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United States Government Accountability Office  
Washington, DC 20548

B-302788

January 21, 2005

The Honorable Harriet Miers  
Counsel to the President  
The White House

*Subject: Agency Reporting Requirements under the Vacancies Reform Act*

Dear Ms. Miers:

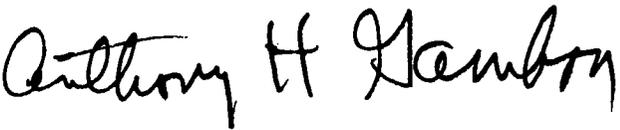
I am writing to request your assistance, in your new position as White House Counsel, in reminding executive branch agencies of their duties under the Federal Vacancies Reform Act of 1998. 5 U.S.C. §§ 3345-3349d. Under the Act, executive agencies must report to the Comptroller General any vacancy that occurs in a presidentially appointed, Senate-confirmed (PAS) position subject to the Act, the service of any acting official in such a position, a nomination to such a position, and the rejection, withdrawal, or return of such a nomination. 5 U.S.C. § 3349(a). In addition, agencies must ensure that acting officials do not exceed the statutory time restrictions that limit service in an acting capacity. 5 U.S.C. § 3346. As you may know, the Act generally limits such service to 210 days from the date of the vacancy and requires the Comptroller General to report any violations of these time restrictions to Congress, the President, and the Office of Personnel Management. 5 U.S.C. §§ 3346, 3349(b).

Your predecessor, Alberto Gonzales, was quite helpful in notifying agencies of their duties under the Act. In March of 2001, he sent the enclosed memorandum to the heads of agencies notifying them of their statutory responsibilities. A similar memorandum from your office might again be helpful in light of the increased number of vacancies at the start of a new presidential term.

We would be happy to meet with you and offer any assistance in notifying agencies of their responsibilities under the Act. I am also enclosing a letter that I sent to the heads of executive agencies earlier this year to remind them of the Act's requirements.

Should you wish to discuss this issue further, please feel free to contact Kathleen A. Wannisky, Managing Associate General Counsel, on 202-512-5207. Thank you for your assistance.

Sincerely yours,

A handwritten signature in black ink that reads "Anthony H. Gamboa". The signature is written in a cursive style with a large, prominent initial "A".

Anthony H. Gamboa  
General Counsel

Enclosures

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR THE HEADS OF FEDERAL EXECUTIVE DEPARTMENTS  
AND AGENCIES AND UNITS OF THE EXECUTIVE OFFICE OF THE PRESIDENT

FROM: ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT *arg*

RE: AGENCY REPORTING REQUIREMENTS UNDER THE VACANCIES  
REFORM ACT

DATE: MARCH 21, 2001

CC: OFFICE OF PRESIDENTIAL PERSONNEL  
GENERAL ACCOUNTING OFFICE

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The purpose of this memorandum is to provide guidance to the federal executive departments and agencies and the units of the Executive Office of the President concerning the reporting requirements imposed by the Vacancies Reform Act (the "Act"), 5 U.S.C. §§ 3345-3349d. This memorandum is not a comprehensive guide to all of the Act's provisions, but is intended to provide practical guidance on the reporting process.

If you require more detailed guidance on the Act's other provisions, or if you have any questions about this memorandum, please contact Rachel Brand, Assistant Counsel to the President, at (202) 456-7909, or Jeff Singdahlsen at the Office of Legal Counsel, Department of Justice, at (202) 514-1858. A copy of the Act is attached to this Memorandum as Exhibit C.

**I. Overview of the Vacancies Reform Act's provisions**

The Vacancies Reform Act provides rules governing the designation of officials to serve temporarily in an acting capacity when vacancies occur in certain executive agency positions.

**A. Agencies and Positions Covered by the Act**

The Act covers only positions that require presidential nomination and Senate confirmation, *i.e.*, PAS positions, within "executive agencies." Most entities within the executive branch, including the Executive Office of the President, the military departments, independent agencies, and government corporations, are "executive agencies" for purposes of the Act. However, the Act contains several specific exceptions. Positions on any board or commission that has multiple members and that governs an independent agency or government corporation are exempt.<sup>1</sup>

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<sup>1</sup> Therefore, members of the Federal Election Commission, the Federal Communications Commission, the Tennessee Valley Authority, and many other boards and commissions within the executive branch are excluded from the Act's requirements. However, the exception only applies to the *members* of multiple-member commissions or boards, not to other PAS positions within those agencies. Thus, for example, although the members of the National Science Board

Positions for which another statute designates who shall serve as an acting officer,<sup>2</sup> or for which another statute specifically authorizes the President, a court, or the head of an executive department to designate an acting officer, are also exempt. Other specifically exempted positions include the following: officers of the General Accounting Office, 5 U.S.C. § 3345(a); FERC commissioners, 5 U.S.C. § 3349c(2); Surface Transportation Board members, 5 U.S.C. § 3349c(3); and judges appointed to courts created under Article I of the Constitution, *e.g.*, administrative courts within executive agencies, 5 U.S.C. § 3349c(4).<sup>3</sup>

The agency head or general counsel of each agency is responsible for determining whether that agency is subject to the Act's requirements at all and, if so, which positions within that agency are covered by the Act.

### **B. Limitations on the Tenure of Acting Officers**

The tenure of any acting officer serving in a position covered by the Act is limited to 210 days beginning on the date the vacancy occurs. This period is extended by 90 days for vacancies occurring within 60 days of the inauguration of a new President. The Act relaxes these time restrictions in specific circumstances, such as when the President has submitted a formal nomination to the Senate. *See* 5 U.S.C. §§ 3346, 3348(c), 3349a.

### **C. Who May Be Designated as an Acting Officer**

The Act also places restrictions on who may serve as an acting officer in covered positions. By default, the person serving in the position of "first assistant" to the covered position may serve as acting officer unless the President directs otherwise. With respect to some covered positions, it may be unclear what position constitutes the "first assistant" position. For more guidance in such cases, please contact the Office of Counsel to the President or the Office of Legal Counsel.

Notwithstanding the default rule, the President may designate someone other than the first assistant to serve as acting officer if the designee meets certain requirements. For example, the President may designate anyone who is currently serving in a PAS position in an agency to serve as acting officer in another position in that agency or another agency. The President may also

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(which governs the National Science Foundation) are not covered by the Act, the offices of Director and Deputy Director of the National Science Foundation, both of which are PAS positions but not board member positions, are covered by the Act.

<sup>2</sup> For example, because 28 U.S.C. § 508 governs who shall act as Attorney General in the case of a vacancy, the Vacancies Reform Act does not apply to the position of Attorney General unless there is no official serving in any of the positions designated by section 508 to act as attorney general in the case of a vacancy.

<sup>3</sup> The provisions of 5 U.S.C. § 3348, which invalidate the actions of any person who purports to serve as an acting officer in a covered position, but who is not properly designated to serve as such, do not apply to the following: the general counsel of the NLRA; the general counsel of the FLRA; any inspector general appointed by the President and confirmed by the Senate; and any chief financial officer appointed by the President and confirmed by the Senate. *See* 5 U.S.C. § 3348(e). The Act's reporting requirements *do* apply to these positions.

designate an officer or employee of the agency in which the vacancy exists to be acting officer so long as: the designee has served in his or her position in the agency for at least 90 days within the last year; and the rate of pay for the position in which the designee has been serving is equal to or greater than the minimum rate of pay for a GS-15-level federal employee. See 5 U.S.C. § 3345.

## **II. Reporting Requirements of the Vacancies Reform Act**

Each agency to which the Act applies must “immediately” provide written notification to Congress and the GAO whenever any of the following events occur:

- (1) A vacancy occurs in any position covered by the Vacancies Reform Act;
- (2) An individual becomes an acting officer in any position covered by the Act;
- (3) The President sends a nomination to the Senate for any position covered by the Act;
- (4) A presidential nomination for any covered position is rejected by the Senate, withdrawn from Senate consideration, or returned by the Senate to the President.

See 5 U.S.C. § 3349(a).<sup>4</sup>

Whenever one of these events occurs, the agency must send separate notifications to the Speaker of the House of Representatives, the President of the Senate, and the Comptroller General of the United States.<sup>5</sup> The GAO has created a standardized reporting form, which is available on-line at [www.gao.gov](http://www.gao.gov) and should be used by all agencies for notifications both to the GAO and to Congress.

The recent change in Administration has created many vacancies and has resulted in many persons serving in an acting capacity. According to the GAO, however, very few vacancy reports have been submitted since the beginning of the current Administration. It seems likely, therefore, that there are many unreported vacancies. The agency head or general counsel in each agency should determine which covered positions within that agency are currently vacant, and for which of those positions acting officers have been designated or nominations have been submitted to the Senate. Reporting forms should be completed accordingly and submitted immediately.

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<sup>4</sup> The standardized reporting form created by the GAO asks the reporting agency to designate which event the form reports. One of the stated options is “discontinuation of service in acting role.” The statute does not require agencies to report discontinuations of service in an acting role (as opposed to initiations of service in an acting role), but the GAO requests this for informational purposes. It is within the discretion of the general counsel or equivalent officer at each agency whether to submit reports on such occasions.

<sup>5</sup> In the previous Administration, agencies forwarded written notifications to the Office of Presidential Personnel, which forwarded them to the appropriate recipients. This procedure will be discontinued in the current Administration; agencies are responsible for submitting forms directly to Congress and the GAO.

The procedure for submitting written notifications to Congress and the GAO is as follows:

1. **The designated officer in each agency completes the standardized reporting form.** Each agency is responsible for designating an employee to complete and submit reports. The standardized reporting form may be downloaded from the GAO's website, [www.gao.gov](http://www.gao.gov). A blank form is attached to this memorandum as Exhibit A.
2. **The designated agency official creates four copies, two with original signatures.** The rules of the House and Senate require forms to be submitted with original signatures. Therefore, the submitting official must execute two original copies of each report.
3. **Submission of Forms to Senate, House of Representatives, and GAO.**
  - a) One copy of the form, *with original signature*, must be submitted to the President of the Senate:

The Honorable Richard B. Cheney  
Office of the President of the Senate  
United States Senate  
Washington, D.C. 20510

- b) One copy of the form, *with original signature*, must be submitted to the Speaker of the House of Representatives:

Office of the Speaker  
The Honorable Dennis Hastert  
House of Representatives  
Washington, D.C. 20515

- c) One photocopy of the form must be submitted to the Comptroller General of the United States:

Comptroller General of the United States  
Attn: Kathleen Wannisky  
441 G Street, N.W.  
Washington, D.C. 20548

- d) One courtesy copy should be submitted to the Office of Presidential Personnel:

Office of Presidential Personnel  
Attn: Katja Bullock  
Eisenhower Executive Office Building, Room 131  
Washington, D.C. 20502