



B-336149

July 15, 2024

The President  
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Under Secretary of Agriculture for Food, Nutrition, and Consumer Services, 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 Under Secretary of Agriculture for Food, Nutrition, and Consumer Services (Under Secretary). Specifically, we are reporting that the service of Sivakumar Narayan Chandran as Acting Under Secretary from January 16, 2024, 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.

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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).

## 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 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 Under Secretary position became vacant on January 19, 2017.<sup>3</sup> President Trump nominated Brandon Lipps for the position on January 6, 2020, and the nomination was returned on January 3, 2021.<sup>4</sup> President Biden was inaugurated on January 20, 2021, and has submitted two nominations to date.<sup>5</sup> Stacy Dean was nominated on May 17, 2022, and the nomination was returned 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.*

January 3, 2023.<sup>6</sup> Stacy Dean was renominated on January 23, 2023, and that nomination was returned on January 3, 2024.<sup>7</sup> This means that the period of permissible acting service under the Vacancies Act ended on August 1, 2023, the last day of the 210-day period after the return of the first nomination of Stacy Dean.

USDA reported that Sivakumar Narayan Chandran began serving as Acting Under Secretary on January 16, 2024, via Presidential designation.<sup>8</sup> According to USDA, Mr. Chandran has continued to serve as Acting Under Secretary since then.

## DISCUSSION

### Time Limitations on Mr. Chandran's Acting Service

Because the Under 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

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<sup>6</sup> USDA Response; Congress.gov, 117th Congress, PN2129 — Stacy Lynn Dean — Department of Agriculture, *available at* <https://congress.gov/nomination/117-congress/2129> (last visited May 31, 2024).

<sup>7</sup> Congress.gov, 118th Congress, PN107 — Stacy Lynn Dean — Department of Agriculture, *available at* <https://www.congress.gov/nomination/118-congress/107> (last visited May 31, 2024).

<sup>8</sup> USDA Response. USDA reported that on January 16, 2024, President Biden designated Mr. Chandran to act as Under Secretary pursuant to 5 U.S.C. § 3345(a)(3). *Id.* Subject to the time limitation of section 3346, section 3345(a)(3) authorizes the President to direct an officer or employee of the agency to act in a vacant position provided: (1) such officer or employee served in a position at the agency for at least 90 days during the 365 days preceding the vacancy; and (2) the rate of pay for the position is equal to or greater than the minimum rate payable for a position at GS-15 of the General Schedule.

<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).

vacant position and does not include a third or successive nomination, even if those later nominations represent the first or second nomination 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.

In this case, the first nomination for the Under Secretary position for purposes of section 3346 was the January 6, 2020, nomination of Brandon Lipps that was returned on January 3, 2021. The second nomination was the May 17, 2022, nomination of Stacy Dean that was returned on January 3, 2023. The January 23, 2023, nomination of Stacy Dean for the second time was the third nomination for the position and its submission did not trigger an additional acting service period. 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. 5 U.S.C. § 3346(b). Here, August 1, 2023, is the 210th day after the return on January 3, 2023, of the second nomination of Stacy Dean.<sup>11</sup> Therefore, the period of permissible acting service ended on August 1, 2023, and Mr. Chandran's service as Acting Under Secretary after that date is in violation of the Act.

#### 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

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<sup>11</sup> The Vacancies Act provides that "if the last day of any [acting service period] is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period." 5 U.S.C. § 3348(c). In other words, this provision extends the acting service period until after the Senate reconvenes. The Senate held a *pro forma* session "with no business . . . conducted" on August 1, 2023. 169 Cong. Rec. S3845 (daily ed. July 27, 2023) (reflecting the Senate's agreement by unanimous consent to convene for a series of *pro forma* sessions between July 28, 2023, and September 1, 2023); 169 Cong. Rec. S3849 (daily ed. Aug. 1, 2023). We have previously concluded that the Senate was "in session" under section 3348(c) when it held a *pro forma* session on August 1, 2023. B-335587, Jan. 25, 2024. And, because the Senate was "in session" on the last day of the acting service period, section 3348(c) did not extend the period.

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 Under Secretary position.<sup>12</sup> Based on USDA’s response, we have no basis to conclude that any actions taken by Mr. Chandran 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 the submission of the January 23, 2023, nomination of Stacy Dean extended the period of permissible acting service.<sup>13</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>14</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 Mr. Chandran’s service as Acting Under 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>15</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.*

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<sup>12</sup> USDA Response.

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

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

<sup>15</sup> *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 renomination of Stacy Dean (the third nomination overall) did not extend the acting service period for the vacant Under Secretary position, and Mr. Chandran's service as Acting Under Secretary since January 16, 2024, is in violation of the Act.

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