



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

B-331540

January 27, 2020

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998:
Inspector General, Export-Import Bank of the United States*

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 “Act”) at the Export-Import Bank of the United States (Bank) with respect to the Inspector General position. Specifically, we are reporting that the service of Jennifer Fain who used the title of Acting Inspector General from August 3, 2019, to October 14, 2019, was in violation of the Act. However, because Ms. Fain is permitted to use the acting title at this time, there is no continuing violation.

The Vacancies Reform 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). In the year of a transitional Presidential inauguration, the Act permits an acting official to serve for 300 days after the vacancy occurs with respect to any vacancy that exists during the 60-day period beginning on the transitional inauguration date. 5 U.S.C. § 3349a(b). Additionally, acting service is also permissible during the pendency of a first or second nomination and for up to 210 days after the date that a first or second nomination is rejected, withdrawn, or returned by the Senate. 5 U.S.C. § 3346. Under the provisions of section 3349(b), the Comptroller General is required, upon a determination that an acting official has served longer than the allowable period of service, to report this finding to Congress, the President, and the Office of Personnel Management.

Agencies are required to report to our Office when a vacancy occurs in a PAS position, when an acting official has been designated, when a nomination to the PAS position occurs, or when a nomination has been rejected, withdrawn, or returned. 5 U.S.C. § 3349(a). The Bank has reported to us that a vacancy in the position of Inspector General existed on January 20, 2017, a transitional inauguration date. Prior to the expiration of the 300-day period, a nomination was submitted to the Senate on September 5, 2017, and remained pending before the Senate until it was returned to the President on January 4, 2019. The Bank further reported to us that Ms. Fain, who had been serving as the Deputy Inspector General, was designated Acting Inspector General on July 7, 2019, and that a second nomination was submitted for the position on October 15, 2019. When we inquired about a potential violation of the permissible period of

¹ Pub. L. No. 105-277, div. C, title I, 112 Stat. 2681-611 (Oct. 21, 1998), as amended, 5 U.S.C. §§ 3345–3349d.

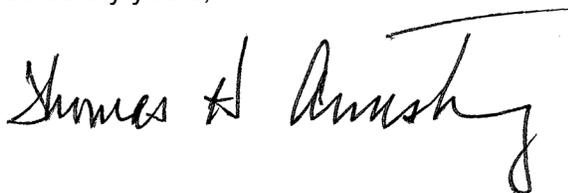
acting service based on the information reported,² the Bank confirmed that Ms. Fain had been using the acting title continuously since her designation.³

In accordance with the Vacancies Reform Act, the 210-day period of permissible acting service triggered by the return of the first nomination by the Senate ended on August 2, 2019. Thus, the position of Inspector General should have been vacant beginning on August 3, 2019. However, as the Bank confirmed, Ms. Fain was still using the acting title after August 2, 2019.⁴ We have previously determined that using the acting title of a position during the period in which the position should be vacant violates the time limitations in the Vacancies Reform Act.⁵ Here, Ms. Fain was not authorized to continue serving using the title of Acting Inspector General from August 3, 2019, to October 14, 2019. Once the second nomination was submitted to the Senate on October 15, 2019, however, Ms. Fain was authorized to resume using the acting title.⁶

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 Reform; the Senate and House Committees on Appropriations; the Senate Committee on Banking, Housing, and Urban Affairs; the House Committee on Financial Services; 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 Janet Temko-Blinder, Assistant General Counsel for Strategic Issues, at 202-512-7104.

Sincerely yours,

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a horizontal line above the name.

Thomas H. Armstrong
General Counsel

² Letter from Deputy Assistant General Counsel for Strategic Issues, GAO, to Senior Vice President and General Counsel, Export-Import Bank of the United States, Nov. 12, 2019.

³ Email from Counsel, Office of Inspector General, Export-Import Bank of the United States, to Deputy Assistant General Counsel for Strategic Issues, Nov. 14, 2019.

⁴ *Id.*

⁵ See, e.g., B-318244, June 18, 2014, at 5-6; B-287720, May 18, 2001, at 3.

⁶ Ms. Fain is currently using the title of Acting Inspector General. She is permitted to do so because the nomination of Peter Coniglio to serve as Inspector General is currently pending before the Senate.