



441 G St. N.W.
Washington, DC 20548

B-326794

November 25, 2015

The President
The White House

Subject: *Violation of the 210-day Limit Imposed by the Federal Vacancies Reform Act of 1998—Department of Health and Human Services, Office of the Assistant Secretary for Health*

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 1998¹ (herein “the Vacancies Reform Act” or “the Act”) at the Department of Health and Human Services (HHS) with respect to the Assistant Secretary for Health position. The Assistant Secretary for Health is a Presidential appointment subject to Senate confirmation,² and thus is subject to the Vacancies Reform Act. 5 U.S.C. § 3345(a). Specifically, we are reporting that the service of Dr. Karen Bollinger DeSalvo as Acting Assistant Secretary for Health from February 28, 2015, until March 26, 2015, was in violation of the Act. As there is no current violation, we believe no further action on this issue is necessary at this time. Nonetheless, we will continue to monitor this vacancy until the position is filled.

The Vacancies Reform Act establishes requirements for temporarily authorizing an acting officer to perform the functions and duties of certain vacant positions that require Presidential appointment and Senate confirmation. It generally limits the period of time that such a position may be filled with an acting officer to 210 days. 5 U.S.C. § 3346(a)(1). After expiration of any acting officer’s allowed period of service the position is to remain vacant and any non-delegable function or duty of that position can only be performed by the head of the agency.³ 5 U.S.C. § 3348(b). Section 3349(b) requires the Comptroller General, upon a determination that an acting officer is serving longer than the 210-day period, to report such findings to Congress, the President, and the Office of Personnel Management.

As required by the Vacancies Act, HHS reported to GAO that a vacancy in the position of Assistant Secretary for Health, HHS, occurred on August 1, 2014. HHS further reported that Dr. Wanda Jones began serving as Acting Assistant Secretary for Health the next day. Prior to

¹ Pub. L. No. 105-277, Div. C, Title I (Oct. 21, 1998), as amended, 5 U.S.C. §§ 3345-3349d.

² The Assistant Secretary for Health is one of the Assistant Secretary positions subject to the requirements for a Presidential appointment and Senate confirmation in accordance with 42 U.S.C. § 3501a, and section 2 of the Reorganization Plan Number 1 of 1953 (67 Stat. 631), see 42 U.S.C. § 3501 note.

³ The term “function or duty” in the Act means any function or duty of the office that is established by statute or regulation, and is required by statute or regulation to be performed by the applicable officer (and only that officer). 5 U.S.C. § 3348(a)(2).

that date, Dr. Jones had been the Principal Deputy Assistant Secretary for Health.⁴ HHS reported that Dr. Jones' tenure as Acting Assistant Secretary for Health ended on October 21, 2014, and that Dr. DeSalvo was directed by the President to serve as Acting Assistant Secretary for Health on October 22, 2014. Prior to that date, Dr. DeSalvo held the position of National Coordinator for Health Information Technology at HHS.⁵ According to HHS, Dr. DeSalvo ceased to serve as Acting Assistant Secretary on March 26, 2015. On May 7, 2015, the President nominated Dr. DeSalvo for the position of Assistant Secretary for Health.

The Vacancies Reform Act generally limits the service of acting officials to 210 days from the date of the vacancy. 5 U.S.C. § 3346. In this instance, the 210-day limit on the period of acting service ended on February 27, 2015. Therefore, Dr. DeSalvo's service as Acting Assistant Secretary from February 28, 2015, until she ceased her acting service on March 26, 2015, was in violation of the time limitation in the Act.

The Act also contains a spring-back provision that allows an acting official to resume performing the duties of the office once a nomination is submitted to the Senate for the period that such nomination is pending in the Senate. 5 U.S.C. § 3346(a)(2). Thus, Dr. DeSalvo was permitted to resume her service as Acting Assistant Secretary as of May 7, 2015, when her nomination for this position was submitted to the Senate.

The Vacancies Reform Act contains an enforcement provision, whereby any action taken in performing a non-delegable function or duty of the vacant position by an acting officer serving in violation of the Vacancies Reform Act shall have no force or effect and may not be ratified.⁶ 5 U.S.C. § 3348(d). In response to our inquiry, HHS reported that no functions and duties within the meaning of section 3348(a)(2) of the Act were undertaken by Dr. DeSalvo after February 27, 2015, and before her nomination.⁷ Accordingly, we have no basis upon which to conclude that any actions performed by Dr. DeSalvo must be nullified or viewed as having no force or effect.

In accordance with the requirements of the Vacancies Reform Act, we are 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 Government Reform, the Senate and House Committees on Appropriations, the Senate

⁴ Dr. Jones' designation as Acting Assistant Secretary for Health is in accordance with the Vacancies Reform Act, specifically 5 U.S.C. § 3345(a)(1), which permits the first assistant to the vacant position to serve as the acting officer.

⁵ Due to Dr. DeSalvo's tenure at HHS as National Coordinator for Health Information Technology, it appears she was eligible to serve as Acting Assistant Secretary for Health under the requirements of 5 U.S.C. § 3345(a)(3), which permits the President to designate a senior-level employee who has served in the agency for at least 90 days during the year preceding the vacancy. Dr. DeSalvo continues to serve as the National Coordinator.

⁶ As discussed above, generally when a position is vacant and the applicable periods of temporary service have expired, no one but the head of the agency may perform any of the non-delegable functions or duties of the vacant position. 5 U.S.C. § 3348(b)(2).

⁷ Email from Deputy General Counsel, HHS, to Assistant General Counsel for Strategic Issues, GAO (April 22, 2015). Based on information reported to us by HHS, we began a review of whether Dr. DeSalvo's service as Acting Assistant Secretary for Health was in accordance with the Vacancies Act. As is our practice, we solicited the views and comments of HHS, see GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064P (Washington, D.C.: Sept. 2006), available at <http://www.gao.gov/products/GAO-06-1064SP>, and we received its response by letter dated April 10, 2015. The letter was signed by William B. Schultz, General Counsel, Department of Health and Human Services. We also received a follow-up correction by email on April 22, 2015. That email was sent by Jeffrey Davis, Deputy General Counsel, Department of Health and Human Services. Finally, we received an additional response from Mr. Davis by email to a follow-up inquiry on June 8, 2015.

Committee on Health, Education, Labor, and Pensions, the House Committee on Energy and Commerce, and the Director of the Office of Personnel Management. We are also sending a copy of this letter to the General Counsel of HHS.

If you have any questions regarding this matter, please call me on 202-512-5400, or Managing Associate General Counsel Robert J. Cramer on 202-512-7227.

Sincerely yours,

A handwritten signature in black ink, appearing to read "S. Poling". The signature is written in a cursive, flowing style.

Susan A. Poling
General Counsel