



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

B-334565

February 8, 2023

The President  
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Assistant Administrator of the Bureau for Asia, U.S. Agency for International Development*

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 1998 (Vacancies Act),<sup>1</sup> at the United States Agency for International Development (USAID) with respect to the Assistant Administrator of the Bureau for Asia (Assistant Administrator) position. Specifically, we are reporting that the service of Karen Freeman, from November 16, 2021, through March 6, 2022, Craig Hart, from March 6, 2022, through June 22, 2022, and Ann Marie Yastishock, from June 22, 2022, through August 8, 2022, as Acting Assistant Administrator was in violation of the Act.<sup>2</sup> Because no one is currently using the acting title for this position, there is no continuing violation.

While the inauguration of a new President resets and extends the 210-day acting service period for existing vacant positions, the Vacancies Act does not authorize additional acting service for the pendency of a new President's first or second

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<sup>1</sup> 5 U.S.C. §§ 3345–3349d.

<sup>2</sup> We contacted USAID to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USAID (Aug. 31, 2022); Email from Staff Attorney, GAO, to Bureau for Legislative and Public Affairs, USAID (Oct. 20, 2022). USAID responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from General Counsel, USAID, to Assistant General Counsel for Appropriations Law, GAO (Sept. 29, 2022) (USAID Letter); Letter from General Counsel, USAID, to Staff Attorney, GAO (Nov. 30, 2022) (USAID Non-Delegable Functions and Duties Response).

nomination for a vacant position where a former President has already made two or more unsuccessful nominations.<sup>3</sup>

### Requirements of the Vacancies Act

The Vacancies 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 positions). The Act identifies three categories of persons who may temporarily perform the functions and duties of a vacant PAS position.<sup>4</sup> The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories.<sup>5</sup> The President may designate as acting officer either: (1) an individual serving in another PAS position, or (2) a senior agency officer or employee who has served for a minimum period of time prior to the vacancy.<sup>6</sup>

If no nomination has been submitted for the vacant position, the Vacancies Act generally limits the period of acting service to 210 days beginning on the date the vacancy occurs.<sup>7</sup> But when a vacancy exists during the 60-day period beginning on the date of a transitional inauguration day, the 210-day period is extended by 90 days, allowing for 300 days of acting service beginning on the transitional inauguration day or the date the vacancy occurs, whichever is later.<sup>8</sup> If a nomination has been submitted, acting service is permitted during the pendency of a first or second nomination and, if the nominee is not confirmed, for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned.<sup>9</sup>

After the expiration of the period of permissible acting service, the position must remain vacant and only the head of the agency may perform the functions or duties of the position.<sup>10</sup> The Comptroller General is required, upon a determination that an

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<sup>3</sup> See B-333853, June 28, 2022.

<sup>4</sup> 5 U.S.C. § 3345.

<sup>5</sup> *Id.* § 3345(a)(1).

<sup>6</sup> *Id.* §§ 3345(a)(2)–(3).

<sup>7</sup> *Id.* § 3346(a)(1).

<sup>8</sup> *Id.* § 3349a(b).

<sup>9</sup> *Id.* §§ 3346(a)(2), (b).

<sup>10</sup> *Id.* § 3348(b).

acting official has served longer than the allowable period, to report such findings to Congress, the President, and the Office of Personnel Management.<sup>11</sup>

## BACKGROUND

USAID reported that the Assistant Administrator position became vacant on January 17, 2017.<sup>12</sup> President Trump submitted two nominations to the position during his term, but both were returned by the Senate.<sup>13</sup> Following President Biden's inauguration, he nominated Amy Searight to the position on August 2, 2021, and this nomination was returned on January 3, 2022.<sup>14</sup> On June 22, 2022, President Biden nominated Michael Schiffer to the position, and he was confirmed on September 15, 2022.<sup>15</sup>

According to USAID, between January 17, 2021, and March 6, 2022, Karen Freeman served as Acting Assistant Administrator due to her service as the senior deputy assistant administrator, which qualifies as the first assistant to the Assistant Administrator position.<sup>16</sup> Craig Hart replaced Karen Freeman on March 6, 2022, and

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<sup>11</sup> *Id.* § 3349(b).

<sup>12</sup> USAID Letter, at 1.

<sup>13</sup> President Trump nominated Mina Chang to the position on September 13, 2018. Library of Congress, *PN2528 — Mina Chang — United States Agency for International Development*, available at <https://www.congress.gov/nomination/115th-congress/2528> (last visited Feb. 1, 2023). This nomination was returned on January 3, 2019. *Id.* President Trump then nominated Sutapa Ghosh Stricklett to the position on July 21, 2020. Library of Congress, *PN2102 — Sutapa Ghosh Stricklett — United States Agency for International Development*, available at <https://www.congress.gov/nomination/116th-congress/2102> (last visited Feb. 1, 2023). This nomination was returned on January 3, 2021. *Id.*

<sup>14</sup> Library of Congress, *PN954 — Amy Elizabeth Searight — United States Agency for International Development*, available at <https://www.congress.gov/nomination/117th-congress/954> (last visited Feb. 1, 2023). Only the first two nominations to the vacant position affect the acting service period. See 5 U.S.C. § 3346(a)(2), (b); B-333853.

<sup>15</sup> Library of Congress, *PN2271 — Rolfe Michael Schiffer — United States Agency for International Development*, available at <https://www.congress.gov/nomination/117th-congress/2271> (last visited Feb. 1, 2023).

<sup>16</sup> According to USAID, agency regulations, codified within its Automated Directives System (ADS), state that “the first assistant for an [Assistant Administrator] is the senior deputy assistant administrator.” USAID, *ADS Chapter 103, Delegations of Authority*, 103.3.1.2.b, (Sept. 18, 2017), available at <https://2012->

served as Acting Assistant Administrator through June 22, 2022.<sup>17</sup> Ann Marie Yastishock replaced Craig Hart on June 22, 2022, and served as Acting Assistant Administrator through August 8, 2022.<sup>18</sup> According to USAID, it advised Ms. Yastishock to cease using the acting title when it learned on or about August 8, 2022, of GAO's conclusion that, with respect to positions that remain vacant across Presidential administrations, each nomination made will count toward the total number of nominations for the position for purposes of calculating the time limitations in section 3346.<sup>19</sup>

## DISCUSSION

### Time Limitations on Acting Service

Because the Assistant Administrator position was vacant on the most recent transitional inauguration day, January 20, 2021, the Vacancies Act authorized 300 days of acting service beginning on that day,<sup>20</sup> regardless of the fact that previous periods of permissible acting service had expired prior to the inauguration.<sup>21</sup> This acting service period ended on November 15, 2021.<sup>22</sup>

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[2017.usaid.gov/sites/default/files/documents/1868/103\\_0.pdf](https://2017.usaid.gov/sites/default/files/documents/1868/103_0.pdf); USAID Letter, at 2. See also 5 U.S.C. § 3345(a)(1).

<sup>17</sup> USAID reported that Craig Hart served as Acting Assistant Administrator by virtue of holding the Senior Deputy Assistant Administrator position. *Id.*

<sup>18</sup> USAID reported that Ann Marie Yastishock served as Acting Assistant Administrator by virtue of holding the Senior Deputy Assistant Administrator position. *Id.*

<sup>19</sup> USAID Letter, at 3–4. See also B-333853.

<sup>20</sup> Section 3349a resets the 210-day acting service period under section 3346 and extends it by 90 days, allowing for 300 days of acting service beginning on inauguration day for vacancies existing on that day. See 5 U.S.C. § 3349a(b)(1).

<sup>21</sup> See B-333853. Prior to January 20, 2020, acting service was permitted during the following periods: for 300 days beginning on January 20, 2017, which was a transitional inauguration day; during the pendency of the first nomination, submitted on September 13, 2018, and for 210 days after its return on January 3, 2019; and during the pendency of the second nomination, submitted on July 21, 2020, and for 210 days after its return on January 3, 2021. See 5 U.S.C. §§ 3346(a)–(b); 3349a(b)(1). The 210-day period following the return of the second nomination was superseded by the 300-day period created as a result of the transitional inauguration day on January 20, 2021. See *id.* § 3349a(b)(1).

<sup>22</sup> See B-333853; B-333857, Apr. 18, 2022. The 210-day period was deemed to begin 90 days after inauguration day, April 20, 2021, and therefore concluded on November 15, 2021. 5 U.S.C. § 3349a(b)(1).

The Vacancies Act also permits acting service during the pendency of “a first or second nomination” and, if the nominee is not confirmed, for 210 days after those nominations are rejected, withdrawn, or returned.<sup>23</sup> We have concluded that the phrase “a first or second nomination” refers to the first two nominations for the vacant position and does not include a third or successive nomination, even if those later nominations represent the first or second nomination submitted by a newly inaugurated President.<sup>24</sup> In other words, while the inauguration of a new President authorizes an additional 300 days of acting service for existing vacant positions, it does not “reset” the nominations for purposes of the nomination-related acting service periods.<sup>25</sup>

In this case, when Ms. Freeman assumed the role of Acting Assistant Administrator on January 17, 2021, there had already been two nominations to the position. Following the return of the second nomination on January 3, 2021, an eligible official was permitted to act in this position for an additional 300 days from the transitional inauguration day.<sup>26</sup> As noted above, the period of permissible acting service for the Assistant Administrator position ended on November 15, 2021. Therefore, the service of Karen Freeman, from November 16, 2021, through March 6, 2022, Craig Hart, from March 6, 2022, through June 22, 2022, and Ann Marie Yastishock, from June 22, 2022, through August 8, 2022, as Acting Assistant Administrator was in violation of the Act.

#### Validity of Actions Taken on and after November 16, 2021

The Vacancies Act includes an enforcement mechanism that restricts the performance of certain functions and duties of a vacant position when no “officer or employee is performing the functions and duties in accordance with” the Act.<sup>27</sup> In that situation, “the office shall remain vacant” and only the head of the agency may perform the functions or duties of the position.<sup>28</sup> An action taken by any other person “in the performance of any function or duty . . . shall have no force or effect” and “may not be ratified.”<sup>29</sup> The Vacancies Act defines “function or duty” as any function or duty of the position that is established by statute or regulation (including any regulation in effect at any time during the 180-day period preceding the date of

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<sup>23</sup> 5 U.S.C. §§ 3346(a)(2), (b).

<sup>24</sup> See B-333853.

<sup>25</sup> *Id.*

<sup>26</sup> See 5 U.S.C. §§ 3346(b)(2)(B), 3349a(b).

<sup>27</sup> *Id.* § 3348(b).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 3348(d).

the vacancy) and required by statute or regulation to be performed by the applicable officer (and only that officer).<sup>30</sup> Furthermore, officials may be authorized to take certain actions in their official, rather than acting, positions.

In response to our inquiry, USAID reports that there are five non-delegable functions that an Acting Assistant Administrator could not perform.<sup>31</sup> According to USAID, it has not identified any instances in which a non-delegable authority was exercised by an Acting Assistant Administrator between November 16, 2021, and August 8, 2022.<sup>32</sup> Based on USAID's response, we have no basis upon which to conclude that any actions taken by Ms. Freeman, Mr. Hart, or Ms. Yastishock on or after November 16, 2021, must be nullified or viewed as having no force or effect.

#### USAID Response and OLC Opinion on Nominations by a New President

In its response to us, USAID noted a 2022 opinion issued by the Department of Justice, Office of Legal Counsel (OLC) asserting that upon the inauguration of a new President, section 3349a deems preexisting vacancies to have newly arisen after the inauguration and resets the entire timing sequence for acting service for those positions, including the nominations that trigger certain acting service periods.<sup>33</sup>

In its opinion, OLC acknowledges that section 3349a does not expressly address the effect of the provision on prior nominations and therefore might be understood as not resetting any previously exhausted nomination-related periods, but contends that the structure and relationship of the various timing provisions in the Vacancies Act and the Act's legislative history support its conclusions.<sup>34</sup>

First, OLC asserts that in section 3349a, "the 210-day period under section 3346 or 3348" refers to the initial 210-day acting service period following a vacancy in section 3346(a)(1) and not the 210-day periods following the rejection, withdrawal, or

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<sup>30</sup> *Id.* § 3348(a)(2).

<sup>31</sup> USAID Non-Delegable Functions and Duties Response, at 1–2. According to USAID, these functions can be found in the USAID Acquisition Regulations, sections (1) 706.302-70; (2) 752.7009; (3) 722.170; (4) 752.7028; and (5) 752.7031. *Id.*

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 2–3; see *Federal Vacancies Reform Act's Application to a Vacancy for which Prior Presidents Submitted Multiple Nominations*, 46 Op. Off. Legal Counsel \_\_\_, slip op. (Oct. 21, 2022) (OLC Opinion), available at [https://www.justice.gov/d9/2022-11/2022-10-21\\_-\\_vra\\_multiple\\_nominations.pdf](https://www.justice.gov/d9/2022-11/2022-10-21_-_vra_multiple_nominations.pdf) (last visited Feb. 1, 2023).

<sup>34</sup> OLC Opinion, at 7–13.

return of a first or second nomination in section 3346(b).<sup>35</sup> OLC then contends that the provision must be read as resetting the nominations for purposes of the nomination-related periods because to read it otherwise would mean that not even the initial 210-day period would be reset, given that “section 3346’s authorization of acting service ceases after the final 210-day period following a second nomination.”<sup>36</sup> Finally, OLC asserts that the purpose of section 3349a and its legislative history support OLC’s interpretation.<sup>37</sup> Specifically, OLC maintains that section 3349a is intended to encourage a new President to submit nominations promptly and cites relevant legislative history stating this purpose, while acknowledging that the legislative history does not expressly address the effect of a prior President’s unsuccessful nominations.<sup>38</sup>

OLC’s interpretation does not comport with the text of section 3349a or section 3346. In B-333853, we concluded that section 3349a only expressly resets the initial 210-day period in section 3346(a)(1) and does not address nominations in any way, much less prescribe different treatment for nominations submitted on or after inauguration day. We made this determination, in part, because section 3349a does not modify the date of the vacancy, and merely “deem[s]” the initial 210-day period “to begin” on one of two specified dates instead of “the date the vacancy occurs” as provided in section 3346.<sup>39</sup> We also noted that the initial 210-day period in section 3346 is independent of the nomination-related periods and calculated separately.<sup>40</sup> Therefore, the exhaustion of the nomination-related periods does not, as OLC contends, prohibit additional acting service during the 210-day period under section 3346(a)(1) when reset by section 3349a.<sup>41</sup>

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<sup>35</sup> OLC Opinion, at 5–7; see 5 U.S.C. §§ 3346(b)(1), (2)(B). We discussed the ambiguity of this phrase in B-333853 and determined that, as a practical matter, the issue was not relevant for determining whether there was a time violation. B-333853, at 8 n.38. But we also acknowledged that section 3349a could refer to the initial 210-day period in section 3346(a)(1) and assumed as much in our analysis. *Id.* at 5, 6, 8 n.38, 9.

<sup>36</sup> OLC Opinion, at 7–8.

<sup>37</sup> See *id.* at 9–13.

<sup>38</sup> See *id.*

<sup>39</sup> See 5 U.S.C. §§ 3346(a)(1), 3349a(b); B-333853, at 7 n.34, 8 n.38; *cf.* 5 U.S.C. § 3349a(b)(2) (distinguishing between the date the 210-day period is deemed to begin and “the date on which the vacancy occurs” with respect to vacancies arising after the transitional inauguration day).

<sup>40</sup> B-333853, at 8; see 5 U.S.C. § 3346(a).

<sup>41</sup> OLC’s interpretation would also call into question the treatment of nominations submitted by either the previous or new President that are pending on the date the 210-day period begins under section 3349a. Such nominations would have been

Further, we do not view the statements cited by OLC regarding section 3349a's purpose, standing alone, as implicitly suggesting congressional intent to reset the nominations for long-vacant positions. Nothing in the legislative history suggests, as OLC asserts, that congressional concern about new Presidents filling long-vacant positions (including those for which prior unsuccessful nominations had been submitted) was an animating force behind the addition of section 3349a. Instead, Congress was concerned about the large number of vacancies that a new President would need to fill as a result of the transition ("essentially all [PAS] positions in the executive branch"), potentially requiring "additional time to nominate individuals to fill them."<sup>42</sup> The vast majority of such vacancies would be too recent for the previous President to have submitted a nomination.<sup>43</sup>

In B-333853, we recognized the same concerns that OLC raises regarding our interpretation of section 3349a, namely that past nominations may disadvantage a newly inaugurated President by limiting the acting service period in the new administration.<sup>44</sup> However, these concerns cannot override the plain meaning of the Vacancies Act's provisions.

## CONCLUSION

While the inauguration of a new President resets and extends the 210-day acting service period under section 3346 for existing vacant positions, it does not "reset" the nominations for purposes of that section. Therefore, the service of Karen Freeman, from November 16, 2021, through March 6, 2022, Craig Hart, from March 6, 2022, through June 22, 2022, and Ann Marie Yastishock, from June 22, 2022, through August 8, 2022, as Acting Assistant Administrator was in violation of the Act.

In accordance with the requirements of the Vacancies Act, we are also sending letters reporting this violation to the chairs and ranking members of the Senate

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submitted prior to the reset 210-day period and therefore out of sequence under OLC's view of the structure of the various timing provisions. OLC implicitly acknowledges the issue but declines to address how such nominations would be treated. OLC Opinion, at 13 n.8.

<sup>42</sup> S. Rep. No. 105-250, at 21 (1998).

<sup>43</sup> After receiving the referral that led to our decision in B-333853, we examined in May 2022 how many vacant PAS positions subject to the Vacancies Act had nominations submitted by a prior President. Of the hundreds of covered positions, we identified less than 40 vacant positions at the time for which at least one nomination had been submitted by a prior President; less than 25 of those were positions for which at least two nominations had been submitted by a prior President.

<sup>44</sup> B-333853, at 8.



Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Accountability, the Senate and House Committees on Appropriations, the Senate Committee on Foreign Relations, the House Foreign Affairs Committee, 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 Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

Sincerely yours,

A handwritten signature in cursive script that reads "Edda Emmanuelle Perez".

Edda Emmanuelli Perez  
General Counsel