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United States Government Accountability Office
Washington, DC 20548

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August 19, 2004

The Honorable Susan M. Collins
Chairman
Committee on Governmental Affairs
United States Senate

Subject: *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998*

Dear Senator Collins:

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 at the Department of Education. As you know, the Vacancies Reform Act established new requirements for the temporary filling of vacant executive agency positions that require Presidential appointment and Senate confirmation. The Act generally limits the period of time that such a position may be filled with an acting official to 210 days.² Section 3349(b) of the Act requires the Comptroller General, upon a determination that an acting official is serving longer than the 210-day period and any applicable extensions, to report such finding to Congress, the President, and the Office of Personnel Management.

As required by the Vacancies Reform Act, the Department of Education reported to us that a vacancy in the position of Assistant Secretary for Elementary and Secondary Education began on January 31, 2003, when Assistant Secretary Susan Neuman resigned. The position of Assistant Secretary for Elementary and Secondary Education requires Presidential appointment and Senate confirmation, and thus is subject to the Vacancies Reform Act.³ The Department also reported to us that two officials, Eugene Hickok and Ronald J. Tomalis, served in an acting capacity until

¹ 5 U.S.C. §§ 3345-3349d.

² 5 U.S.C. § 3346.

³ 20 U.S.C. § 3412(b).

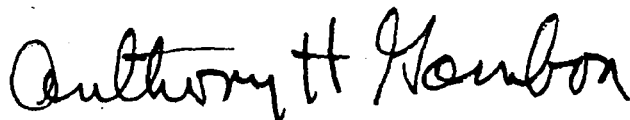
September 22, 2003, when the President nominated Raymond Simon to serve as Assistant Secretary for Elementary and Secondary Education.⁴

The Vacancies Reform Act generally limits the service of acting officials to 210 days from the date of the vacancy. In this instance, the 210-day period ended on August 29, 2003, but since the Senate was not in session on August 29, the Act extends the 210-day period to the day after the Senate next reconvenes, which was September 3, 2003.⁵ 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. Thus, Mr. Tomalis could resume his service as acting Assistant Secretary on September 22, 2003, when the President submitted Mr. Simon's nomination to the Senate.⁶ However, Mr. Tomalis' service as acting Assistant Secretary for Elementary and Secondary Education from September 3, 2003, until September 22, 2003, was in violation of the time limitation in the Vacancies Reform Act.

The Vacancies Reform Act contains an enforcement provision, which nullifies any action taken by an acting official who is serving in violation of the Act.⁷ However, the Department of Education reported to us that Mr. Tomalis did not undertake any agency actions, as defined by 5 U.S.C. § 551(13), nor did he perform any exclusive function or duty, as defined by 5 U.S.C. § 3348, during the period between September 3 and September 22, 2003.

In accordance with the requirements of the Vacancies Reform Act, we are sending identical letters to the House Committee on Government Reform, the House and Senate Appropriations Committees, the Senate Health, Education, Labor, and Pensions Committee, the House Education and the Workforce Committee, the President, and the Director of the Office of Personnel Management. If you should have any questions regarding this matter, please call me on 202-512-5400 or Susan A. Poling, Managing Associate General Counsel, on 202-512-2667.

Sincerely yours,



Anthony H. Gamboa
General Counsel

⁴ Mr. Hickok served as Acting Assistant Secretary from March 7, 2003, until July 24, 2003, when he was designated to serve as Acting Deputy Secretary of Education, at which time Mr. Tomalis was designated to serve as Acting Assistant Secretary. Mr. Simon was granted a recess appointment by the President on December 26, 2003, and ultimately was confirmed by the Senate on January 28, 2004.

⁵ 5 U.S.C. § 3348(c).

⁶ 5 U.S.C. § 3346(a)(2).

⁷ 5 U.S.C. § 3348(d).