



B-336151

July 11, 2024

The President  
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Assistant Secretary for Civil Rights, U.S. Department of Agriculture*

Dear Mr. President:

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting a violation of the Federal Vacancies Reform Act of 1998 (Vacancies Act)<sup>1</sup> at the U.S. Department of Agriculture (USDA) with respect to the position of Assistant Secretary for Civil Rights (Assistant Secretary). Specifically, we are reporting that the service of Dr. Penny Brown Reynolds as Acting Assistant Secretary from November 19, 2023, through the present day is in violation of the Act.<sup>2</sup>

While the inauguration of a new President resets and extends the 210-day acting service period for existing vacant positions, the Vacancies Act does not authorize additional acting service for the pendency of a third or successive nomination for a vacant position, or after the nomination's rejection, withdrawal, or return, even if the nomination represents the first or second nomination made by a newly inaugurated President. See B-335587, Jan. 25, 2024.

#### Requirements of the Vacancies Act

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require presidential appointment and Senate confirmation (PAS positions). The Act identifies three categories of persons who may temporarily perform the functions and

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<sup>1</sup> 5 U.S.C. §§ 3345–3349d.

<sup>2</sup> We contacted USDA to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Principal Deputy General Counsel, USDA (Mar. 25, 2024). USDA responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from Principal Deputy General Counsel, USDA, to Assistant General Counsel for Appropriations Law, GAO (May 3, 2024) (USDA Response) (with attachments).

duties of a vacant PAS position. 5 U.S.C. § 3345. The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories. 5 U.S.C. § 3345(a)(1). The President may designate as acting officer either: (1) an individual serving in another PAS position; or (2) a senior agency officer or employee who has served for a minimum period of time prior to the vacancy. 5 U.S.C. §§ 3345(a)(2)–(3).

If no nomination has been submitted for the vacant position, the Vacancies Act generally limits the period of acting service to 210 days beginning on the date the vacancy occurs. 5 U.S.C. § 3346(a)(1). When a vacancy exists during the 60-day period beginning on the date of a transitional presidential inauguration, however, the 210-day period is extended by 90 days, allowing for 300 days of acting service beginning on the transitional inauguration day or the date the vacancy occurs, whichever is later. 5 U.S.C. § 3349a(b). If a nomination has been submitted, acting service is also permitted during the pendency of a first or second nomination and, if the nominee is not confirmed, for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned. 5 U.S.C. §§ 3346(a)(2), (b).

After the expiration of the period of permissible acting service, the position must remain vacant and only the head of the agency may perform the functions or duties of the position. 5 U.S.C. § 3348(b). The Comptroller General is required, upon a determination that an acting official has served longer than the allowable period, to report such findings to Congress, the President, and the Office of Personnel Management. 5 U.S.C. § 3349(b).

## BACKGROUND

USDA reported that the Assistant Secretary position became vacant on January 20, 2017.<sup>3</sup> President Trump nominated Naomi Earp for the position twice on February 15, 2018, and January 16, 2019.<sup>4</sup> The Senate returned those nominations on January 3, 2019, and January 3, 2020, respectively.<sup>5</sup> President Biden was inaugurated on January 20, 2021. President Biden nominated Margo Schlanger to serve in the position on September 20, 2021, and the Senate returned the nomination on January 3, 2023.<sup>6</sup> President Biden nominated Margo Schlanger for a second time on January 23, 2023, and the Senate returned that nomination on

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<sup>3</sup> USDA Response; GAO's Executive Vacancy System.

<sup>4</sup> USDA Response.

<sup>5</sup> *See id.*

<sup>6</sup> USDA Response; Congress.gov, 117th Congress, PN1150 — Margo Schlanger — Department of Agriculture, *available at* <https://congress.gov/nomination/117-congress/1150> (last visited June 24, 2024).

January 3, 2024.<sup>7</sup> The period of permissible acting service under the Vacancies Act ended on November 15, 2021, the date GAO calculates as the final day of the 300-day period beginning on the most recent transitional inauguration day, which was January 20, 2021.

USDA reported that Dr. Brown Reynolds automatically became the Acting Assistant Secretary on November 19, 2023, by virtue of serving as the Deputy Assistant Secretary for Civil Rights, which is the first assistant to the vacant position under USDA's regulations. 5 U.S.C. § 3345(a)(1).<sup>8</sup> According to USDA, Dr. Brown Reynolds has continued to serve as Acting Assistant Secretary since that date.

## DISCUSSION

### Time Limitations on Dr. Brown Reynolds's Acting Service

Because the Assistant Secretary position was vacant on the most recent transitional inauguration day, January 20, 2021, the Vacancies Act authorized 300 days of acting service beginning on that day.<sup>9</sup> See B-333853, June 28, 2022. This acting service period ended on November 15, 2021. See B-334562, Feb. 8, 2023; B-333853, June 28, 2022.<sup>10</sup>

The Vacancies Act also permits acting service during the pendency of "a first or second nomination" and, if the nominee is not confirmed, for 210 days after those nominations are rejected, withdrawn, or returned. 5 U.S.C. §§ 3346(a)(2), (b). The phrase "a first or second nomination" refers to the first two nominations for the vacant position and does not include a third or successive nomination, even if those later nominations represent the first or second nominations submitted by a newly inaugurated President. See B-334690, Feb. 8, 2023; B-333853, June 28, 2022. In other words, while the inauguration of a new President authorizes an additional 300 days of acting service for existing vacant positions, it does not reset the nominations for purposes of the nomination-related acting service periods. See B-335587, Jan. 25, 2024; B-333853, June 28, 2022.

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<sup>7</sup> USDA Response; Congress.gov, 118th Congress, PN108 — Margo Schlanger — Department of Agriculture, *available at* <https://congress.gov/nomination/118-congress/108> (last visited June 24, 2024).

<sup>8</sup> USDA Response.

<sup>9</sup> Section 3349a resets the 210-day acting service period under section 3346 and extends it by 90 days, allowing for 300 days of acting service beginning on inauguration day for vacancies existing on that day. See 5 U.S.C. § 3349a(b)(1).

<sup>10</sup> The 210-day period was deemed to begin April 20, 2021, 90 days after inauguration day, and therefore concluded on November 15, 2021. See 5 U.S.C. § 3349a(b)(1).

In this case, the first nomination for the Assistant Secretary position for purposes of section 3346 was the February 15, 2018, nomination of Naomi Earp that was returned on January 3, 2019. The second nomination was the January 16, 2019, nomination of Naomi Earp that was returned on January 3, 2020. After his inauguration, President Biden nominated Margo Schlanger twice for the position, on September 20, 2021, and January 23, 2023. Those nominations were returned on January 3, 2023, and January 3, 2024, respectively. Because the nominations of Margo Schlanger were the third and fourth nominations for the position, their submission did not trigger any additional acting service periods. See B-335587, Jan. 25, 2024; B-334690, Feb. 8, 2023.

A determination of when the acting service period for this position ended is made by reference to the specific facts and the interaction of several Vacancies Act provisions. As described above, the Vacancies Act permits acting service for 210 days after the return of a first or second nomination, and these permissible acting service periods expired prior to the most recent transitional inauguration day. See 5 U.S.C. § 3346(b). Because the Assistant Secretary position was vacant on the most recent transitional inauguration day, January 20, 2021, the Vacancies Act authorized an additional 300 days of acting service beginning on that date. See B-333853, June 28, 2022. This acting service period ended on November 15, 2021, and Dr. Brown Reynolds's service as Acting Assistant Secretary after that date is in violation of the Act. See B-334562, Feb. 8, 2023; B-333853, June 28, 2022.

#### Validity of Actions Taken

The Vacancies Act includes an enforcement mechanism that restricts the performance of certain functions and duties of a vacant position when no "officer or employee is performing the functions and duties in accordance with" the Act. 5 U.S.C. § 3348(b). In that situation, "the office shall remain vacant" and only the head of the agency may perform the functions or duties of the position. *Id.* An action taken by any other person "in the performance of any function or duty . . . shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d). The Vacancies Act defines "function or duty" as any function or duty of the position that is established by statute or regulation (including any regulation in effect at any time during the 180-day period preceding the date of the vacancy) and required by statute or regulation to be performed by the applicable officer (and only that officer). 5 U.S.C. § 3348(a)(2). Agency officials who are not validly acting may, however, still be authorized to take certain actions in their official positions, so long as they are not performing a "function or duty" of the vacant position.

In response to our inquiry, USDA reports that there are no functions or duties meeting the Vacancies Act definition with respect to the Assistant Secretary position.<sup>11</sup> Based on USDA's response, we have no basis to conclude that any

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<sup>11</sup> USDA Response.

actions taken by Dr. Brown Reynolds must be nullified or viewed as having no force or effect.

### USDA Response

USDA disagrees with our interpretation of the Vacancies Act's time limitations. USDA contends that Dr. Brown Reynolds is properly serving as the Acting Assistant Secretary because the submission of the January 23, 2023, nomination of Margo Schlanger extended the period of permissible acting service.<sup>12</sup> As support for its position, USDA cites a 2022 opinion issued by the Department of Justice's Office of Legal Counsel (OLC) asserting that the inauguration of a new President resets the entire time sequence under section 3346 such that the first nomination of the new President to a position with a preexisting vacancy is the first nomination for purposes of the timing provisions of the Act and the prior returned nominations submitted by the predecessor President do not reduce the available time period for acting service under section 3346.<sup>13</sup> See Memorandum Opinion for the Counsel to the President, *Federal Vacancies Reform Act's Application to a Vacancy for Which Prior Presidents Submitted Multiple Nominations*, OLC Opinion, Oct. 21, 2022. Accordingly, USDA asserts that Dr. Brown Reynolds's service as Acting Assistant Secretary complies with the time limitations of the Vacancies Act because the 210-day period following the return of President Biden's second nomination to the position has not yet ended.<sup>14</sup>

Our finding of a time violation in this instance is consistent with our previous interpretations. See, e.g., B-335587, Jan. 25, 2024. As we have previously explained, OLC's interpretation does not comport with the text of the Vacancies Act and is not supported by the Act's legislative history. *Id.*

### CONCLUSION

While the inauguration of a new President resets and extends the 210-day acting service period under section 3346 for existing vacant positions, it does not reset the nominations for purposes of that section. In other words, the Vacancies Act does not authorize additional acting service for the pendency of a third or successive nomination for a vacant position, or after the nomination's rejection, withdrawal, or return, even if the nomination represents the first or second nomination made by a newly inaugurated President. Therefore, the nominations of Margo Schlanger (the third and fourth nominations overall) did not extend the acting service period for the vacant Assistant Secretary position, and Dr. Brown Reynolds's service as Acting Assistant Secretary since November 19, 2023, is in violation of the Act.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

In accordance with the requirements of the Vacancies Act, we are also sending letters reporting this violation to the chairs and ranking members of the Senate Committee on Homeland Security and Governmental Affairs; the House Committee on Oversight and Accountability; the Senate and House Committees on Appropriations; the Senate Committee on Agriculture, Nutrition, and Forestry; the House Committee on Agriculture; and the Director of the Office of Personnel Management.

If you have any questions regarding this matter, please contact Shirley A. Jones, Managing Associate General Counsel, at (202) 512-8156, or Kristine Hassinger, Assistant General Counsel, at (202) 512-8152.

Sincerely,

A handwritten signature in cursive script that reads "Edda Emmanuelle Perez".

Edda Emmanuelli Perez  
General Counsel