLC memorandum, especially its Footnote 4, is further attenuated for other reasons.

Footnote 4 of the OLC memorandum references the exemption for gratuitous services that exists when Congress has only set broad parameters in the compensation for the position, especially when it has identified only the maximum rate of pay, and not the minimum rate of pay. This posits that the parties could agree to permit the uncompensated employee of the position to waive any claim to compensation.

Footnote 4 provides:

> If a statute provides that a position may be compensated at "a rate not to exceed" a particular level – without requiring any minimum rate – then the person and the agency may lawfully agree that the salary should be set at zero. See 58 Comp. Gen. 383 (1979). We also note that persons who are permitted to hold two federal appointments simultaneously are prohibited from accepting compensation for both offices under the requirements of the Dual Compensation Act, 5 U.S.C. 5533(a), and as long as the dual appointee is paid the higher of the two salaries, there is no improper waiver of compensation. See Memorandum for Arnold Intrater, General Counsel, Office of White House Administration from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, re: "Dual Office of Executive Secretary of National Security Council and Special Assistant" (March 1, 1988).

The 1979 Comptroller General opinion case cited by the OLC opinion ((58 Comp. Gen. 383 (1979)) involved the legality of members of the United States Metric Board waiving their compensation or in some cases accepting their compensation and then returning it as a gift to the Board. (This fact pattern involving the waiver of compensation by officials of government commissions has arisen more frequently in Comptroller General opinions than have situations involving the hiring of uncompensated rank-and-file federal employees.) In the Metric Board case, the dispositive language of the opinion states:

> Our Office has consistently held on the basis of court decision that it is contrary to public policy for an appointee to a position in the Federal Government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority. 54 Comp. Gen. 393 (1974); 27 ID. 194(1974); 26 ID. 956 (1947*); Glavey v. United States*, 182 U.S. 595 (1900); *Miller v. United States*, 103 F. 413 (S.D. N.Y. 1900). In *Miller*, the court held such waiver to be against public policy since the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress. In addition, the United States Supreme Court, in *Glavey*, stated the opinion that if waiver of compensation fixed by Congress were permitted, "salaries for public officers would be under the control of the Executive Department of the Government."
>
> Waiver of compensation, however, has been permitted in certain circumstances. In 27 Comp. Gen. 194 (1947) we held that the person occupying a position could waive his right to all or part of the compensation if there was some applicable provision of law authorizing the acceptance of services without compensation. In that case the law permitting the employment of experts and consultants on a temporary or intermittent basis provided that such employment should be without

> regard to civil service and classification laws and fixed only the maximum rate of compensation that could be paid.
>
> … In the above waiver situations the controlling factor is whether the salary to be waived is set by or pursuant to statute, i.e., set by Congress. **Every salary of anyone who is paid by the government in a sense is set pursuant to statute. This is so since the government may not make any payment without statutory authorization. As indicated above, our cases do not preclude waiver in all cases. In the present situation, the language of 15 U.S.C. 205H sets a maximum rate of compensation entitlement for Board members. Where the statutory authorization of the salary of an individual who is to render services to the United States merely sets a maximum limit for that salary, then the salary of that individual is not considered to be fixed pursuant to statute within the meaning of our cases.** Therefore, assuming other conditions are satisfied, such individuals may waive their salaries. Also, we do not read section 205H as fixing the compensation which each Board member must be paid. Accordingly, Board members may agree to serve without compensation and thereafter they would be stopped from asserting any valid claim for compensation on account of the service performed. Compare 57 Comp. Gen. 423 (1977); 54 ID. 393 (1974). [Emphasis added].

The Comptroller General clearly was mindful of the new, looser interpretation created by its Metric Board decision, in contrast to its recent decisions involving the waiver of compensation. The two "compare" citations in the Metric Board decision language, recited above, involve Comptroller General decisions that strictly interpreted the Antideficiency Act prohibition on voluntary services and did not find a waiver of compensation to exist. The first case involved alleged compensation waivers at the U.S. Agency for International Development, 57 Comp. Gen. 423 (1977), referenced earlier in this letter. The other case involved an alleged compensation waiver at the Commission on Marihuana and Drug Abuse, 54 Comp. Gen. 393 (1974). The AID case, as noted earlier, found no waiver of salary to exist, even under an administratively-determined pay plan. The Marihuana and Drug Abuse Commission case similarly found that, "[I]n the absence of statutory authority therefor, there are no circumstances under which an original appointee to a position in the federal service properly may legally waive his ordinary right to the compensation fixed by or pursuant to law for the position and thereafter be estopped from claiming and receiving the compensation previously waived."

The AID case is the most controlling, and its parallels to EOUSA and its AD pay plan are striking. There, the Comptroller General concluded that, even when an agency has broad discretion in evaluating and fixing the compensation of AD positions, that compensation cannot be waived when the positions and their rates of compensation were fixed pursuant to statute. 57 Comp. Gen. 423, B-190455. Although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation were fixed pursuant to statute, and therefore the compensation for AD officers and employees could not be validly waived.

This authority conferred to AID is far broader than the maximum-amount approach governing United States Attorney and AUSA pay. Nonetheless, the Comptroller General concluded that Congress had a role in shaping the authority and its connection to civil service appointment and General Service grade structures, which were determined by law. As the Comptroller General stated:

> "The AID regulations covering appointments under this authority provided for each position to be evaluated and assigned an appropriate administratively determined (AD) grade. The AD grades assigned were based on the responsibilities, duties and compensation rates of General Schedule grades. Each AD position was evaluated prior to the appointment of an individual to the position. The compensation of the appointee was made at any rate within the range of rates for the position which was filled depending on the appointee's qualifications. Also each position could be reevaluated without reference to civil service laws whenever changed responsibilities and duties indicated the necessity therefor."

This led the Comptroller General to conclude that, although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation nonetheless were fixed pursuant to statute, and therefore could not be validly waived.

The same factors apply to Assistant United States Attorneys and their AD pay system. That system is established by statute (28 U.S.C. 548), thus satisfying the requirement that the system be "fixed by or pursuant to statute." Pay rates under that system are statutorily linked to the Executive Schedule pay structure through section 548's identification of Executive Level-IV (of the Executive Schedule set forth in 5 U.S.C. 5315), as the maximum rate of compensation. Furthermore, the current schedule governing pay rates for AUSAs prescribes the lowest rate of pay at $44,581, not at zero (see attachment). Therefore, the compensation of a SAUSA cannot be validly waived. As the courts and GAO have recognized, such a waiver of compensation would undermine public policy since the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress.

In conclusion, the National Association of Assistant United States Attorneys shares serious concerns that the hiring of uncompensated SAUSAs violates the general principle of appropriations law that the government cannot accept the voluntary services of persons for work that otherwise would have been performed by paid employees in positions for which their pay has been established by law.

The Department of Justice has faithfully and historically endeavored to honor its constitutional responsibility to abide by and enforce our nation's laws. Public trust in the Department and the unswerving commitment of its employees rest upon the fair and

responsible execution of that obligation. In light of the considerations expressed in this letter, we urge the Department of Justice to discontinue the practice of hiring uncompensated SAUSAs and to refrain from further action inconsistent with the Antideficiency Act and interpretations thereof.

Thank you for your consideration of our views.

Sincerely,

[Signature]

Robert Gay Guthrie
President

cc: Attorney General Eric H. Holder, Jr.
Marshall Jarrett, Director, Executive Office for U.S. Attorneys
Paul J. Fishman, Chair, Attorney General's Advisory Committee

ENCLOSURE 1

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MAY 23 2013

Robert Gay Guthrie
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Dear Mr. Guthrie:

It was good seeing you at our recent meeting. This letter responds to the National Association of Assistant United States Attorneys' (NAAUSA) letter to Deputy Attorney General James Cole, dated November 26, 2012, regarding the use of uncompensated Special Assistant United States Attorneys (SAUSAs) in United States Attorneys' Offices.

Your letter requests that the Department of Justice (Department) discontinue its hiring of uncompensated SAUSAs based on NAAUSA's concern that such hiring "arguably violates" general principles of appropriations law. We respectfully disagree that the Department's use of uncompensated SAUSAs contradicts appropriations law principles. In fact, we continue to believe that the Department's long standing use of uncompensated SAUSAs is legally permissible.

As you correctly point out in your letter, there is an important distinction in this context between "volunteer services" and "gratuitous services." Opinions issued over the years by the United States Supreme Court, the Attorney General, the Comptroller General, and the Department's Office of Legal Counsel consistently have distinguished between the provision of voluntary services to an agency, which generally is not permissible under the Antideficiency Act, and the provision of gratuitous services, which generally is permissible. This long standing precedent has established that it is generally not a violation of the Antideficiency Act for an agency to accept gratuitous services from individuals who agree to waive entitlement to compensation.

With respect to SAUSAs in particular, Title 28 U.S. Code § 543 grants the Attorney General authority to appoint SAUSAs to assist United States Attorneys. Attorneys appointed under 28 U.S.C. § 543 are subject to a salary fixed by the Attorney General with a specified maximum amount, but there is no mandatory minimum salary. As a result, the Department is

authorized, pursuant to 28 U.S.C. §§ 543 and 548, to appoint SAUSAs at a gratuitous rate of pay (i.e., $0). A gratuitous rate of pay distinguishes uncompensated SAUSAs from mere providers of volunteer services. Uncompensated SAUSAs thus legally may provide gratuitous services to the Department.

We have concluded that, because 28 U.S.C. §§ 543 and 548 give the Department specific authority to appoint SAUSAs at a gratuitous rate of pay, the Department's long standing use of uncompensated SAUSAs is legally permissible under the Antideficiency Act and does not result in an impermissible augmentation of its appropriations. Consequently, we do not believe that appropriations law principles require the Department to discontinue its use of uncompensated SAUSAs, as you request in your letter. Again, thank you for sharing NAAUSA's concerns regarding this issue.

Sincerely,

H. Marshall Jarrett

H. Marshall Jarrett
Director

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November 26, 2012

The Honorable James M. Cole
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Uncompensated Assistant United States Attorneys

Dear Deputy Attorney General Cole:

I write to you on behalf of the National Association of Assistant United States Attorneys ("NAAUSA") to express our concerns about the legal permissibility of hiring uncompensated Special Assistant United States Attorneys ("SAUSAs") within United States Attorney's Offices.

As explained below, the hiring of uncompensated SAUSAs arguably violates the general principle of appropriations law that the government cannot accept the voluntary services of persons for work that otherwise would have been performed by paid employees in positions for which their pay has been established by law. While the administratively-determined ("AD") pay system covering Assistant United States Attorneys ("AUSAs") is more flexible than the General Schedule and confers greater discretion to the Department of Justice, it nonetheless constitutes a pay system fixed by or pursuant to statute. Reasonable interpretations of that statutory authority do not permit the Department to expand it so far as to allow the Department to devise an AUSA pay rate as low as zero. The courts and the Government Accountability Office ("GAO") have recognized that such a waiver of compensation would undermine public policy because the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress. Moreover, the current AD pay plan does not recognize a "zero" pay rate, as the lowest level (AD-21 for an AUSA with 0-3 years experience) is set at $44,581.

The Antideficiency Act Prohibits the Acceptance of Voluntary Services

The Antideficiency Act prohibits federal agencies from accepting voluntary services without specific statutory authority. 31 U.S.C. § 1341. Violations of this prohibition constitute a criminal offense. 31 U.S.C. § 1350. Generally, the Antideficiency Act prohibits federal employees from:

- making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

- involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).

- **accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.** (Emphasis added).

- making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

The third prohibition above – the bar upon the acceptance of voluntary services for the United States, or employing personal services not authorized by law – is the key operative limitation on the Department of Justice's ability to secure the services of SAUSAs.

The prohibition on the acceptance of voluntary services was enacted over a century ago. There are several reasons for this Congressional prohibition. First, it reinforces Congress' constitutional "power of the purse," and forces agencies to operate within the amounts provided by Congress, without the supplementation of voluntary services. B-309301, June 8, 2007; B-322832, March 30, 2012. Second, it recognizes that certain government activities may not be suitable or lawful for non-federal employees to perform. Third, the purposes of federal conflict of interest statutes in Title 18 may be frustrated by permitting voluntary services. This can draw into play the opportunity for self-dealing and abuse of governmental position that the federal conflict of interest laws are intended to prevent.

These policy motivations have led to the broad understanding that the Antideficiency Act prohibits a contract between a federal agency and an individual for voluntary services for which no payment is required. Nonetheless, over time, the voluntary services prohibition has been limited in certain circumstances. Case law has distinguished between "voluntary services" prohibited by the Antideficiency Act, and "gratuitous services" which are performed pursuant to an advance agreement or contract in which the provider of services has agreed to serve without compensation. In such cases, the services are not "voluntary" within the meaning of the prohibition.

The Attorney General has held that services rendered "gratuitously" in an official capacity under a regular appointment to a position otherwise permitted by law to be non-salaried are acceptable. 30 Op. Atty'. Gen 51 (1913). See also subchapter 1-4.d of *The Federal Personnel Manual*, chapter 311. Subchapter 1-4 of Chapter 311 of The Federal Personnel Manual defines "gratuitous service" as that offered and accepted without pay under an appointment to perform duties the pay for which has not been established by law. [Emphasis added].

Even if the services are gratuitous, compensation may not be waived, by advance agreement or otherwise, where Congress has fixed by law the rate or amount of the compensation sought to be waived. *Glavey v. United States*, 182 U.S. 595, 609 (1901). The Supreme Court in *Glavey* warned that, if waiver of compensation fixed by Congress were permitted, it would defeat the express will of Congress. Congress would be ceding its express will to the Executive Branch. Otherwise, "the subject of salaries for public officers would be under the control of the Executive Department of the Government." See also 58 Comp. Gen. 383 (1979); 54 Comp. Gen. 393 (1974); 27 Comp. Gen. 194, 195 (1947).

A desk reference book on federal appropriations law has suggested that the underlying philosophy of the "voluntary" versus "gratuitous" distinction is best conveyed by the Justice Department's Office of Legal Counsel statement: "Although the interpretation of [section] 1342 has not been entirely consistent over the years, the weight of authority does support the view that the section was intended to eliminate subsequent claims against the United States for the compensation of a "volunteer," rather than to deprive the government of the benefit of truly gratuitous services. 5 Op. Off. Legal Counsel 160, 162 (1982). The reference book cites in further support a 1982 decision involving the American Association of Retired Persons and its desire to volunteer services to assist in crime prevention activities (distribute literature, give lectures, etc.) on Army installations. The GAO found no Antideficiency Act problem as long as the services were agreed to in advance and, so documented, were gratuitous. B-204326 (July 26, 1982). The desk reference goes on to suggest that subsequent interpretations by GAO have resulted in the following principle: If compensation is not fixed by statute, i.e., if it is fixed administratively, or if the statute merely prescribes a maximum but no minimum, it may be waived as "gratuituous." Jensen, John E., *Quick Reference to Federal Appropriations Law*, 150 (2006).

At the same time, the GAO has devoted attention to how far an agency can go in asserting its independence from the Antideficiency Act, by virtue of the discretion embodied in Congressionally-authorized compensation arrangements that allow the agency to administratively fix pay. There are limits on that independence. Time and again, the GAO has accorded primacy to the Antideficieny Act's prohibition on the acceptance of waivers by an official or employee when the rate of compensation is fixed by statute. *Glavey v. U.S., supra*. *See also* B-322832 (March 30, 2012); 58 Comp. Gen. 383 (1979); 54 Comp. Gen. 393 (1974); 27 Comp. Gen. 194, 195 (1947).

In one case, the Comptroller General has concluded that, even when an agency has broad discretion in evaluating and fixing the compensation of AD positions, that compensation cannot be waived when the positions and their rates of compensation were fixed pursuant to statute. 57 Comp. Gen. 423, B-190455. That 1978 decision involved the U.S. Agency for International Development ("AID") and its AD pay plan. There the Comptroller General ruled that, although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation were fixed pursuant to statute, and therefore the compensation for AD officers and employees could not be validly waived.

The AD-Pay Plan Covering AUSAs Is Fixed Pursuant to Statute

In ruling upon the AID pay system, the Comptroller General took note of the role that Congress played in shaping the system and its connection to civil service appointment and General Schedule grade structures which were determined by law.

As the Comptroller General stated:

> The AID regulations covering appointments under this authority provided for each position to be evaluated and assigned an appropriate administratively determined (AD) grade. The AD grades assigned were based on the responsibilities, duties and compensation rates of General Schedule grades. Each AD position was evaluated prior to the appointment of an individual to the position. The compensation of the appointee was made at any rate within the range of rates for the position which was filled depending on the appointee's qualifications. Also each position could be reevaluated without reference to civil service laws whenever changed responsibilities and duties indicated the necessity therefor.

This led the Comptroller General to conclude that, although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation nonetheless were fixed pursuant to statute, and therefore could not be validly waived. The same conclusion may arguably be applied to the Department of Justice and the AD pay plan covering AUSAs: rates of compensation for AUSAs are fixed pursuant to statute and may not be validly waived.

The AD pay plan covering AUSAs is fixed pursuant to statute at 28 U.S.C. § 548, which provides:

> § 548. Salaries
> Subject to sections 5315 through 5317 of title 5, the Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 543 of this title at rates of compensation not in excess of the rate of basic compensation

> provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.

NAAUSA requested the legal justification for uncompensated SAUSAs during a meeting with officials of the Executive Office for United States Attorneys ("EOUSA") on June 29, 2012. In response, EOUSA provided the Department of Justice Office of Legal Counsel ("OLC") memorandum entitled "Uncompensated Voluntary Services," dated November 28, 1994.

The OLC memorandum addresses the permissibility of a range of services performed voluntarily by persons for the Department of Education, specifically, the completion of services for the Department by once-employed persons after they have retired, and the voluntary provision of a computer needs assessment by a private entity for the Department. The memorandum concludes that the performance of uncompensated services by retired Department employees, or the uncompensated and voluntary provision of a computer needs assessment by a private entity, are legally objectionable only to the extent that those services or projects encompass official work for the Department that would otherwise have been performed by paid government employees as part of their regular duties. The memorandum continues by noting that, "assuming the volunteer services in question are not objectionable on that basis, we do not believe those performing them must be appointed to an office or formal position, because in that case the restrictions of the Anti-Deficiency Act would not apply." However, the memorandum continues, "in order to minimize possible legal problems, the persons performing the services could be appointed as uncompensated consultants under the provisions of 5 US.C. 3109 to assure compliance with a more restrictive interpretation of the ADA." The memorandum concludes that "[i]n any case, we would also recommend that the persons performing the volunteer services sign agreements confirming that they are to receive no compensation."

The 1994 OLC Opinion Does Not Apply to Uncompensated SAUSA Hiring

The work to be performed by SAUSAs is work that otherwise would have been performed by paid AUSAs as part of their regular duties, a primary point identified by OLC in testing the viability of the Department of Education arrangement. Therefore, the guidance provided by the 1994 OLC memorandum to the question of the permissibility of non-payment of SAUSAs is nonbinding and dicta, at best. Reliance upon OLC memorandum, especially its Footnote 4, is further attenuated for other reasons.

Footnote 4 of the OLC memorandum references the exemption for gratuitous services that exists when Congress has only set broad parameters in the compensation for the position, especially when it has identified only the maximum rate of pay, and not the minimum rate of pay. This posits that the parties could agree to permit the uncompensated employee of the position to waive any claim to compensation.

Footnote 4 provides:

> If a statute provides that a position may be compensated at "a rate not to exceed" a particular level – without requiring any minimum rate – then the person and the agency may lawfully agree that the salary should be set at zero. See 58 Comp. Gen. 383 (1979). We also note that persons who are permitted to hold two federal appointments simultaneously are prohibited from accepting compensation for both offices under the requirements of the Dual Compensation Act, 5 U.S.C. 5533(a), and as long as the dual appointee is paid the higher of the two salaries, there is no improper waiver of compensation. See Memorandum for Arnold Intrater, General Counsel, Office of White House Administration from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, re: "Dual Office of Executive Secretary of National Security Council and Special Assistant" (March 1, 1988).

The 1979 Comptroller General opinion case cited by the OLC opinion ((58 Comp. Gen. 383 (1979)) involved the legality of members of the United States Metric Board waiving their compensation or in some cases accepting their compensation and then returning it as a gift to the Board. (This fact pattern involving the waiver of compensation by officials of government commissions has arisen more frequently in Comptroller General opinions than have situations involving the hiring of uncompensated rank-and-file federal employees.) In the Metric Board case, the dispositive language of the opinion states:

> Our Office has consistently held on the basis of court decision that it is contrary to public policy for an appointee to a position in the Federal Government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority. 54 Comp. Gen. 393 (1974); 27 ID. 194(1974); 26 ID. 956 (1947*); Glavey v. United States*, 182 U.S. 595 (1900); *Miller v. United States*, 103 F. 413 (S.D. N.Y. 1900). In *Miller*, the court held such waiver to be against public policy since the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress. In addition, the United States Supreme Court, in *Glavey*, stated the opinion that if waiver of compensation fixed by Congress were permitted, "salaries for public officers would be under the control of the Executive Department of the Government."
>
> Waiver of compensation, however, has been permitted in certain circumstances. In 27 Comp. Gen. 194 (1947) we held that the person occupying a position could waive his right to all or part of the compensation if there was some applicable provision of law authorizing the acceptance of services without compensation. In that case the law permitting the employment of experts and consultants on a temporary or intermittent basis provided that such employment should be without

> regard to civil service and classification laws and fixed only the maximum rate of compensation that could be paid.
>
> … In the above waiver situations the controlling factor is whether the salary to be waived is set by or pursuant to statute, i.e., set by Congress. **Every salary of anyone who is paid by the government in a sense is set pursuant to statute. This is so since the government may not make any payment without statutory authorization. As indicated above, our cases do not preclude waiver in all cases. In the present situation, the language of 15 U.S.C. 205H sets a maximum rate of compensation entitlement for Board members. Where the statutory authorization of the salary of an individual who is to render services to the United States merely sets a maximum limit for that salary, then the salary of that individual is not considered to be fixed pursuant to statute within the meaning of our cases.** Therefore, assuming other conditions are satisfied, such individuals may waive their salaries. Also, we do not read section 205H as fixing the compensation which each Board member must be paid. Accordingly, Board members may agree to serve without compensation and thereafter they would be stopped from asserting any valid claim for compensation on account of the service performed. Compare 57 Comp. Gen. 423 (1977); 54 ID. 393 (1974). [Emphasis added].

The Comptroller General clearly was mindful of the new, looser interpretation created by its Metric Board decision, in contrast to its recent decisions involving the waiver of compensation. The two "compare" citations in the Metric Board decision language, recited above, involve Comptroller General decisions that strictly interpreted the Antideficiency Act prohibition on voluntary services and did not find a waiver of compensation to exist. The first case involved alleged compensation waivers at the U.S. Agency for International Development, 57 Comp. Gen. 423 (1977), referenced earlier in this letter. The other case involved an alleged compensation waiver at the Commission on Marihuana and Drug Abuse, 54 Comp. Gen. 393 (1974). The AID case, as noted earlier, found no waiver of salary to exist, even under an administratively-determined pay plan. The Marihuana and Drug Abuse Commission case similarly found that, "[I]n the absence of statutory authority therefor, there are no circumstances under which an original appointee to a position in the federal service properly may legally waive his ordinary right to the compensation fixed by or pursuant to law for the position and thereafter be estopped from claiming and receiving the compensation previously waived."

The AID case is the most controlling, and its parallels to EOUSA and its AD pay plan are striking. There, the Comptroller General concluded that, even when an agency has broad discretion in evaluating and fixing the compensation of AD positions, that compensation cannot be waived when the positions and their rates of compensation were fixed pursuant to statute. 57 Comp. Gen. 423, B-190455. Although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation were fixed pursuant to statute, and therefore the compensation for AD officers and employees could not be validly waived.

This authority conferred to AID is far broader than the maximum-amount approach governing United States Attorney and AUSA pay. Nonetheless, the Comptroller General concluded that Congress had a role in shaping the authority and its connection to civil service appointment and General Service grade structures, which were determined by law. As the Comptroller General stated:

> "The AID regulations covering appointments under this authority provided for each position to be evaluated and assigned an appropriate administratively determined (AD) grade. The AD grades assigned were based on the responsibilities, duties and compensation rates of General Schedule grades. Each AD position was evaluated prior to the appointment of an individual to the position. The compensation of the appointee was made at any rate within the range of rates for the position which was filled depending on the appointee's qualifications. Also each position could be reevaluated without reference to civil service laws whenever changed responsibilities and duties indicated the necessity therefor."

This led the Comptroller General to conclude that, although AID had broad discretion in evaluating and fixing the compensation of AD positions, the positions and their rates of compensation nonetheless were fixed pursuant to statute, and therefore could not be validly waived.

The same factors apply to Assistant United States Attorneys and their AD pay system. That system is established by statute (28 U.S.C. 548), thus satisfying the requirement that the system be "fixed by or pursuant to statute." Pay rates under that system are statutorily linked to the Executive Schedule pay structure through section 548's identification of Executive Level-IV (of the Executive Schedule set forth in 5 U.S.C. 5315), as the maximum rate of compensation. Furthermore, the current schedule governing pay rates for AUSAs prescribes the lowest rate of pay at $44,581, not at zero (see attachment). Therefore, the compensation of a SAUSA cannot be validly waived. As the courts and GAO have recognized, such a waiver of compensation would undermine public policy since the willingness of one person to waive his compensation would exclude from competition all other candidates who were not willing or unable to take the position for less than the salary fixed by Congress.

In conclusion, the National Association of Assistant United States Attorneys shares serious concerns that the hiring of uncompensated SAUSAs violates the general principle of appropriations law that the government cannot accept the voluntary services of persons for work that otherwise would have been performed by paid employees in positions for which their pay has been established by law.

The Department of Justice has faithfully and historically endeavored to honor its constitutional responsibility to abide by and enforce our nation's laws. Public trust in the Department and the unswerving commitment of its employees rest upon the fair and

responsible execution of that obligation. In light of the considerations expressed in this letter, we urge the Department of Justice to discontinue the practice of hiring uncompensated SAUSAs and to refrain from further action inconsistent with the Antideficiency Act and interpretations thereof.

Thank you for your consideration of our views.

Sincerely,

[Signature]

Robert Gay Guthrie
President

cc: Attorney General Eric H. Holder, Jr.
Marshall Jarrett, Director, Executive Office for U.S. Attorneys
Paul J. Fishman, Chair, Attorney General's Advisory Committee