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United States General Accounting Office  
Washington, D.C. 20548

General Government Division

B-286347

September 29, 2000

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

Subject: Implementation of the Federal Vacancies Reform Act of 1998

Dear Mr. Chairman:

The Federal Vacancies Reform Act of 1998<sup>1</sup> (Vacancies Reform Act), which took effect on November 21, 1998, provides new requirements for the temporary filling of certain vacant executive agency positions that require presidential appointment and Senate confirmation (PAS positions). The Vacancies Reform Act is intended to create a clear process and a time limit for the temporary filling of those PAS positions. It requires agencies to inform Congress and GAO whenever (1) a PAS position becomes vacant, (2) a vacant position is filled on a temporary basis, (3) a nomination is made to the Senate to fill a vacancy, and (4) a nomination for the position is rejected, withdrawn, or returned. You asked us to assess the Vacancies Reform Act's implementation. More specifically, you asked us to determine whether agencies were (1) notifying Congress and GAO of all reportable vacancies and temporary appointments; (2) submitting timely notifications of vacancies, appointments of acting officials, and nominations to fill vacant positions; and (3) adhering to the 210 day time limit for temporary service. In addition, in conjunction with the second objective, you asked us to describe the procedures followed for reporting vacancies, temporary appointments, and nominations to Congress and GAO.

This letter addresses those areas by reviewing information agencies provided for this review and by reviewing data taken from notifications that agencies had previously sent to GAO as required by the Vacancies Reform Act. To determine whether all vacancies and temporary appointments were reported, we reviewed the vacancy and notification histories of 246 PAS positions provided by the White House Office of Presidential Personnel at 11 agencies—the Departments of Agriculture, Commerce, Defense (DOD), Education, Health and Human Services (HHS), the Interior, Justice, Transportation (DOT), the Treasury, and Veterans

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<sup>1</sup> 5 U.S.C. 3341-3349d

Affairs (VA) and the Environmental Protection Agency (EPA). To determine whether notifications were timely, we analyzed data that GAO had recorded for notifications that it had received. This analysis was not limited to the 11 agencies but covered all agencies that had submitted notifications within the scope of this report. For the first and second objectives, we used reporting to GAO as a surrogate measure for reporting to Congress. To determine whether the 210-day limit was exceeded, we reviewed data agencies had provided to GAO under the Vacancies Reform Act's notification requirement and, for the 11 agencies, cross checked that data with information obtained from the 11 agencies specifically for this review. As agreed, we will later address your other concerns regarding the Vacancies Reform Act's implementation as well as provide additional information on how completely other agencies have been reporting vacancies and temporary appointments to Congress and GAO.

## Results in Brief

Between November 21, 1998, and June 30, 2000, the 11 agencies together, on the basis of information they provided for this review, incurred 60 PAS vacancies and filled those vacancies with 58 acting officials. We determined that a majority of those vacancies and acting officials had been reported to GAO. However, as of July 13, 2000, GAO had not been notified of 8 vacancies and 12 acting officials. Together, these 20 instances of nonreporting represented about 17 percent of the 118 reportable vacancies and acting officials. GAO has since received 12 of the 20 notices, as of September 25, 2000.

The 11 agencies were more likely to notify GAO of a vacancy and less likely to notify GAO of an acting official. The reporting records of the 11 agencies varied, ranging from 5 agencies reporting all vacancies and acting officials to GAO, to 1 agency reporting less than half as of July 13, 2000.

Many of the vacancy and acting official notices that GAO received between November 21, 1998, and July 13, 2000, took 4 or more weeks to arrive, counting from the date the vacancy or acting service began. This length of time to arrive at GAO was the case for 56 percent of the vacancy notifications and 47 percent of the acting official notifications. The Vacancies Reform Act requires that agency heads notify Congress and GAO immediately upon the occurrence of the triggering event, although "immediately" is not defined in the Vacancies Reform Act. Since about July 1999, agencies have been instructed by a White House memorandum to send notifications to the White House Office of Presidential Personnel, which, after recording information, is to route them to the Office of Management and Budget (OMB), which is to simultaneously transmit them to Congress and GAO.

The length of time that notices have taken to reach GAO has improved since the first several months after the Vacancies Reform Act took effect. The median number of days dropped from 44 days to 27 days for vacancy notices and from 42 days to 21 days for acting official notices between the first approximately 7-month period and the most recent 7-month period under the Vacancies Reform Act.

We found that three acting officials—two Acting Inspectors General and one Acting Chief Financial Officer—had served longer in these positions than the Vacancies Reform Act permits. One official served for 10 days, and the other two for about 2 months past the 210-

day limit. In general, the Vacancies Reform Act invalidates the actions of acting officials during the time they exceed the 210-day time limitation, except for certain PAS positions including Inspectors General and Chief Financial Officers. Therefore, although the two Acting Inspectors General and the Acting Chief Financial Officer exceeded the 210-day limitation, the Vacancies Reform Act does not invalidate their actions. The subsection of the Vacancies Reform Act that exempts Inspectors General and Chief Financial Officers from the provision that invalidates actions by an acting official who exceeds the 210-day limit is in the same section as the provision that allows for the extension of the 210-day period in certain circumstances. This may have contributed to confusion by some agencies about whether acting Inspectors General and Chief Financial Officers were covered by the 210-day time limit. On September 15, 2000, we wrote to the relevant congressional committees, the President, and the Office of Personnel Management (OPM) informing them of the time-limit violations.

## Background

Under the Federal Vacancies Reform Act of 1998, a vacancy occurs if a presidential appointee covered by the Vacancies Reform Act dies, resigns, or is otherwise unable to perform the functions and duties of the office. For PAS vacancies covered by the Vacancies Reform Act, the Act among other things,

- specifies who may serve as an acting officer;
- imposes a time limit on how long vacancies can be filled by acting officers; and
- requires agencies to immediately report to the Senate, the House of Representatives, and the Comptroller General of the United States any vacancy and the date it occurs; the name of any person serving in an acting capacity and the date such service began; the name of any person nominated to fill a vacancy and the date such nomination is submitted to the Senate; and the date of any rejection, withdrawal, or return of a nomination.

The Vacancies Reform Act also requires the Comptroller General of the United States to inform specified congressional committees, the President, and OPM if an acting officer is serving longer than 210 days, a period which may be extended through various provisions of the Vacancies Reform Act.

Generally, the Vacancies Reform Act applies to any office within an executive agency to which appointment is required to be made by the President, by and with the advice and consent of the Senate. The Vacancies Reform Act, however, excludes from its coverage certain officers. It does not apply, for example, to any PAS position on a multimember board or commission that governs an independent establishment or government corporation. The Vacancies Reform Act also recognizes that a number of PAS positions are covered by other statutes that specifically address how the office is to be filled on a temporary basis.

The Federal Vacancies Reform Act of 1998 replaced an earlier Vacancies Act, which the Justice Department and several other executive agencies had maintained was not the exclusive authority for the temporary filling of vacant PAS positions. These agencies said their enabling statutes, which gave their agency heads general authority to assign functions and delegate authority within the agency, could override the Vacancies Act. In other words,

the heads of these agencies could assign individuals to temporarily fill vacant PAS positions without informing Congress and for longer than the 120 days established by the Vacancies Act. In a long line of cases concerning officials who were serving in acting capacities without Senate approval, GAO determined that the Vacancies Act was the exclusive authority for the temporary filling of vacant positions. The question of whether agencies needed to follow the Vacancies Act, according to Chairman Thompson in a 1998 hearing, went to the heart of one of the Senate's most important powers, the duty to advise and consent on presidential nominations.

As previously mentioned, the Vacancies Reform Act assigned GAO certain responsibilities. To carry out those responsibilities, GAO together with the executive branch developed a form, "Submission Under the Federal Vacancies Reform Act," which the White House has instructed agencies to use since July 1999 to notify Congress and GAO of vacancies, acting officials, and nominations. GAO also has developed a computerized "Executive Vacancies Act Tracking System" to collect and analyze submitted data. Information from this system is accessible to agencies and the public through GAO's web page (<http://www.gao.gov>). In June 1999, concerned with having received only 23 vacancy reports, GAO sent a letter to the heads of executive departments and agencies describing the requirements that the Vacancies Reform Act imposes on agencies and providing additional guidance for reporting information to GAO.

## **Agencies Reported Many but Not All Vacancies and Temporary Appointments**

As required by the Vacancies Reform Act, agencies must notify Congress and GAO whenever a vacancy occurs in a position covered by the Vacancies Reform Act. They also must provide the name of any person carrying out the duties of the vacant position in an acting capacity as well as certain other specific items of information. The 11 agencies we reviewed, as a group, notified GAO about most but not every vacancy and acting official. The 11 agencies more often failed to report that someone was serving in an acting capacity than they failed to report a vacancy.

In response to our request, the 11 agencies provided information on 246 PAS positions identified by the White House Office of Presidential Personnel as subject to the Vacancies Reform Act. For three out of every four positions, the agencies said there had been no vacancies during the period we covered—November 21, 1998, through June 30, 2000. However, the agencies reported that vacancies had occurred in 60 positions. In connection with those vacancies, 58 officials had served in acting capacities.

Although GAO should have been previously notified of all 60 vacancies, it was notified of 52 vacancies, but not the other 8, as of July 13, 2000. As table 1 shows, the Department of Justice failed to notify GAO about six vacancies, and DOD and the Department of Commerce each failed to notify GAO about one vacancy. The eight other agencies had previously notified GAO of all of their vacancies.

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Although GAO should have been previously notified of all 58 acting officials, it was notified about 46 officials, but not the other 12, as of July 13, 2000. As table 1 shows, 6 of the 11 agencies had failed to notify GAO about one or more acting officials. The Department of Justice had failed to notify GAO about five acting officials and the Department of the Treasury about three acting officials. Each of the other four agencies had not notified GAO of one acting official. The Treasury Department had notified GAO of all 13 of its vacancies but only 6 of its 9 acting officials.

**Table 1: Number of Vacancies and Acting Officials at 11 Agencies, From Nov. 21, 1998, Through June 30, 2000, and the Number Reported to GAO as of July 13, 2000**

| Agency        | Vacancies    |                        |                            | Acting officials |                        |                            |
|---------------|--------------|------------------------|----------------------------|------------------|------------------------|----------------------------|
|               | Total number | Number reported to GAO | Number not reported to GAO | Total number     | Number reported to GAO | Number not reported to GAO |
| Agriculture   | 1            | 1                      | 0                          | 2                | 2                      | 0                          |
| Commerce      | 8            | 7                      | 1                          | 7                | 6                      | 1                          |
| DOD           | 5            | 4                      | 1                          | 5                | 4                      | 1                          |
| Education     | 5            | 5                      | 0                          | 5                | 4                      | 1                          |
| HHS           | 2            | 2                      | 0                          | 2                | 2                      | 0                          |
| Interior      | 5            | 5                      | 0                          | 6                | 6                      | 0                          |
| Justice       | 10           | 4                      | 6                          | 10               | 5                      | 5                          |
| DOT           | 6            | 6                      | 0                          | 6                | 6                      | 0                          |
| Treasury      | 13           | 13                     | 0                          | 9                | 6                      | 3                          |
| VA            | 2            | 2                      | 0                          | 3                | 3                      | 0                          |
| EPA           | 3            | 3                      | 0                          | 3                | 2                      | 1                          |
| <b>Totals</b> | <b>60</b>    | <b>52</b>              | <b>8</b>                   | <b>58</b>        | <b>46</b>              | <b>12</b>                  |

Source: Information that the agencies provided to GAO for this review and in response to the Vacancies Reform Act.

Several agencies—Agriculture, HHS, Interior, DOT, and VA—notified GAO of all of their vacancies and acting officials. Justice notified GAO of fewer than half of its vacancies (4 of 10) and only half of its acting officials (5 of 10).

Because the Vacancies Reform Act was signed into law on October 21, 1998, and generally became effective 30 days later, it is possible that some affected agencies or offices within agencies were not aware of their responsibilities under the Vacancies Reform Act shortly after it passed. However, the 20 instances of nonreporting cannot all be attributed to the newness of the Vacancies Reform Act. Thirteen of the 20 instances occurred in 2000.

For each vacancy and acting official that had not been previously reported to GAO by July 13, 2000, we contacted the responsible agency to verify that notification should have occurred. The agencies generally acknowledged that some notifications were not sent and others were only sent recently. However, in the case of an acting official at DOD and the case of a vacancy and an acting official at Commerce, officials said that a report had already been submitted but provided us with another copy. However, GAO has no record of receiving the original reports. Several of the events that would trigger reporting occurred in 1999 or early 2000 but were reported after the July 13 cutoff date that we are using in this letter. We noted that, in 12 of the 20 cases, we received notification from the agency after July 13, 2000. As discussed in

the following section, Vacancies Reform Act reports frequently take considerable time to reach GAO. Enclosure I lists the positions for which vacancies or acting officials were not previously reported to GAO.

## **Notices Frequently Took Longer Than 4 Weeks to Reach GAO**

The Vacancies Reform Act requires that the heads of agencies notify Congress and GAO immediately of certain events relating to a PAS vacancy, including the date on which the vacancy occurs and the assignment of an acting official to the vacancy. While the Vacancies Reform Act does not define “immediately,” we found that notifications that GAO received over the November 1998 to July 2000 period frequently arrived more than 1 month after the event had occurred.

The administration’s procedures for notifying Congress and GAO have evolved since November 1998. Initially, some agencies sent notifications to Congress and GAO directly while others sent notifications through the White House Office of Presidential Personnel. Since about July 1999, agencies have been instructed, by a memorandum from the Assistant to the President and Director of Presidential Personnel, to submit all notifications to the White House Office of Presidential Personnel. At that time, GAO was informed of the procedures that the White House and the executive branch would use in forwarding notifications. The agencies, according to White House officials, fax the notifications to the Office of Presidential Personnel to expedite notification. The Office, according to officials there, places the information on a computer database and then sends the faxed notifications to OMB, routinely doing so on a weekly basis and on occasion more frequently. OMB in turn, according to White House officials, sends copies of the notifications received from the Office of Presidential Personnel, a few days after receiving them, concurrently to Congress and GAO. Because officials of the White House Office of Presidential Personnel said that notifications are sent concurrently to Congress and GAO, we view the length of time taken to notify GAO as reflecting the length of time taken to notify Congress.

Between November 21, 1998, and July 13, 2000, GAO received notices from 18 agencies of 75 PAS-position vacancies subject to the Vacancies Reform Act’s reporting requirements and, related to those vacancies, 62 acting officials.<sup>2</sup> The 75 vacancies and the acting service of the 62 officials all began on or after November 21, 1998. These numbers do not include the 8 vacancies and 12 acting officials we identified through this review as not having been previously reported to GAO. As table 2 shows, the administration frequently took more than 4 weeks to notify GAO about the existence of a vacancy or the assignment of an acting official to fill a vacant position. The number of weeks is from the date that the vacancy or acting service began to the date that GAO received the related notification.

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<sup>2</sup> As the Scope and Methodology section of this report explains, we screened out certain notifications before arriving at these numbers.

**Table 2: Number of Weeks the Administration Took to Notify GAO, for Notifications That GAO Received From Nov. 21, 1998, to July 13, 2000**

| Number of weeks to notify GAO | About a vacancy         |                                  | About assignment of an acting official |  |
|-------------------------------|-------------------------|----------------------------------|--|--|
|                               | Number of notifications | Percent of vacancy notifications | Number of notifications                | Percent of acting official notifications |
| 1 week or less                | 10                      | 13%                              | 12                                     | 19%                                      |
| Between 1-2 weeks             | 11                      | 15%                              | 10                                     | 16%                                      |
| Between 2-4 weeks             | 12                      | 16%                              | 11                                     | 18%                                      |
| More than 4 weeks             | 42                      | 56%                              | 29                                     | 47%                                      |

Source: GAO's Executive Vacancies Tracking System.

However, as table 3 shows, the length of time the administration took to notify GAO became considerably shorter after the first approximately 7 months of experience with the Vacancies Reform Act. Over the most recent 7-month period, the median time was 3 to 4 weeks.<sup>3</sup>

**Table 3: Median and Average Numbers of Days the Administration Took to Notify GAO During Three Intervals Since Nov. 21, 1998, for Notifications GAO Received From Nov. 21, 1998, to July 13, 2000**

| Time interval           | Number of days to notify GAO about |                        |                         |                       |                        |    |
|-------------------------|------------------------------------|------------------------|-------------------------|-----------------------|------------------------|----|
|                         | Vacancies                          |                        |                         | Acting officials      |                        |    |
| Number of notifications | Median number of days              | Average number of days | Number of notifications | Median number of Days | Average number of days |    |
| 11/21/98 – 06/30/99     | 34                                 | 44                     | 72                      | 23                    | 42                     | 61 |
| 07/01/99 – 12/31/99     | 26                                 | 27                     | 42                      | 22                    | 21                     | 53 |
| 01/01/00 – 07/13/00     | 15                                 | 27                     | 39                      | 17                    | 21                     | 35 |

Source: GAO's Executive Vacancies Tracking System.

<sup>3</sup> The median and mean (or average) are frequently used measures of the central tendency of a set of numbers. The median is the number or value below which and above which half the numbers fall. The mean is the arithmetic average of all values (add up all the values and divide by the number of values added). The mean is most influenced by extreme values while the median is more stable than the mean because extreme scores do not affect it.

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Over the November 1998 to July 2000 period, the administration also notified GAO of 40 nominations to the Senate related to the 75 vacancies.<sup>4</sup> For the 40 notifications, GAO received

- four (10 percent) in 1 week or less,
- nine (23 percent) between 1 to 2 weeks,
- eight (20 percent) between 2 and 4 weeks, and
- nineteen (48 percent) more than 4 weeks after the date of the nomination.

The median amount of time the 40 notifications took to reach GAO dropped from 53 days—during the first several months after the Vacancies Reform Act took effect (Nov. 21, 1998, to June 30, 1999)—to 13 days (from Jan. 1, 2000, to July 13, 2000).

There was a sizeable range in time on how quickly the notices of individual agencies reached GAO. For example, the 11 DOD notifications took a median of 6 to 16 days to reach GAO from the dates that vacancies occurred, officials assumed positions in acting capacities, and nominations were submitted to Congress. In comparison, the 13 notifications that the administration submitted from the Agency for International Development took a median of 91 to 105 days to reach GAO. Enclosure II provides agency-by-agency information on the timeliness of notifications.

Regardless of the length of time it has taken notifications to reach the Senate, most—250 of approximately 284—notifications have not been distributed to the appropriate committees of jurisdiction. Vacancies Reform Act notices are not usually submitted bearing the original signatures of the respective agency heads. As previously noted, OMB sends to Congress and GAO copies of notices that agencies fax to the Office of Presidential Personnel. Just as for other executive branch documents that the Senate receives, the Senate Parliamentarian requires the transmittal letter or document to bear the original signature of an agency official in order for it to be referred to the appropriate committee. We found the same situation exists with the House of Representatives. According to the House Parliamentarian's Office, after consultation with the Senate Parliamentarian, the House Office is holding 203 notifications and is not referring them to appropriate committees because they do not bear original signatures.

### **Acting Officials Have Served Beyond the 210-Day Limit**

In general, the Vacancies Reform Act permits vacancies to be filled for up to 210 days by acting officials, with the 210 days beginning on the date the vacancy occurred.<sup>5</sup> At the end of

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<sup>4</sup> As the Scope and Methodology section of this report explains, we screened out certain notifications before arriving at these numbers.

<sup>5</sup> 5 U.S.C. 3346(a)(1)



the 210-day limit, the position can no longer be filled on an acting basis. The Vacancies Reform Act extends or resets the 210-day period under certain circumstances, such as when a nomination is pending before Congress.<sup>6</sup> The Vacancies Reform Act directs GAO to determine whether acting officers serve beyond the time limit and to report any violations to certain congressional committees, the President, and OPM.<sup>7</sup>

GAO depends on data it receives from the executive branch to determine whether acting officials serve more than the 210 days that the Vacancies Reform Act permits. On the basis of information in the notifications that GAO received through July 13, 2000, and from discussions GAO had with agencies and the White House Office of Presidential Personnel, GAO found one violation of the 210-day limit. Subsequent information that agencies provided to us for this review showed two additional violations of the time limit. The positions involved two Acting Inspectors General, one at DOD and the other at the Department of Justice, and one Acting Chief Financial Officer, which was at EPA.

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.<sup>8</sup> This would include actions taken by an acting officer after the 210-day limit has been reached.<sup>9</sup> However, the Vacancies Reform Act exempts Inspectors General and Chief Financial Officers from the latter provision concerning the force and effect of actions past the 210-day time limit.<sup>10</sup> Thus the provision generally invalidating the actions of acting officials who exceed the 210-day time limit does not invalidate the actions of acting Inspectors General and Chief Financial Officers who improperly exceed the 210-day limit.

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 that 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.<sup>11</sup> 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.<sup>12</sup>

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<sup>6</sup> 5 U.S.C. 3346 (a)(2)

<sup>7</sup> 5 U.S.C. 3349(b)

<sup>8</sup> 5 U.S.C. 3348(d)(1)

<sup>9</sup> 5 U.S.C. 3346(a)(1) and 3348(d)(1)

<sup>10</sup> 5 U.S.C. 3348(e)(3) and (4)

<sup>11</sup> 5 U.S.C. 3348(c)

<sup>12</sup> 5 U.S.C. 3348(e)(3) and (4)

The subsection of the Vacancies Reform Act<sup>13</sup> which exempts Inspectors General and Chief Financial Officers from the provision<sup>14</sup> that invalidates actions by an acting official who exceeds the 210-day limit is in the same section<sup>15</sup> as the provision<sup>16</sup> 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, it is clear in our view that the 210-day limit applies to acting Inspectors General and Chief Financial Officers and may not be extended under the exceptions allowed other acting officials when the last day of the period is a day that 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 Financial Officers take in an acting capacity past the 210-day limit would not be subject to the invalidation provision.

### Acting Inspector General of DOD

The Deputy Inspector General of DOD became the Acting Inspector General on May 1, 1999, the day after the Inspector General resigned from her position on April 30. GAO's database shows that DOD reported that it retained the Acting Inspector General in that position until January 25, 2000, or for 270 days. Subsequently, in the course of this review, DOD reported to us that the Deputy Inspector General was Acting Inspector General until November 26, 1999, or for 210 days.

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.<sup>17</sup> DOD originally viewed this provision as extending the time period for an acting Inspector General to serve and advised the Deputy Inspector General that his tenure as Acting Inspector General would end on January 25, 2000. DOD reported to us that the Acting Inspector General left his acting position on January 25.

Subsequently, DOD concluded, after consulting with the Department of Justice, that the Deputy Inspector General could not serve past November 26, 1999, because Inspectors General were specifically exempted from the application of the section that extends the 210-day limit if the last day of the 210-day period is a day when the Senate was not in session.<sup>18</sup>

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<sup>13</sup> 5 U.S.C. 3348(e)(3) and (4)

<sup>14</sup> 5 U.S.C. 3348(d)

<sup>15</sup> 5 U.S.C. 3348(d)

<sup>16</sup> 5 U.S.C. 3348

<sup>17</sup> 5 U.S.C. 3348(c)

<sup>18</sup> 5 U.S.C. 3348(e)(3)

Thus 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 (Nov. 26, 1999), rather than the date that he actually stepped down (Jan. 25, 2000).

We agree that DOD's Acting Inspector General should not have served past November 26, 1999. Accordingly, the Acting DOD Inspector General's service in that capacity after November 26 exceeded the 210-day time limit in violation of the Vacancies Reform Act.

### 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.<sup>19</sup> 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,<sup>20</sup> 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.

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<sup>19</sup> 5 U.S.C. 3346(a)(2)

<sup>20</sup> 5 U.S.C. 3346(c)

Although for the purposes of this letter, we generally used the November 21, 1998, to July 13, 2000, time period for measuring compliance with the Vacancies Reform Act, EPA 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.

We have informed the relevant congressional committees, the President, and OPM about the three situations in which the statutory 210-day limit was exceeded. However, as stated above, 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, we do not believe that any actions these officers may have taken after the 210 day time limit had been exceeded would be invalidated by the act.

## Agency Comments

We requested comments on a draft of this letter from the Assistant to the President and Director, Office of Presidential Personnel or his designee. At a September 22, 2000, meeting, an Associate Counsel to the President and others provided oral comments on the draft. They generally agreed with the facts presented in the draft. They suggested certain clarifications and offered certain technical comments, which we incorporated in this letter as appropriate.

While the draft was with the White House for comment, we performed additional checks on the contents of our tables and found two additional instances where notifications had been provided to GAO prior to July 13, 2000. We have made appropriate adjustments to this letter to recognize these notifications.

## Scope and Methodology

To determine whether Congress and GAO had been notified of all vacant PAS positions since November 21, 1998, and any acting officials serving in those positions, we obtained, from the White House Office of Presidential Personnel, a list of PAS positions that was the best available approximation of those subject to the Vacancies Reform Act. In transmitting the list of 484 positions, the Associate Counsel to the President said the list was a working list based primarily on Vacancies Reform Act submissions prepared by agency officials. It was not intended to represent, he said, a final legal determination on the coverage of the Vacancies Reform Act.

The positions were identified by agency, and we sent the names of the 484 positions to the 48 respective agencies together with a form we developed to collect information on each position. We asked the agencies to complete a form for (1) each position and (2) any PAS position they considered subject to the Vacancies Reform Act that was not on the list we sent. The form requested the name of any individual who filled a vacant position on an acting (temporary) basis and the dates of service.

For purposes of this report, we compared the vacancy and acting service information submitted by 11 agencies with the notifications GAO had received from them, as required by the Vacancies Reform Act. In making this comparison, we compared the information we received to information on GAO's Executive Vacancies Act Tracking System, which records the information that agencies submit to GAO under the Vacancies Reform Act. The tracking system information we used was through July 13, 2000, which was the latest information available when we began making various analyses for this letter. When information we received was not on the tracking system, we rechecked the source information for our tracking data and contacted the responsible agency to verify the information.

The amount of time necessary to make comparisons and to follow up with agencies if a difference was discovered made it impractical at this time to report on every agency that submitted responses through September 7, 2000. We therefore restricted our analysis to 11 agencies—the Departments of Agriculture, Commerce, DOD, Education, HHS, the Interior, Justice, DOT, the Treasury, and VA and EPA. We selected these agencies because they accounted for a large percentage—about 51 percent—of the positions on the Office of Presidential Personnel's list of PAS positions. However, as agreed with your representatives, we will continue to compare the remaining responses and will report at a later date on all responses.

To determine the timeliness of agency reporting to GAO, we used data from GAO's Executive Vacancies Act Tracking System. When GAO receives notifications from agencies, it stamps the notifying documents with a "form received date" and records that date on the tracking system. GAO also records from the notification documents the dates that vacancies and acting services began and the dates that nominations were submitted to the Senate. Using data from the tracking system, we counted the days between the starting or submission dates and the form-received dates to measure how soon GAO was notified. Often a notification reported both a vacancy and acting service, with the starting dates for each a few days apart.

While we tracked the length of time notifications have taken to reach GAO, we did not track how long notifications have taken to reach the Senate and House of Representatives. We understood from officials of the White House Office of Presidential Personnel that OMB sends notifications concurrently to Congress and GAO. Accordingly, the amount of time notifications have taken to reach GAO should also reflect the amount of time they have taken to reach Congress. This parallel time would be true for notifications that OMB transmitted after agencies began sending all notifications to the White House Office of Presidential Personnel, which they were to do starting in July 1999.

We measured the timeliness of notifications for 75 vacancies and, related to those vacancies, 62 acting officials and 40 nominations. The vacancies occurred from the effective date of the Vacancies Reform Act, November 21, 1998, to July 13, 2000. In going through the notifications we would analyze, we screened out 41 notifications for time analysis for two reasons. We removed 26 notifications because the reported vacancies, and related acting officials and nominations, were for positions such as U.S. Attorney and U.S. Marshal positions that have existing statutes that expressly authorize the designation of officers to perform the functions and duties of these offices temporarily outside the Vacancies Reform Act. For another 15 notifications, our database lacked a date necessary for computing the timeliness of

submissions, and we excluded them from our analysis because time did not permit us to track down the missing dates. We kept in our analysis two notifications where GAO was notified before the actual event. For purposes of our analysis, we assigned zero as the number of days between the start of the two events and the form-received dates.

In analyzing timeliness on an agency-by-agency basis (enc. II), we noted that the number of events reported on the tracking system sometimes differed from the number of events some of the 11 agencies reported to us individually. For example, the tracking system contained information on eight acting officials at the Department of the Interior. However, that department reported six acting officials to us. We have not yet reconciled these differences, but will do so as we continue our work.

To determine whether vacancies were filled for longer than 210 days by acting officials, we used data from GAO's Executive Vacancies Act Tracking System and information that agencies submitted for this review. GAO's Executive Vacancies Act Tracking System is programmed to count 210 days from the dates vacancies occur, as reported by the respective agencies. The tracking system also is programmed to make adjustments provided for by the Vacancies Reform Act, such as suspending the 210-day count if a vacancy occurs during the adjournment of Congress or if a nomination has been sent to the Senate. We obtained tracking system information on how long acting officials filled PAS positions that had become vacant before as well as since November 21, 1998. The 210-day limit is the only provision of the Vacancies Reform Act that also applied to vacancies that existed on November 20, 1998. We tracked how long an acting official occupied a vacant position through August 2000. We discussed with the GAO staff who operate the tracking system how the system works in general and what steps they took when 210 days was about to expire or expired.

As part of our data collection efforts for this review, agencies provided us with the dates when vacancies had occurred in PAS positions and the dates when acting officials began and ended their service in those vacancies. We compared the information agencies submitted with information from GAO's tracking system. In several instances, GAO was not previously notified of a vacancy and acting official. As a result, the tracking system could not monitor those vacancies to determine whether acting officials served longer than 210 days. In other instances, the tracking system contained information about the vacancies and acting officials, but the dates recorded did not match the dates the agencies provided for this review. Where dates were off by 1 day, we accepted both without further examination. For differences greater than 1 day, we first tried to resolve the difference by using data that we already had available. Where differences still remained, we asked the affected agencies to explain why there were differences, to tell us which dates were correct, and to explain why those dates were correct. With this corrected information, we determined, as appropriate, whether the 210 days had elapsed.

We did our work in Washington, D.C., from May 2000 to September 2000 in accordance with generally accepted government auditing standards.

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As agreed with your office, unless you publicly announce this letter's contents earlier, we plan no further distribution of it until 30 days after the date of this letter. We will then send copies to Senator Joseph I. Lieberman, Ranking Minority Member, Senate Committee on

Governmental Affairs; Senators Thad Cochran, Chairman, and Daniel K. Akaka, Ranking Minority Member, Subcommittee on International Security, Proliferation, and Federal Services, Senate Committee on Governmental Affairs; Senators George V. Voinovich, Chairman, and Richard J. Durbin, Ranking Minority Member, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Senate Committee on Governmental Affairs; Representatives Dan Burton, Chairman, and Henry A. Waxman, Ranking Minority Member, House Committee on Government Reform; Representatives Joe Scarborough, Chairman, and Elijah E. Cummings, Ranking Minority Member, Subcommittee on Civil Service, House Committee on Government Reform; Mr. Bob J. Nash, Assistant to the President and Director, Office of Presidential Personnel, The White House; the Honorable Janice R. Lachance, Director, Office of Personnel Management; and the Honorable Jacob Joseph Lew, Director, Office of Management and Budget. In addition, copies will be sent to other congressional committees, the heads of the agencies discussed in this letter, and other interested parties. We will also make copies available to others on request.

Major contributors to this letter are listed in enclosure III. Please contact Mr. Richard Caradine, Assistant Director, or me on (202) 512-8676 if you have any questions.

Sincerely yours,



Michael Brostek  
Associate Director, Federal Management  
and Workforce Issues

# PAS Positions For Which GAO Was Not Notified Of Vacancies or Acting Officials as of July 13, 2000

The Vacancies Reform Act requires agencies to notify GAO of vacancies and acting service in PAS positions covered by the act. As table I.1 shows, 6 of the 11 agencies covered by this report had not informed GAO of 8 vacancies and 12 acting officials as of July 13, 2000. In making this determination, we sent lists of PAS positions to the respective agencies, and asked them to tell us whether there had been a vacancy or acting service at any time since November 21, 1998. We then compared the information they provided with the information they had reported to GAO for the Vacancies Reform Act. The White House Office of Presidential Personnel provided the lists of positions that we sent to the agencies.

**Table I.1: Vacancies and Acting Service in PAS Positions Subject to the Vacancies Reform Act but not Reported to GAO as of July 13, 2000**

| Agency    | PAS position   | Not notified of vacancy     | Not notified of acting official   |
|-----------|--|-----------------------------|---|
|           |  | Date position became vacant | Date official began acting service  |
| Commerce  | Assistant Secretary and Director General, U.S. and Foreign Commercial Service <sup>a</sup> | 01/10/2000                  | Assistant Secretary and Director General, U.S. and Foreign Commercial Service <sup>a</sup> 01/10/2000 |
| DOD       | Under Secretary for Personnel and Readiness <sup>a</sup>                                   | 03/31/2000                  | Under Secretary for Personnel and Readiness <sup>a</sup> 04/01/2000                                   |
| Justice   | Administrator, Juvenile Justice and Delinquency Prevention                                 | 02/28/2000                  | Administrator, Juvenile Justice and Delinquency Prevention 03/01/2000                                 |
|           | Associate Attorney General <sup>b</sup>  | 10/28/1999                  | Associate Attorney General <sup>b</sup> 10/29/1999  |
|           | Director, National Institute of Justice <sup>b</sup>                                       | 04/21/2000                  | Director, National Institute of Justice <sup>b</sup> 04/21/2000                                       |
|           | Deputy Administrator, Drug Enforcement Administration <sup>b</sup>                         | 06/02/2000                  |   |
|           | Assistant Attorney General, Office of Justice Programs <sup>b</sup>                        | 02/25/2000                  | Assistant Attorney General, Office of Justice Programs <sup>b</sup> 02/26/2000                        |
|           | Inspector General <sup>b</sup>   | 08/15/1999                  | Inspector General <sup>b</sup> 08/16/1999   |
| Education |  |                             | Under Secretary <sup>b</sup> 03/13/2000   |
| Treasury  |  |                             | Assistant Secretary, Financial Institutions <sup>b</sup> 07/16/1999                                   |
|           |  |                             | Assistant Secretary, Public Affairs <sup>b</sup> 08/11/1999   |
|           |  |                             | Director of the Mint 03/27/2000   |
| EPA       |  |                             | Assistant Administrator, Environmental Information 12/02/1999   |



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**Enclosure I**  
**PAS Positions For Which GAO Was Not Notified Of Vacancies or Acting Officials as of July 13, 2000**

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<sup>a</sup>DOD and Commerce said that a report had already been submitted to GAO but provided us with another copy. However, GAO has no record of receiving the original reports.

<sup>b</sup>GAO received notification after July 13, 2000.

Source: Information provided by the respective agencies and from GAO's Executive Vacancies Act Tracking System.

# Timeliness of Vacancies Reform Act Notifications by Agency

Between November 21, 1998, and July 13, 2000, GAO received notice of 75 PAS-position vacancies subject to the Vacancies Reform Act's reporting requirements from 18 agencies and, related to those vacancies, 62 acting officials<sup>1</sup>. These numbers do not include the 8 vacancies and 12 acting officials we identified through this review as not having been previously reported to GAO as required by the Vacancies Reform Act. Over the same period, the administration also notified GAO of 40 nominations to the Senate, related to those 75 vacancies. Table II.1 shows the mean and median number of days the administration took to notify GAO of the 75 vacancies and the 62 acting officials. Table II.2 provides the mean and median number of days that nomination notices took to reach GAO.

**Table II.1: Mean and Median Number of Days Agencies Took to Notify GAO of PAS Vacancies and Acting Officials From November 21, 1998, Through July 13, 2000**

| Agency            | Vacancy notices |      |        | Acting official notices |      |        |
|-------------------|-----------------|------|--------|-------------------------|------|--------|
|                   | Number          | Mean | Median | Number                  | Mean | Median |
| Agriculture       | 1               | 19   | 19     | 1                       | 19   | 19     |
| Commerce          | 7               | 57   | 10     | 6                       | 64   | 10     |
| DOD               | 5               | 41   | 7      | 3                       | 22   | 6      |
| Education         | 5               | 49   | 19     | 3                       | 42   | 7      |
| EEOC <sup>a</sup> | 1               | 33   | 33     | 1                       | 32   | 32     |
| Energy            | 2               | 52   | 52     | 2                       | 52   | 52     |
| EPA               | 3               | 135  | 75     | 2                       | 167  | 167    |
| HHS               | 2               | 18   | 18     | 2                       | 18   | 18     |
| HUD <sup>b</sup>  | 1               | 145  | 145    | 0                       | 0    | 0      |
| Interior          | 5               | 46   | 27     | 8                       | 31   | 15     |
| AID <sup>c</sup>  | 5               | 113  | 105    | 5                       | 106  | 91     |
| Justice           | 4               | 87   | 65     | 4                       | 87   | 64     |
| Labor             | 5               | 28   | 32     | 5                       | 26   | 30     |
| EOP <sup>d</sup>  | 4               | 48   | 14     | 4                       | 26   | 27     |
| State             | 4               | 39   | 41     | 4                       | 112  | 50     |
| DOT               | 6               | 19   | 15     | 6                       | 18   | 14     |
| Treasury          | 14              | 56   | 34     | 5                       | 23   | 22     |
| VA                | 1               | 35   | 35     | 1                       | 34   | 34     |

<sup>a</sup>EEOC is Equal Employment Opportunity Commission.

<sup>b</sup>HUD is Department of Housing and Urban Development.

<sup>c</sup>AID is Agency for International Development.

<sup>d</sup>Executive Office of the President

Source: GAO's Executive Vacancies Act Tracking System.

<sup>1</sup> As the Scope and Methodology section of this report explains, we screened out certain notifications before arriving at these numbers.

**Enclosure II**  
**Timeliness of Vacancies Reform Act Notifications by Agency**

**Table II.2: Mean and Median Number of Days Agencies Took to Notify GAO of PAS Nominations to the Senate**

| <b>Agency</b> | <b>Nomination notices</b> |             |               |
|---------------|---------------------------|-------------|---------------|
|               | <b>Number</b>             | <b>Mean</b> | <b>Median</b> |
| Agriculture   | 1                         | 97          | 97            |
| Commerce      | 5                         | 30          | 17            |
| DOD           | 3                         | 16          | 16            |
| Education     | 3                         | 26          | 27            |
| EEOC          | 1                         | 32          | 32            |
| Energy        | 1                         | 115         | 115           |
| EPA           | 0                         | 0           | 0             |
| HHS           | 0                         | 0           | 0             |
| HUD           | 0                         | 0           | 0             |
| Interior      | 3                         | 17          | 12            |
| AID           | 3                         | 83          | 97            |
| Justice       | 2                         | 36          | 36            |
| Labor         | 3                         | 25          | 21            |
| EOP           | 2                         | 22          | 22            |
| State         | 1                         | 256         | 256           |
| DOT           | 4                         | 7           | 7             |
| Treasury      | 8                         | 88          | 51            |
| VA            | 0                         | 0           | 0             |

Source: GAO's Executive Vacancies Act Tracking System.

# GAO Contacts and Staff Acknowledgments

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## GAO Contacts

Michael Brostek or Richard W. Caradine (202)512-8676

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## Acknowledgments

In addition to the individuals named above, Terry L. Draver, H. John Ripper, Marlene M. Zacharias, Domingo D. Nieves, Janet C. Dolen, Randall L. Byle, V. Bruce Goddard, Alan N. Belkin, and Anthony Assia made key contributions to this report.

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