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United States General Accounting Office
Washington, DC 20548

February 23, 2001

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

Subject: Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions
Under the Federal Vacancies Reform Act of 1998

Dear Mr. Chairman:

The Federal Vacancies Reform Act of 1998 (Vacancies Reform Act), which took effect on November 21, 1998, provided new requirements for the temporary filling of certain vacant executive agency positions that require presidential appointment and Senate confirmation (PAS positions).¹ The Vacancies Reform Act is intended to create a clear process and a time limit for the temporary filling of those PAS positions. For example, it generally limits the period in which vacant PAS positions can be filled on a temporary basis to 210 days, with the 210 days beginning on the date the vacancy occurred. At the end of 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 during Presidential inaugural transitions or when a nomination is pending before Congress. It also provides specific criteria that must be met in order for individuals to temporarily fill vacant PAS positions. At your request, we are reviewing agencies' implementation of the Act. We provided you with an interim report on our work in a September 29, 2000, correspondence.²

As part of our work, you asked that we provide this letter describing (1) the criteria that must be met in order for someone to temporarily fill a vacant PAS position under the Act and (2) the types of documents that are relevant to showing that the criteria are met. We reviewed the statute and its legislative history to identify the eligibility criteria that must be met and used our experience in personnel matters to identify the

¹ The Act (5 U.S.C. §§ 3345-3349d.) excludes from its coverage certain specified officers such as any member of a board or commission that is composed of multiple members and governs an independent establishment or Government corporation. In addition, the Act recognizes that there are other mechanisms, such as specified statutes, that allow acting officials to fill vacant PAS positions on a temporary basis outside of the Vacancies Reform Act.

² *Implementation of the Federal Vacancies Reform Act of 1998* (GAO/GGD-00-210R, Sept. 29, 2000).

types of personnel records that would demonstrate adherence to the required criteria. We discussed both the eligibility criteria and the types of relevant documentation with officials from the White House Counsel's Office and Office of Presidential Personnel from the Clinton Administration and from the departments of Commerce, Defense, Interior, Labor, Transportation, and the Treasury.

The Act specifies the eligibility criteria that must be met in order for an individual to serve in an acting capacity. Eligibility can be based on (1) service as a first assistant to the former holder of the position; (2) service in another PAS position; (3) service as a senior agency official; or (4) service in a term limited PAS position for which the President has nominated the individual to another term without a break in service.

We discuss each of the four ways that an individual may be eligible to serve as an acting official and the eligibility criteria for each situation below. We also discuss the types of documentation that would verify an official's eligibility to serve in an acting capacity.³

Eligibility Based on Service as a First Assistant

The Vacancies Reform Act provides that the first assistant to the office of the officer who has left the position vacant (under specified circumstances) may temporarily perform the functions and duties of the PAS position in an acting capacity subject to the Act's time limitations. Although the Act does not define the term "first assistant," the legislative history indicates that first assistant positions may be designated by statute or regulation. Agencies have also designated first assistants in agency orders, agency directives, and position descriptions.

The Vacancies Reform Act also limits a first assistant's ability to act in a PAS position if the first assistant is also nominated to the same PAS position. If the President nominates the first assistant for the vacant position, the first assistant may continue to serve as the acting official for that position only if (1) the person served as first assistant for 90 days or more during the 365-day period prior to the vacancy, or (2) the position of the first assistant is itself a PAS position and the Senate approved the appointment of the first assistant to that position.

The following documents are relevant to showing whether a person may serve in an acting capacity because he or she was a first assistant.

- Copies of the statute, regulation, or other documentation that designates the individual's position as first assistant to the vacant position. The document(s) used to designate the position as the first assistant position should be dated, to verify that the position (and individual) was designated as first assistant prior to the occurrence of the vacancy.
- Standard Form(s) 50--Notification of Personnel Action. These forms, along with other documentation, are useful to demonstrate that an individual held the first

³ The suggested documents are not meant to be all-inclusive. Agencies may have other forms of documentation to demonstrate that eligibility criteria are met.

assistant position and the time period an individual served in the first assistant position. Thus, in cases where the first assistant is nominated for the office, the SF-50's would assist in showing whether the individual was first assistant for 90 days or more during the 365 days preceding the vacancy.

- If the position of first assistant is also a PAS position, thereby allowing the individual to be the nominee and to continue service as an acting official, documentation that the person was serving in a Presidentially appointed, Senate confirmed position.

Eligibility Based on Service in a Presidentially Appointed, Senate Confirmed Position

The Vacancies Reform Act provides that a PAS official may serve as an acting official in a vacant position at the direction of the President. The Act does not impose any limitations on which PAS officials the President may designate. There are no previous length of service requirements, and the designated PAS official does not need to be from the same agency as that in which the vacancy occurred.

In placing a PAS official in another PAS position in an acting capacity, the following documents are relevant to showing whether the PAS official meets the Act's requirements:

- Copies of documents showing the individual to be a PAS official. Such documents could include the White House commission or other evidence from the White House clerk's office showing that the individual was appointed to a PAS position, a statute designating the individual's position to be a PAS position, a Standard Form 50-Notification of Personnel Action showing the individual's position, and the *Congressional Record* showing the individual was confirmed for a PAS position.
- A copy of the President's designation of the PAS official to serve as the acting official in the vacant position.

Eligibility Based on Service as a Senior Agency Official

The President may designate a senior agency official to serve as the acting official for a vacant position. The Vacancies Reform Act places a number of limitations on which agency employees qualify to be designated as senior agency officials. First, the senior agency official must be from the same agency in which the vacancy occurs. Second, the senior agency official must have served within the agency for not less than 90 days during the 365 days preceding the vacancy. Third, the senior agency official must have served at the rate of pay of GS-15, step 1 level or above.

The following documents are relevant to showing whether a person may serve in an acting capacity as a senior agency official:

- Standard Form(s) 50--Notification of Personnel Action would demonstrate whether the senior agency official's rate of pay is at the GS-15, step 1 level or above, and whether the official served in the agency for 90 days or more at the minimum rate or higher during the 365 days preceding the vacancy.
- A copy of the President's designation of the senior agency official to serve in the vacant position in an acting capacity.

Eligibility Based on Reappointment to a Term-Limited Position

For PAS positions that have a limited term of service, the President may direct an official whose term is expiring to continue to serve in that position in an acting capacity. However, for such an official to qualify to serve in an acting status, the President must nominate the official for an additional term without a break in service.

Documents that would assist in showing that the above requirements are met include:

- Presidential appointment documents showing the individual had been appointed to the term-limited PAS position and the term of the appointment.
- The Presidential directive that the official whose term was expiring should continue to serve in that position in an acting capacity.
- The nomination by the President for reappointment and the date of the nomination. This would show whether the nomination for reappointment occurred without a break in service.
- Standard Form 50--Notification of Personnel Action. This would show that the official was serving in the position having a limited term of service without a break in service.

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As agreed with your office, we are sending copies of this letter to Senator Joseph I. Lieberman, Ranking Member, Senate Committee on Governmental Affairs; Senators Thad Cochran, Chairman, and Daniel K. Akaka, Ranking Member, Subcommittee on International Security, Proliferation, and Federal Services, Senate Committee on Governmental Affairs; Senators George V. Voinovich, Chairman, and Richard J. Durbin, Ranking 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 Danny Davis, Ranking Minority Member, Subcommittee on Civil Service and Agency Organization, House Committee on Government Reform; Mr. Timothy E. Flanigan, Deputy Counsel to the President; Mr. Clay S. Johnson, Director, Office of Presidential Personnel; Mr. Steven R. Cohen, Acting Director, Office of Personnel Management; and the Honorable Mitchell E. Daniels, Jr., Director,

Office of Management and Budget. In addition, we will send copies to other congressional committees, the heads of agencies discussed in this letter, and other interested parties. The letter will also be available on GAO's home page at <http://www.gao.gov>.

Please contact Mr. Richard Caradine, Assistant Director, or me on (202) 512-6806 if you have any questions.

Sincerely yours,

A handwritten signature in cursive script that reads "Carlotta Joyner". The signature is written in black ink and is positioned above the printed name and title.

Carlotta C. Joyner
Director, Strategic Issues