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United States General Accounting Office
Washington, DC 20548

Office of the General Counsel

B-286265

September 15, 2000

The Honorable Fred Thompson
Chairman
Committee on Governmental Affairs
United States Senate

Subject: Violations of the 210-Day Limit Imposed by the Vacancies Reform Act

Dear Mr. Chairman:

This is to report, pursuant to section 3349(b) of title 5 of the United States Code, as added by the Federal Vacancies Reform Act of 1998¹ (Vacancies Reform Act), that we have found three instances in which acting executive branch officers have served longer than the 210-day period allowed under the Act. The Vacancies Reform Act established new requirements for the temporary filling of vacant executive agency positions that require Presidential appointment and Senate confirmation (PAS positions). The Act limits the period of time such a position may be temporarily filled to 210 days with adjustments extending that time period in certain circumstances, such as when the President submits a nomination for the position to the Senate.²

The Vacancies Reform Act requires executive agencies to report to the Congress and the Comptroller General specific information relating to covered vacancies.³ The Act also provides that the Comptroller General is to report to specified congressional committees, the President, and the Office of Personnel Management if the Comptroller General determines that an acting officer in a covered position is serving longer than the 210 days permitted by the Act.⁴ This is to inform you that, based on information we have received, there have been three instances—two Acting Inspectors General, one at DOD and one at the Department of Justice, and one Acting Chief Financial Officer at EPA—in which the 210-day limit has been exceeded.

¹ 5 U.S.C. § 3345 - 3349d

² 5 U.S.C. § 3346(a)(1) and (2)

³ 5 U.S.C. § 3349(a)

⁴ 5 U.S.C. § 3349(b)

The Vacancies Reform Act states that actions taken by acting officials in the performance of the functions and duties of the vacant office which are not delegable and which can only be performed by the holder of that office shall have no force or effect if they are not taken in accordance with the provisions of the Act.⁵ This would include actions taken by an acting officer after the 210-day limit has been reached.⁶ However the Vacancies Reform Act⁷ specifically exempts Inspectors General and Chief Financial Officers from this provision⁸. Thus, the Act does not invalidate the actions of acting Inspectors General and Chief Financial Officers whose service exceeds the permissible 210-day limit.

Also as a general matter, the Vacancies Reform Act provides that if the last day of any 210-day 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 allowed for an official to perform in an acting capacity.⁹ However, this provision extending the period in which a person may serve as an acting officer does not apply to Inspectors General and Chief Financial Officers.¹⁰

The same subsection of the Vacancies Reform Act¹¹ which exempts Inspectors General and Chief Financial Officers from the provision¹² that invalidates actions by an acting official who exceeds the 210-day limit excludes them from the provision¹³ which allows for the extension of the 210-day period in certain circumstances. This may have contributed to confusion by some agencies as to whether acting Inspectors General and Chief Financial Officers were covered by the 210-day time limit. However, we and the agencies now agree that the 210-day limit applies to acting Inspectors General and Chief Financial Officers and may not be extended under the exception allowed other acting officials when the last day of the period is a day the Senate is not in session. Accordingly, such officials should not be permitted to continue to serve in their acting positions after the 210-day time limit has been reached. As stated above, any actions that acting Inspectors General and Chief

⁵ 5 U.S.C. § 3348(d)(1)

⁶ 5 U.S.C. § 3346(a)(1) and 3348(d)(1)

⁷ 5 U.S.C. § 3348(e)(3) and (4)

⁸ 5 U.S.C. § 3348(d)(1)

⁹ 5 U.S.C. § 3348(c)

¹⁰ 5 U.S.C. § 3348(e)(3) and (4)

¹¹ 5 U.S.C. § 3348(e)(3) and (4)

¹² 5 U.S.C. § 3348(d)(1)

¹³ 5 U.S.C. § 3348(c)

Financial Officers take in an acting capacity past the 210-day limit would not be subject to the invalidation provision of the Vacancies Reform Act.

Acting Inspector General of DOD

In its initial report to us, DOD stated that the Inspector General's position became vacant on April 30, 1999, and that the Deputy Inspector General became the acting Inspector General on May 1, 1999. GAO's database showed that DOD reported that it retained the Acting Inspector General in that position until January 25, 2000, which exceeded the 210-day limit by about 2 months.

During our subsequent review of the Vacancies Reform Act's implementation, DOD informed us that the Acting Inspector General served from the beginning of the vacancy, actually May 1, 1999, but only until November 26, 1999, or for 210 days.

The discrepancy in DOD's responses is explained as follows. Initially DOD's position was that since the 210-day period expired on November 26, 1999, a day the Senate was not in session, the Acting Inspector General could serve until January 25, 2000, which was the second day after the Senate came back into session. As noted above, as a general matter, the Vacancies Reform Act provides that if the last day of any 210-day 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 allowed for an official to perform in an acting capacity.¹⁴ DOD originally viewed this provision as extending the time period for an acting Inspector General to serve and DOD reported to us that the Acting Inspector General left his acting position on January 25.

Subsequently, however, DOD concluded, after consulting with the Department of Justice, that the Deputy Inspector General could not serve as Acting Inspector General past November 26, 1999, because Inspectors General were specifically exempted from the application of the section which extends the 210-day limit if the last day of the 210-day period is a day when the Senate is not in session.¹⁵ DOD, recognizing that its Acting Inspector General should not have served past November 26, 1999, apparently believed that it should report the date the Acting Inspector General should have stepped down from the acting position (November 26, 1999), rather than the date that he actually stepped down (January 25, 2000). It is our view that DOD's Acting Inspector General should not have served past November 26, 1999. The Acting Inspector General was in fact not removed from his acting capacity until January 25, 2000. Accordingly, the Acting Inspector General's service in that capacity after November 26, 1999, exceeded the 210-day time limit in violation of the Vacancies Reform Act.

¹⁴ 5 U.S.C. § 3348(c)

¹⁵ 5 U.S.C. § 3348(e)(3)

Acting Inspector General of the Department of Justice

On July 14, 2000, 11 months after the position had become vacant, we received notification from the Department of Justice that the position of Inspector General had become vacant on August 15, 1999. On July 14, 2000, the Department of Justice also notified us that an individual had started serving as Acting Inspector General on August 16, 1999, and was continuing to serve in that position. Further, on July 14, 2000, the Department of Justice informed us that a nomination for the Inspector General's position was submitted to the Senate on May 15, 2000.

Under the Vacancies Reform Act, the last day of the 210-day period that the Department of Justice's Acting Inspector General could serve was March 11, 2000. Therefore from March 12, 2000, until May 14, 2000, a period of approximately 2 months, the Department of Justice's Acting Inspector General's service in that capacity was in violation of the 210-day limit imposed by the Vacancies Reform Act.

However, under the Vacancies Reform Act, a person may serve as an acting officer once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.¹⁶ On May 15, 2000, once a nomination for the Inspector General at the Department of Justice was submitted, the Acting Inspector General could once again properly serve in an acting capacity under the provisions of the Vacancies Reform Act.

Acting Chief Financial Officer of EPA

On March 30, 2000, we received notification that the position of Chief Financial Officer at EPA had become vacant on January 15, 2000, and that on January 16, 2000, an Acting Chief Financial Officer had begun service. Since the vacancy occurred during an adjournment of the Congress sine die, the 210-day period began on the date that the Senate first reconvened,¹⁷ January 24, 2000. (Neither Inspectors General nor Chief Financial Officers are exempted from this particular provision of the Vacancies Reform Act extending the 210-day time limit.) Thus, the 210-day period for the Acting Chief Financial Officer of EPA expired on August 20, 2000.

EPA has recently informed us that the Acting Chief Financial Officer was not removed from his position until August 30, 2000. Thus, we are also reporting that EPA's Acting Chief Financial Officer's service in that capacity exceeded the 210-day time limit by 10 days in violation of the Vacancies Reform Act.

¹⁶ 5 U.S.C. § 3346(a)(2)

¹⁷ 5 U.S.C. § 3346(c)

Effect of Exceeding 210-day Limit

Although, as stated above, the continuation of these officers in their acting positions exceeded the 210-day time limit, since Inspectors General and Chief Financial Officers are specifically exempted from the provision invalidating nondelegable actions that are not taken in accordance with the provisions of the Vacancies Reform Act, none of the actions these acting officers may have taken after the 210-day time limit had been exceeded would be invalidated by the Act.

We note that there has been a delay in our reporting that the Acting Inspector General of DOD exceeded the 210-day time limit. As pointed out in this letter, the provision that both exempts Inspectors General and Chief Financial Officers from the invalidation provision of the Act and from the provision extending the 210-day period when the last day of the period is a day the Senate is not in session has raised questions as to how the 210-day limit applies to such officials. In this case, DOD originally believed that the provision extending the 210-day period applied, which would have meant that the acting official's service would not have exceeded the time limit. Later, however, DOD changed its view, and recognized that the acting official's service should have terminated on November 26, 1999. We now agree with the latter view and believe that the DOD situation constituted a violation. In view of the fact that we have now identified two further violations of the 210-day time limit involving an Acting Inspector General and an Acting Chief Financial Officer, we are reporting all three violations.

Sincerely yours,



Robert P. Murphy
General Counsel