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United States General Accounting Office
Washington, DC 20548

Office of the General Counsel

June 28, 1999

The Honorable Andrew M. Cuomo
The Secretary of Housing and
Urban Development

Dear Mr. Cuomo:

The purpose of this letter is to call your attention to the requirements of the Federal Vacancies Reform Act of 1998, and in particular to provisions that require executive departments and agencies to report information about vacant positions to the Congress and the Comptroller General.

The Federal Vacancies Reform Act of 1998 ("Vacancies Reform Act") was enacted on October 21, 1998.¹ The Act replaces the prior Vacancies Act, and provides new rules for the temporary filling of vacant executive agency positions that require Presidential appointment with Senate confirmation. Under the Act, an acting officer may serve in a vacant position for no longer than 210 days, with adjustments to be made if the President submits a nomination to fill the position and under other specified circumstances. The Act requires executive departments and agencies to report to the Congress and to the Comptroller General certain items of information about a vacancy immediately upon the occurrence of events specified in the Act. The Act also provides that the Comptroller General is to report to specified congressional committees, the President, and the Office of Personnel Management if, based on the information submitted by an agency, the Comptroller General determines that an acting officer is serving longer than the 210-day period (including applicable exceptions) established by the Act.

Since enactment of the Vacancies Reform Act, GAO has received reports on only 23 vacancies government-wide. In view of the small number of reports received, and the fact that GAO must rely on agencies to provide us with the information we need to meet our statutory reporting responsibilities, the following describes the requirements that apply to executive departments and agencies and provides

¹Pub. L. No. 105-277, Div. C, tit. 1, § 151, 112 Stat. 2681-611-16, to be codified at 5 U.S.C. §§ 3345-49d.

additional guidance on the reporting of information to GAO. This letter is being sent to the heads of all executive departments and agencies.

REQUIREMENTS OF THE VACANCIES REFORM ACT

Under the Vacancies Reform Act of 1998, a vacancy occurs if a Presidential appointee covered by the Act dies, resigns, or is otherwise unable to perform the functions and duties of the office. If the vacancy is caused by a reason other than sickness, an acting officer who is temporarily filling the position may serve for no longer than 210 days from the date the vacancy occurs, unless the President submits a first or second nomination for the office to the Senate. Once a nomination is submitted, the acting officer may serve (1) until the nomination is confirmed, or (2) if the nomination is rejected by the Senate or is withdrawn or returned to the President, for no more than 210 days after the date of such action. Specific rules for computing the 210-day time period are set forth in the Vacancies Reform Act.

The Vacancies Reform Act requires that agency heads report to the Comptroller General and each House of Congress specific items of information about the occurrence and filling of a vacancy covered by the Act. Specifically, 5 U.S.C. § 3349(a) provides as follows:

“(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress—

“(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

“(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

“(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

“(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.”

If, based on this information, the Comptroller General determines that an acting officer is serving longer than the 210-day time limitation (including applicable exceptions), the Comptroller General is to report that determination to specified congressional committees, the President, and the Office of Personnel Management pursuant to 5 U.S.C. § 3349(b). The Act provides that, with certain limited

exceptions, an action taken by an acting officer to perform the functions or duties of a vacant office after the time limitation has expired will have no force and effect and may not be ratified. The responsibility for ensuring that acting officers serve in accordance with the time limitation, and that the required information is accurately and immediately reported to Congress and the Comptroller General, rests with the executive agencies. As indicated above, GAO's sole responsibility under the Act is to determine whether acting officers are serving beyond the statutory time limitation and, if so, to report that determination to the specified entities.

GUIDANCE ON REPORTING TO GAO

Reports on pre-existing vacancies. For positions that became vacant on or before the effective date of the Act, November 20, 1998, the only restriction in the Act that applies is the time limitation on service by acting officers.² The Act provides that the time limitation is to apply to these positions as if they first became vacant on the effective date of the Act.

As described above, under the Vacancies Reform Act, GAO is responsible for monitoring compliance with the statutory time limitation through the reports the agencies submit under 5 U.S.C. § 3349(a). In order to enable GAO to carry out this function with respect to all positions that are subject to the statutory time limitation, agencies need to provide GAO with the information specified in section 3349(a) for positions that were vacant as of November 20, 1998, as well as for positions becoming vacant after that date. Unless agencies report this information to GAO, Congress has no mechanism to ensure that acting officers subject to the time limitation, including those serving in positions that were vacant as of November 20, 1998, are not exceeding the limitation.

Timing and contents of reports. The Vacancies Reform Act requires the head of each agency to report to the Comptroller General and Congress immediately upon the occurrence of each of the events specified in the Act (i.e., occurrence of vacancy; designation of acting officer; submission of nomination; rejection, withdrawal, or return of nomination). Because each event must be reported immediately after it occurs, an agency may need to file a series of reports on any given vacancy.

²The Act provides that, for any office vacant on the effective date of the Act (November 20, 1998), "the time limitations under section 3346 of title 5, United States Code (as amended by this section) shall apply to such office." See Pub. L. No. 105-277, section 151(d)(2)(B). In guidance issued on November 13, 1998, and March 22, 1999, the Justice Department's Office of Legal Counsel concluded that the only restriction in the Act that applies to positions that were vacant on November 20, 1998, is the time limitation on service by acting officers. In contrast, the full scope of the Act, including the criteria for who may serve as an acting officer, applies to positions becoming vacant after the effective date of the Act.

In addition to the specific items of information identified in 5 U.S.C. § 3349(a), GAO needs certain supplementary information to meet its statutory reporting responsibilities. Specifically, GAO requests that each agency report—

- The authority under which the acting officer was designated, if the designation was made under an authority other than the Vacancies Reform Act;³
- Any changes in the status of the vacant position (such as a change of title or elimination of the position);
- The name, mailing address, and telephone number of the reporting agency's designated contact person; and
- The agency or sub-agency where the position is located.

A form that can be used to report the information required by 5 U.S.C. § 3349(a) and the supplementary information requested above appears at GAO's internet site, www.gao.gov/forms/submitvc.htm.

Should you have any questions about the reporting of vacancies to GAO, you may contact Kathleen E. Wannisky, Associate General Counsel for Operations, at 202-512-5207.

Sincerely yours,



Robert P. Murphy
General Counsel

cc: Ms. Gail W. Laster
General Counsel
Department of Housing and
Urban Development

³For most vacancies, the Act provides the exclusive means for making temporary appointments. There are some specific exceptions, such as where a statute expressly authorizes the President, a court, or the head of an executive department to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity. See 5 U.S.C. § 3347(a).