



B-334690

February 8, 2023

The President  
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Controller, Office of Federal Financial Management, Office of Management and Budget*

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 Office of Management and Budget (OMB) with respect to the position of Controller in the Office of Federal Financial Management (OFFM). Specifically, we are reporting that the service of Deidre Harrison as Acting Controller from August 2, 2022, 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.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. §§ 3345–3349d.

<sup>2</sup> We contacted OMB to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Deputy General Counsel, OMB (Oct. 27, 2022); Email from Assistant General Counsel for Appropriations Law, GAO, to Confidential Assistant, OMB (Dec. 16, 2022). OMB responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from General Counsel, OMB, to Assistant General Counsel for Appropriations Law, GAO (Nov. 30, 2022) (OMB Response) (with attachment); Letter from General Counsel, OMB, to Assistant General Counsel for Appropriations Law, GAO (Dec. 23, 2022) (with attachment) (OMB Supplemental Response).

<sup>3</sup> See B-333853, June 28, 2022.

## 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.<sup>4</sup> The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> But when a vacancy exists during the 60-day period beginning on the date of a presidential transitional inauguration, 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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<sup>4</sup> 5 U.S.C. § 3345.

<sup>5</sup> 5 U.S.C. § 3345(a)(1).

<sup>6</sup> 5 U.S.C. §§ 3345(a)(2)–(3).

<sup>7</sup> 5 U.S.C. § 3346(a)(1).

<sup>8</sup> 5 U.S.C. § 3349a(b).

<sup>9</sup> 5 U.S.C. §§ 3346(a)(2), (b).

<sup>10</sup> 5 U.S.C. § 3348(b).

<sup>11</sup> 5 U.S.C. § 3349(b).

## BACKGROUND

OMB reported that the Controller position became vacant on January 20, 2017.<sup>12</sup> President Trump nominated Frederick M. Nutt for the position on September 5, 2017, and the nomination was returned on January 4, 2019.<sup>13</sup> President Biden was inaugurated on January 20, 2021, and has submitted two nominations to date.<sup>14</sup> Laurel A. Blatchford was nominated on October 27, 2021, and the nomination was returned on January 3, 2022.<sup>15</sup> Ms. Blatchford was nominated a second time on January 4, 2022, and the nomination was withdrawn on October 11, 2022.<sup>16</sup>

OMB states that on March 23, 2021, Deidre Harrison was appointed Deputy Controller, which is the first assistant to the Controller position, and has served as Acting Controller since that date.<sup>17</sup> OMB further states that at the time of Ms.

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<sup>12</sup> OMB Response, at 1, 3; GAO's Executive Vacancy System.

<sup>13</sup> OMB Response, at 3.

<sup>14</sup> *Id.* at 1–3.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> OMB Response, at 1, 3. OMB states that the Deputy Controller is the most senior position below the Controller, administers OFFM under the Controller's leadership, and represents the Controller on numerous boards and commissions. *Id.* at 3–4; OMB Supplemental Response. In light of these duties and the structure of OFFM, OMB considers the position to be the first assistant to the Controller, even without a written designation as such. OMB Supplemental Response. To avoid doubt, however, the OMB Director formally designated the Deputy Controller as first assistant to the Controller on December 23, 2022. See *id.*, Attachment; Memorandum from Director, OMB, to Deputy Controller, OFFM, *Designation of First Assistant to the OFFM Controller Under the Federal Vacancies Reform Act of 1998* (Dec. 23, 2022).

Although we generally look to agency regulations or other documentation designating a first assistant position *prior to the vacancy* to establish that a position qualifies as the first assistant, see B-332995, Aug. 2, 2021, we have also found that an agency's longstanding practice of treating the most senior position below the vacant PAS position as the first assistant, supported by a history of individuals in that position acting during previous vacancies, is sufficient. See B-333857, Apr. 18, 2022, at 3 n.7. In this case, the Deputy Controller served as Acting Controller during the previous vacancy. See GAO's Executive Vacancy System (reflecting OMB reports of Norman Dong serving as Acting Controller after the position became vacant in 2014); Mark Rockwell, *Werfel officially out of government*, FCW, Jan. 27, 2014, available at <https://fcw.com/people/2014/01/werfel-officially-out-of-government/247685/> (last visited Feb. 1, 2023) (identifying Mr. Dong as Deputy Controller at the time of the vacancy). Accordingly, we conclude that this

Harrison's appointment as Deputy Controller, another individual, John Pasquantino, was exercising the delegable duties of the Controller in accordance with a delegation from the OMB Director and continued to do so until the delegation was revoked on September 8, 2021.<sup>18</sup> According to OMB, although Ms. Harrison was the Acting Controller under the Vacancies Act between the date of her appointment and the date the delegation to Mr. Pasquantino was revoked, Mr. Pasquantino mistakenly used the acting title during this period.<sup>19</sup> After the revocation of the delegation, Ms. Harrison began using the acting title.<sup>20</sup>

## DISCUSSION

### Time Limitations on Acting Service

Because the Controller 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>21</sup> regardless of the fact that previous periods of permissible acting service had expired prior to the inauguration.<sup>22</sup> This acting service period ended on November 15, 2021.<sup>23</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.<sup>24</sup> We have concluded that the phrase "a first or second nomination" refers to the first two nominations for the

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longstanding practice is sufficient to establish that the Deputy Controller is the first assistant to the Controller position under the Vacancies Act.

<sup>18</sup> OMB Response, at 1. OMB indicates that, other than Ms. Harrison, there have been no other acting officials since January 20, 2021. *Id.* at 3.

<sup>19</sup> *Id.* at 1 & n.1, 3.

<sup>20</sup> *Id.* at 1, 3.

<sup>21</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>22</sup> See B-333853. Prior to January 20, 2021, acting service was permitted during the following periods: for 300 days beginning on the date of the vacancy, January 20, 2017, which was a transitional inauguration day; during the pendency of Mr. Nutt's September 5, 2017, nomination; and for 210 days after the nomination's return on January 4, 2019.

<sup>23</sup> See B-333853; B-333857. The 210-day period was deemed to begin 90 days after inauguration day, April 20, 2021, and therefore concluded on November 15, 2021. 5 U.S.C. § 3349a(b)(1).

<sup>24</sup> 5 U.S.C. §§ 3346(a)(2), (b).

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.<sup>25</sup> 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.<sup>26</sup>

In this case, the first nomination for the Controller position for purposes of section 3346 was Mr. Nutt's September 5, 2017, nomination, which was returned on January 4, 2019. The second nomination was Ms. Blatchford's October 27, 2021, nomination, which was returned January 3, 2022.<sup>27</sup> Acting service was therefore permitted during the pendency of Ms. Blatchford's nomination and for 210 days after its return, or through August 1, 2022. Ms. Blatchford's January 4, 2022, renomination, however, was the third nomination for the position, and its submission did not trigger an additional acting service period. Therefore, Ms. Harrison's service as Acting Controller after August 1, 2022, is in violation of the Act.

We also note that Mr. Pasquantino's use of the acting title from March 23, 2021, (when Ms. Harrison began serving as Acting Controller) until September 8, 2021, (when the OMB Director's delegation was revoked) was not authorized.<sup>28</sup> However, he ceased using the acting title before the permissible period of acting service expired, and, therefore, his use of the title did not violate the Vacancies Act's time limitations.<sup>29</sup>

#### 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.<sup>30</sup> In that situation, "the office shall remain vacant" and only the head of the agency may perform the functions or duties of the position.<sup>31</sup> An action taken by any other

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<sup>25</sup> See B-333853.

<sup>26</sup> *Id.*

<sup>27</sup> This nomination was submitted prior to the expiration of the 300-day acting service period provided by section 3349a.

<sup>28</sup> See B-333857. OMB's response suggests that Mr. Pasquantino's use of the acting title was limited to this period, see OMB Response, at 1 n.1, 3, and we have found no evidence of him using the title outside of this period.

<sup>29</sup> See B-333857.

<sup>30</sup> 5 U.S.C. § 3348(b).

<sup>31</sup> *Id.*

person “in the performance of any function or duty . . . shall have no force or effect” and “may not be ratified.”<sup>32</sup> 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).<sup>33</sup> Furthermore, officials may be authorized to take certain actions in their official, rather than acting, positions.

In response to our inquiry, OMB reports that there are no functions or duties meeting the Vacancies Act definition with respect to the Controller position.<sup>34</sup> Based on OMB’s response, we have no basis to conclude that any actions taken by Ms. Harrison after August 1, 2022, must be nullified or viewed as having no force or effect.

#### OMB Response and OLC Opinion on Nominations by a New President

OMB disagrees with our interpretation of the Vacancies Act’s time limitations and contends that section 3349a resets both the 210-day acting service period and the nomination count in section 3346.<sup>35</sup> In support, OMB cites a 2022 opinion issued by the Department of Justice’s Office of Legal Counsel (OLC) asserting that upon the inauguration of a new President, section 3349a deems preexisting vacancies to have newly arisen after inauguration and resets the entire timing sequence for acting service for those positions, including the nominations that trigger certain acting service periods.<sup>36</sup> Accordingly, OMB asserts that Ms. Blatchford’s two nominations constitute the first and second nominations for purposes of section 3346, meaning that the period of permissible acting service continues until May 9, 2023, 210 days after the withdrawal of Ms. Blatchford’s second nomination.<sup>37</sup>

In its opinion, OLC acknowledges that section 3349a does not expressly address the effect of the provision on prior nominations and therefore might be understood as not resetting any previously exhausted nomination-related periods, but contends that the

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<sup>32</sup> 5 U.S.C. § 3348(d).

<sup>33</sup> 5 U.S.C. § 3348(a)(2).

<sup>34</sup> OMB Response, at 4.

<sup>35</sup> OMB Response, at 2.

<sup>36</sup> *Id.* at 2, 4, Attachment; see *Federal Vacancies Reform Act’s Application to a Vacancy for Which Prior Presidents Submitted Multiple Nominations*, 46 Op. Off. Legal Counsel \_\_ (Oct. 21, 2022), available at <https://www.justice.gov/d9/2022-11/2022-10-21 - vra multiple nominations.pdf> (last visited Feb. 1, 2023).

<sup>37</sup> OMB Response, at 2, 4.

structure and relationship of the various timing provisions in the Vacancies Act and the Act's legislative history support its conclusions.<sup>38</sup>

First, OLC asserts that in section 3349a, “the 210-day period under section 3346 or 3348” refers to the initial 210-day acting service period following a vacancy in section 3346(a)(1) and not the 210-day periods following the rejection, withdrawal, or return of a first or second nomination in section 3346(b).<sup>39</sup> OLC then contends that the provision must be read as resetting the nominations for purposes of the nomination-related periods because to read it otherwise would mean that not even the initial 210-day period would be reset, given that “section 3346’s authorization of acting service ceases after the final 210-day period following a second nomination.”<sup>40</sup> Finally, OLC asserts that the purpose of section 3349a and its legislative history support OLC’s interpretation.<sup>41</sup> Specifically, OLC maintains that section 3349a is intended to encourage a new President to submit nominations promptly and cites relevant legislative history stating this purpose, while acknowledging that the legislative history does not expressly address the effect of a prior President’s unsuccessful nominations.<sup>42</sup>

OLC’s interpretation does not comport with the text of section 3349a or section 3346. In B-333853, we concluded that section 3349a only expressly resets the initial 210-day period in section 3346(a)(1) and does not address nominations in any way, much less prescribe different treatment for nominations submitted on or after inauguration day. We made this determination, in part, because section 3349a does not modify the date of the vacancy, and merely “deem[s]” the initial 210-day period “to begin” on one of two specified dates instead of “the date the vacancy occurs” as provided in section 3346.<sup>43</sup> We also noted that the initial 210-day period in section

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<sup>38</sup> OLC Opinion, at 7–13.

<sup>39</sup> OLC Opinion, at 5–7; see 5 U.S.C. §§ 3346(b)(1), (2)(B). We discussed the ambiguity of this phrase in B-333853 and determined that, as a practical matter, the issue was not relevant for determining whether there was a time violation. B-333853, at 8 n.38. But we also acknowledged that section 3349a could refer to the initial 210-day period in section 3346(a)(1) and assumed as much in our analysis. *Id.* at 5, 6, 8 n.38, 9.

<sup>40</sup> OLC Opinion, at 7–8.

<sup>41</sup> See *id.* at 9–13.

<sup>42</sup> See *id.*

<sup>43</sup> See 5 U.S.C. §§ 3346(a)(1), 3349a(b); B-333853, at 7 n.34, 8 n.38; cf. 5 U.S.C. § 3349a(b)(2) (distinguishing between the date the 210-day period is deemed to begin and “the date on which the vacancy occurs” with respect to vacancies arising after the transitional inauguration day).

3346 is independent of the nomination-related periods and calculated separately.<sup>44</sup> Therefore, the exhaustion of the nomination-related periods does not, as OLC contends, prohibit additional acting service during the 210-day period under section 3346(a)(1) when reset by section 3349a.<sup>45</sup>

Further, we do not view the statements cited by OLC regarding section 3349a's purpose, standing alone, as implicitly suggesting congressional intent to reset the nominations for long-vacant positions. Nothing in the legislative history suggests, as OLC asserts, that congressional concern about new Presidents filling long-vacant positions (including those for which prior unsuccessful nominations had been submitted) was an animating force behind the addition of section 3349a. Instead, Congress was concerned about the large number of vacancies that a new President would need to fill as a result of the transition ("essentially all [PAS] positions in the executive branch"), potentially requiring "additional time to nominate individuals to fill them."<sup>46</sup> The vast majority of such vacancies would be too recent for the previous President to have submitted a nomination.<sup>47</sup>

In B-333853, we recognized the same concerns that OLC raises regarding our interpretation of section 3349a, namely that past nominations may disadvantage a newly inaugurated President by limiting the acting service period in the new administration.<sup>48</sup> However, these concerns cannot override the plain meaning of the Vacancies Act's provisions.

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<sup>44</sup> B-333853, at 8; see 5 U.S.C. § 3346(a).

<sup>45</sup> OLC's interpretation would also call into question the treatment of nominations submitted by either the previous or new President that are pending on the date the 210-day period begins under section 3349a. Such nominations would have been submitted prior to the reset 210-day period and therefore out of sequence under OLC's view of the structure of the various timing provisions. OLC implicitly acknowledges the issue but declines to address how such nominations would be treated. OLC Opinion, at 13 n.8.

<sup>46</sup> S. Rep. No. 105-250, at 21 (1998).

<sup>47</sup> After receiving the referral that led to our decision in B-333853, we examined in May 2022 how many vacant PAS positions subject to the Vacancies Act had nominations submitted by a prior President. Of the hundreds of covered positions, we identified less than 40 vacant positions at the time for which at least one nomination had been submitted by a prior President; less than 25 of those were positions for which at least two nominations had been submitted by a prior President.

<sup>48</sup> B-333853, at 8.



## 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, Ms. Blatchford's second nomination (the third nomination overall) did not extend the acting service period, and Ms. Harrison's service as Acting Controller since August 2, 2022, 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 and House Committees on the Budget, 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 Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

Sincerely yours,

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

Edda Emmanuelli Perez  
General Counsel