



B-333857

April 18, 2022

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Administrator, Office of Information and Regulatory Affairs*

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),¹ at the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), with respect to the Administrator position. Specifically, we are reporting that the service of Dr. Dominic J. Mancini as Acting Administrator from November 16, 2021, through December 7, 2021, was in violation of the Act. Because no one is currently using the acting title for this position, there is no continuing violation.²

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require

¹ 5 U.S.C. §§ 3345–3349d.

² We contacted OMB to seek factual information and its legal views on the matter. Email from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, OMB (Dec. 7, 2021); Letter from Managing Associate General Counsel for Appropriations Law, GAO, to General Counsel, OMB (Dec. 22, 2021); Email from Assistant General Counsel for Appropriations Law, GAO, to Deputy General Counsel, OMB (Mar. 25, 2022). OMB responded with its explanation of pertinent facts, legal analysis, and supporting documents. OMB, *Responses to GAO's Questions Regarding B-333857* (Feb. 16, 2022) (OMB Responses); Memorandum from Acting Director, OMB, to Associate Administrator, OIRA, *Delegation of Authorities* (Oct. 18, 2021) (Block Delegation); Memorandum from Acting Director, OMB, to Deputy Administrator, OIRA, *Delegation of Authorities* (Jan. 31, 2022) (Mancini Delegation); Memorandum from Acting Director, OMB, to Deputy Administrator, OIRA, *Designation of First Assistant to the OIRA Administrator Under the Federal Vacancies Reform Act of 1998* (Feb. 14, 2022) (First Assistant Designation); Email from Deputy General Counsel, OMB, to Assistant General Counsel for Appropriations Law, GAO (Mar. 29, 2022) (OMB March 2022 Email).

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. 5 U.S.C. § 3345. The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories. 5 U.S.C. § 3345(a)(1). 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. 5 U.S.C. § 3345(a)(2)–(3).

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. 5 U.S.C. § 3346(a)(1). But when a vacancy exists during the 60-day period beginning on the date of a presidential transitional inauguration, 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. 5 U.S.C. § 3349a(b). 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. 5 U.S.C. § 3346(a)(2), (b). 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. 5 U.S.C. § 3348(b).³ 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, to report such findings to Congress, the President, and the Office of Personnel Management.

OMB reported that the position of OIRA Administrator became vacant on January 19, 2021,⁴ the day before a transitional presidential inauguration day, and, to date, no one has been nominated to the position.⁵ In accordance with the Vacancies Act, the permissible period for acting service ended on November 15,

³ 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 the vacancy) and required by statute or regulation to be performed by the applicable officer (and only that officer). 5 U.S.C. § 3348(a)(2).

⁴ Although OMB initially reported to GAO that the vacancy began on January 20, 2021, see GAO’s Executive Vacancy System, it clarified in its response that the vacancy began on January 19, 2021. OMB Responses, at 1.

⁵ OMB Responses, at 3.

2021. 5 U.S.C. § 3349a(b).⁶ At the time of the vacancy, Dr. Dominic J. Mancini was serving as Deputy Administrator, the first assistant to the Administrator position, and became Acting Administrator pursuant to the Vacancies Act on January 20, 2021.⁷ See 5 U.S.C. § 3345(a)(1).

On April 20, 2021, the President designated Sharon Block, Associate Administrator of OIRA, to perform the duties of the Administrator pursuant to section 3345(a)(3) of title 5.⁸ This provision permits the President to direct an officer or employee of the agency to perform the functions and duties of a vacant position if such officer or employee served in a position at the agency for at least 90 days during the 365 days preceding the vacancy. 5 U.S.C. § 3345(a)(3)(A). OMB later determined on or around October 12, 2021, that, because Ms. Block had not served in her position for the requisite period prior to the vacancy, she was ineligible to serve as Acting Administrator under section 3345(a)(3), and she ceased using the “acting” title on October 14, 2021.⁹ Because there was no valid presidential designation of an acting official under section 3345(a)(3), the default provision designating the first assistant as acting official continued to apply on and after April 20, 2021. See 5 U.S.C. § 3345(a)(1). Accordingly, Dr. Mancini was authorized to perform the

⁶ Because the vacancy existed on the transitional inauguration day, the 210-day period did not begin to run until 90 days after that date, April 20, 2021. See 5 U.S.C. § 3349a(b)(1).

⁷ GAO has previously determined that agency regulations or other documentation designating a first assistant position before a vacancy occurs are sufficient to establish that a position is the first assistant for purposes of the Vacancies Act. See B-332995, Aug. 2, 2021. OMB stated that the Deputy Administrator is the most senior career position reporting directly to the Administrator, and the agency has long recognized the position as the first assistant to the Administrator. OMB Responses, at 1. OMB further stated that Deputy Administrators have served as Acting Administrator at various points during the last four presidential administrations. *Id.*; see GAO’s Executive Vacancy System (reflecting OMB reports of Dr. Mancini serving as Acting Administrator during vacancies in the two previous administrations). OMB reported that despite this longstanding treatment, it was unable to locate documentation of the original designation of the position as the first assistant and therefore formally memorialized the designation on February 14, 2022. OMB Responses, at 1; First Assistant Designation. Although OMB was unable to provide such documentation in this case, we conclude that OMB’s longstanding practice of treating the Deputy Administrator as the first assistant to the OIRA Administrator, as evidenced by the Deputy Administrator’s service as Acting Administrator during previous vacancies, is sufficient to establish that the Deputy Administrator is the first assistant under the Vacancies Act.

⁸ OMB Responses, at 2.

⁹ OMB Responses, at 2; OMB March 2022 Email.

functions and duties of the Administrator through November 15, 2021, the last day of permissible acting service. See *id.*; 5 U.S.C. § 3349a(b). Beginning on November 16, 2021, only the head of the agency was authorized to perform those functions and duties. See 5 U.S.C. § 3348(b)(2).¹⁰

Although the period of permissible acting service ended on November 15, 2021, Dr. Mancini continued to be listed as Acting Administrator on notices of action issued by OIRA from November 16, 2021, through December 7, 2021, in response to agency information collection requests under the Paperwork Reduction Act of 1995 (PRA)^{11, 12} When we inquired about a potential violation of the time limitations on acting service, OMB stated that it has been longstanding OIRA practice for the name of either the Administrator or Deputy Administrator to appear on PRA notices of action, and Dr. Mancini was inadvertently listed as both “Acting Administrator” and “Deputy Administrator” after November 15, 2021.¹³ OMB stated that this was a clerical mistake, and Dr. Mancini’s title on these notices has since been modified.¹⁴

We have previously determined that an agency’s identification of an individual as an acting officer on official agency documents issued after the end of the period of permissible acting service constitutes a violation of the Vacancies Act’s time limitations. See B-328671, Mar. 3, 2017; B-321357, July 18, 2016. It is immaterial

¹⁰ The then-Acting Director of OMB delegated “the authority to perform the delegable duties of the Administrator of [OIRA]” to Ms. Block on October 18, 2021. Block Delegation. The Acting Director redelegated that authority to Dr. Mancini on January 31, 2022 (effective February 1, 2022). Mancini Delegation. The term “delegable” is sometimes used to refer to a function or duty that does not fall within the Vacancies Act definition and is therefore not subject to the Act’s restrictions. See B-321357, July 18, 2016; *cf.* 5 U.S.C. § 3348(a)(2), (b)(2), (d).

¹¹ 44 U.S.C. §§ 3501–3520.

¹² *E.g.*, OMB, *Notice of Office of Management and Budget Action*, ICR Ref. No. 202107-0651-001 (Nov. 16, 2021), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202107-0651-001 (last visited Mar. 15, 2022); OMB, *Notice of Office of Management and Budget Action*, ICR Ref. No. 202111-0579-011 (Nov. 30, 2021), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202111-0579-011 (last visited Mar. 15, 2022); OMB, *Notice of Office of Management and Budget Action*, ICR Ref. No. 202106-0579-011 (Dec. 7, 2021), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202106-0579-011 (last visited Mar. 15, 2022). We did not identify any agency documents, publications, or websites identifying Ms. Block as Acting Administrator after the period of permissible acting service.

¹³ OMB Responses, at 3.

¹⁴ *Id.*

whether the identification was due to clerical error. See, e.g., B-332618, Jan. 19, 2021 (finding a violation despite agency's response that identification of individual as acting officer on website and Twitter account was a mistake and was corrected upon receipt of GAO's inquiry); B-331539, Sept. 18, 2020 (finding a violation despite agency's response that identification of individual as acting officer on website was a mistake that had been corrected). Use of the acting title conveys to Congress, the public, and other government agencies that an official is authorized to perform all of the functions and duties of the vacant position. See 5 U.S.C. § 3348(b). It is therefore vital that officials cease using the acting title when the permissible period of acting service expires and they are no longer authorized to perform such functions and duties. See 5 U.S.C. § 3348(b), (d).

Here, we find that OMB held Dr. Mancini out to the public as Acting Administrator of OIRA after the period of permissible acting service by identifying him as Acting Administrator on PRA notices of action issued by OIRA and published on its website. Dr. Mancini's use of the Acting Administrator title from November 16, 2021, through December 7, 2021, was not authorized by the Vacancies Act and violated the Act's time limitations.

We also note here that Ms. Block's period of acting service from April 20, 2021 through October 13, 2021,¹⁵ was not authorized by the Vacancies Act. However, she ceased using the title upon a determination that she had not served in her position for the requisite period prior to the vacancy and did not use the title after the permissible period of acting service for the vacancy had expired. Therefore, while Ms. Block's acting service was not authorized, her use of the acting title did not violate the Act's time limitations.

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 Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Government Reform, the Senate and House Committees on Appropriations, the Senate and House Committees on the Budget, and the Director of the Office of Personnel Management.

¹⁵ OMB Responses, at 2; OMB March 2022 Email (stating that Ms. Block immediately ceased using the acting title on October 14, 2021, when she was notified she was not eligible to serve as Acting Administrator).

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 black ink that reads "Edda Emmanuelli Perez". The signature is written in a cursive style with a large initial "E" and a long, sweeping tail on the "z".

Edda Emmanuelli Perez
General Counsel