



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

July 18, 2016

The President
The White House

Subject: *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—
Administrator, Centers for Medicare & Medicaid Services*

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 at the Centers for Medicare & Medicaid Services (CMS), within the Department of Health and Human Services, with respect to the Administrator position. This position requires Presidential appointment and Senate confirmation under the provisions of 42 U.S.C. § 1317(a), and thus is subject to the Vacancies Reform Act. We have reviewed several vacancies in the position of CMS Administrator from October 14, 2006, until April 15, 2016, the time period under consideration here. As a result of our review, we are reporting that the service of one official as Acting Administrator of CMS, Charlene Frizzera, after November 16, 2009, until April 19, 2010, was in violation of the Act. Since the position was subsequently filled, we believe no further action on this issue is necessary.

Background

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. The Act generally limits the period of time that such a position may be filled with an acting official to 210 days. 5 U.S.C. § 3346(a)(1). 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a first or second nomination and for up to 210 days after the date that a first or second nomination has been rejected, withdrawn, or returned. 5 U.S.C. § 3346. After expiration of an acting officer's allowed period of service the position is to remain vacant; any non-delegable function or duty of that position can only be performed by the head of the agency. 5 U.S.C. § 3348(b). Section 3349(b) requires the Comptroller General, upon a determination that an acting official has served longer than the 210-day period (and any applicable extensions), to report such findings to Congress, the President, and the Office of Personnel Management.

There were several vacancies in the position of CMS Administrator from October 14, 2006, until April 15, 2016. After a careful review of each of the Acting Administrator's service during that timeframe, we determined that only the service of Charlene Frizzera exceeded the allowable time period under the Vacancies Reform Act.

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.

Discussion

According to HHS, the Acting Secretary of Health and Human Services designated Charlene Frizzera to be first assistant to the CMS Administrator on January 22, 2009. On the same day, Ms. Frizzera became the CMS Acting Administrator, serving in that capacity until April 19, 2010. Under 5 U.S.C. § 3345(a)(1), the first assistant to the position may automatically assume the functions and duties of the office. Under the Vacancies Reform Act, there is no time period an individual must serve as first assistant before filling a vacant office in an acting capacity unless the President submits a nomination for the individual to the Senate for appointment to that office. 5 U.S.C. § 3345(b). Ms. Frizzera was not nominated by the President and therefore was eligible to serve as Acting Administrator on the same day she was designated first assistant.

If a vacancy exists during the 60-day period beginning on a transitional inauguration day, the 210-day period begins 90 days after such transitional inauguration day or the date the vacancy occurs, whichever is later. 5 U.S.C. § 3349a(b). The CMS Administrator vacancy existed on January 20, 2009, the transitional inauguration day, which was later than the date of the original vacancy. Accordingly, the 210-day period began to run 90 days after January 20, 2009—on April 20, 2009—and ended on November 16, 2009. Consequently, the position should have been vacant beginning November 17, 2009.

Although HHS does not dispute that Ms. Frizzera was serving as Acting Administrator, HHS argues that there was no violation of the Vacancies Reform Act because Ms. Frizzera continued to perform certain functions and duties of the office of CMS Administrator by virtue of a delegation from the Secretary to Ms. Frizzera in her capacity as first assistant. 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.² Ms. Frizzera continued to hold herself out as Acting CMS Administrator past the permissible period. For example, Ms. Frizzera continued to sign CMS waiver applications using the Acting title (see, e.g., 75 Fed. Reg. 5599, Feb. 3, 2010 (signed Jan. 26, 2010)) and CMS rule-making notices using the acting title (see, e.g., 75 Fed. Reg. 38026, July 1, 2010 (signed March 4, 2010)). Accordingly, Ms. Frizzera's use of the acting title from November 17, 2009, until April 19, 2010, shows that she continued to hold herself out as Acting Administrator and serve as such in that position past allowable timeframes in violation of the Vacancies Reform Act.

The Vacancies Reform Act also contains an enforcement provision, 5 U.S.C. § 3348(d), which nullifies certain actions taken by an acting official who is serving in violation of the Act. If this provision is triggered, the Vacancies Reform Act provides that the offending agency actions shall have no force or effect and may not be ratified.

When a position is vacant and the applicable periods for acting service have expired, only the head of the agency may perform the non-delegable functions or duties of the vacant office. 5 U.S.C. § 3348(b)(2). According to HHS, the delegation order providing that Ms. Frizzera perform the delegable duties of the CMS Administrator position also provided that the duties that were non-delegable under statute or regulation would be performed by the Secretary. We

² See, e.g., B-287720, *Violation of the 210-Day Limit Imposed by the Vacancies Reform Act of 1998—Director, Institute of Museum and Library Services*, May 18, 2001 at 3; B-318244, *Violations of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—General Counsel, Department of Health and Human Services*, June 18, 2014 at 5-6.

are aware of no duties or functions of the CMS Administrator that were considered “non-delegable.” Therefore, we have no basis upon which to conclude that any actions performed by Ms. Frizzera must be nullified or viewed as having no force or effect.

Conclusion

For the reasons explained above, we conclude that the service of Charlene Frizzera as Acting Administrator of CMS after the expiration of the allowable period on November 16, 2009, was in violation of the time limitation of the Vacancies Reform Act.

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 Government Reform, the Senate and House Committees on Appropriations, the Senate Committee on Finance, the House Committees on Energy and Commerce and Ways and Means, and the Director of the Office of Personnel Management.

If you have any questions regarding this matter, please call me on 202-512-5400, or Managing Associate General Counsel Robert J. Cramer on 202-512-7227.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "S. Poling".

Susan A. Poling
General Counsel