



B-335739

February 8, 2024

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Assistant Secretary for Economic Policy, U.S. Department of the Treasury*

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 U.S. Department of the Treasury (Treasury) with respect to the position of Assistant Secretary for Economic Policy (Assistant Secretary). Specifically, we are reporting that the service of Eric A. Van Nostrand as Acting Assistant Secretary from October 26, 2023, through November 19, 2023, was in violation of the Act.² Because no one is currently using the acting title for this position, there is no continuing violation.

¹ 5 U.S.C. §§ 3345–3349d.

² We contacted Treasury to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, Treasury (Nov. 17, 2023); Email from Senior Staff Attorney, GAO, to Assistant General Counsel for General Law, Ethics & Regulation, Treasury (Dec. 13, 2023); Email from Senior Staff Attorney, GAO, to Assistant General Counsel for General Law, Ethics & Regulation, Treasury (Dec. 20, 2023). Treasury responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from Assistant General Counsel for General Law, Ethics & Regulation, Treasury, to Assistant General Counsel for Appropriations Law, GAO (Nov. 30, 2023) (Treasury Response) (with attachments); Email from Assistant General Counsel for General Law, Ethics & Regulation, Treasury, to Senior Staff Attorney, GAO (Dec. 15, 2023) (Treasury Supplemental Response); Email from Assistant General Counsel for General Law, Ethics & Regulation, Treasury, to Senior Staff Attorney, GAO (Jan. 10, 2024) (Treasury Third Response).

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. 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 transitional presidential 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 also 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). 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. 5 U.S.C. § 3349(b).

BACKGROUND

Treasury reported that the Assistant Secretary position became vacant on March 30, 2023,³ and that Eric A. Van Nostrand began serving as Acting Assistant Secretary on May 24, 2023, via Presidential designation.⁴ However, we identified multiple

³ Treasury Response; GAO's Executive Vacancy System.

⁴ Treasury Response. Treasury reported that on May 24, 2023, the President designated Mr. Van Nostrand to act as Assistant Secretary pursuant to 5 U.S.C. § 3345(a)(3). *Id.* Section 3345(a)(3) authorizes the President to direct an officer or employee of the agency to act in a vacant position provided: (1) such officer or employee served in a position at the agency for at least 90 days during the 365 days preceding the vacancy; and (2) the rate of pay for the position is equal to or greater than the minimum rate payable for a position at GS-15 of the General Schedule.

(continued...)

instances in which Mr. Van Nostrand was referred to as “Acting Assistant Secretary” prior to the date of the Presidential designation.⁵

According to Treasury, no one else has acted in the position of Assistant Secretary, and there have been no nominations to the position.⁶ This means the period of permissible acting service under the Vacancies Act ended on October 25, 2023, the last day of the 210-day period beginning on the date the vacancy occurred. See 5 U.S.C. § 3346(a)(1).

DISCUSSION

Time Limitations on Mr. Van Nostrand’s Acting Service

Treasury reported that Mr. Van Nostrand discontinued acting in the position on October 26, 2023.⁷ However, Mr. Van Nostrand continued to be listed as Acting Assistant Secretary on Treasury’s Office of Economic Policy website from October 26, 2023, through November 19, 2023.⁸ Additionally, Treasury issued a Press Release on October 30, 2023, which identified Mr. Van Nostrand as Acting Assistant Secretary.⁹ When we inquired about a potential violation of the time

5 U.S.C. § 3345(a)(3). Treasury submitted several Notifications of Personnel Action (Standard Form 50) showing that, prior to the date of the vacancy, Mr. Van Nostrand had been serving in a position at Treasury since August 2022 and that the rate of pay for that position was equal to or greater than the minimum rate payable for a GS-15 position. Treasury Response.

⁵ See, e.g., Treasury, Press Releases, *Economy Statement by Eric Van Nostrand, Acting Assistant Secretary for Economic Policy, for the Treasury Borrowing Advisory Committee* (May 1, 2023), available at <https://home.treasury.gov/news/press-releases/jy1452> (last visited Jan. 17, 2024); Treasury, Featured Stories, *The Price Cap on Russian Oil: A Progress Report* (May 18, 2023), available at <https://home.treasury.gov/news/featured-stories/the-price-cap-on-russian-oil-a-progress-report> (last visited Jan. 17, 2024) (listing Mr. Van Nostrand’s position as “Acting Assistant Secretary for Economic Policy”).

⁶ Treasury Response.

⁷ *Id.*

⁸ See U.S. Department of the Treasury, *Economic Policy*, available at <https://web.archive.org/web/20231112194622/https://home.treasury.gov/about/office/economic-policy> (archived on Nov. 12, 2023) (listing Mr. Van Nostrand’s position as “Acting Assistant Secretary”). According to Treasury, it revised this website with Mr. Van Nostrand’s updated title on November 20, 2023. Treasury Response; Treasury Supplemental Response.

⁹ See U.S. Department of the Treasury, Press Releases, *Economy Statement by Eric Van Nostrand, Acting Assistant Secretary for Economic Policy, for the Treasury* (continued...)

limitations on acting service, Treasury stated that its reference to Mr. Van Nostrand as Acting Assistant Secretary was an inadvertent error that has since been corrected on its website.¹⁰ In addition, Treasury asserted that the issuance of the Press Release listing Mr. Van Nostrand as Acting Assistant Secretary after the period of permissible acting service had ended “did not constitute a violation of the Vacancies Act since issuing such statements is not a ‘function or duty’ for purposes of 5 U.S.C. [§] 3348(a)(2).”¹¹

We have previously determined that an agency’s identification of an individual as an acting officer on official agency documents or on the agency’s website after the end of the period of permissible acting service constitutes a violation of the Vacancies Act’s time limitations. See B-333857, Apr. 18, 2022; B-328671, Mar. 3, 2017; B-331539, Sept. 18, 2020. It is immaterial 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).

Borrowing Advisory Committee (Oct. 30, 2023), available at <https://web.archive.org/web/20231107214922/https://home.treasury.gov/news/press-releases/jy1850> (archived on Nov. 7, 2023) (referring to Mr. Van Nostrand as “Acting Assistant Secretary”). According to Treasury, it posted a revised version of the October 30, 2023, Press Release, with Mr. Van Nostrand’s updated title, on November 20, 2023. Treasury Response; Treasury Supplemental Response.

¹⁰ Treasury Response; Treasury Supplemental Response. Treasury’s Office of Economic Policy website currently refers to Mr. Van Nostrand as “Deputy Assistant Secretary for Financial Economics, performing the duties of Assistant Secretary for Economic Policy”. U.S. Department of the Treasury, *Economic Policy*, available at <https://home.treasury.gov/about/offices/economic-policy> (last visited Jan. 17, 2024). Treasury’s October 30, 2023, Press Release currently refers to Mr. Van Nostrand as “Assistant Secretary for Economic Policy (P.D.O.)”. See U.S. Department of the Treasury, Press Releases, *Economy Statement by Eric Van Nostrand, Assistant Secretary for Economic Policy (P.D.O.), for the Treasury Borrowing Advisory Committee* (Oct. 30, 2023), available at <https://home.treasury.gov/news/press-releases/jy1850> (last visited Jan. 17, 2024).

¹¹ Treasury Response.

In addition, using the acting title after the end of the acting service period constitutes a violation even if the individual does not actually perform a “function or duty” of the vacant position, as defined by section 3348(a)(2), during that time. We previously examined this issue in B-318244, June 18, 2014, when we reported time violations resulting from several officials holding themselves out as the Acting General Counsel of the U.S. Department of Health and Human Services (HHS) after the acting service period had expired. HHS contended that although the individuals held themselves out as acting officials, the Secretary was responsible for performing the functions and duties of the General Counsel, and these officials had been delegated only the delegable functions and duties of the position. *Id.* HHS therefore asserted that there was no acting officer for purposes of the Vacancies Act after the acting service period expired. We rejected the contention that these officials were not serving as acting officers as contemplated by the Vacancies Act and reaffirmed that the Act is violated when officials hold themselves out as acting after the permissible period of acting service expires. *Id.* Since then, we have consistently reported violations of the Act’s time limitations when individuals hold themselves out to be acting after the acting service period expires, even when there is no evidence that the individual performed any functions or duties of the vacant position during that time. See, e.g., B-334564, Feb. 8, 2023; B-334565, Feb. 8, 2023.

Here, we find that Treasury held Mr. Van Nostrand out to the public as Acting Assistant Secretary after the period of permissible acting service had ended by identifying him as Acting Assistant Secretary on a Press Release that was published on its website and listing him as Acting Assistant Secretary on Treasury’s Office of Economic Policy website. Mr. Van Nostrand’s use of the Acting Assistant Secretary title from October 26, 2023, through November 19, 2023, was not authorized by the Vacancies Act and violated the Act’s time limitations.

We also note that Mr. Van Nostrand’s use of the acting title prior to May 24, 2023, when the President designated Mr. Van Nostrand to act as Assistant Secretary pursuant to 5 U.S.C. § 3345(a)(3) was not authorized.¹² Treasury contends that Mr. Van Nostrand was not using the acting title prior to this date.¹³ According to Treasury, although Mr. Van Nostrand’s office was “careful not to [refer to Mr. Van Nostrand as Acting Assistant Secretary] in both internal memoranda and external communications”, the instances we identified “appear to be clerical errors on the part of the Treasury web publishing team.”¹⁴ We have previously held that an agency holds an individual out to the public as acting when it identifies the individual as an

¹² See B-334690, Feb. 8, 2023; B-333857, Apr. 18, 2022 (concluding in both decisions that an individual’s use of the acting title during the period of permissible acting service was unauthorized). As noted above, we found instances in which Mr. Van Nostrand was listed as “Acting Assistant Secretary” prior to May 24, 2023, on Treasury’s website.

¹³ Treasury Third Response.

¹⁴ *Id.*

acting official on an agency website. B-331539, Sept. 18, 2020. It is immaterial whether the identification was due to clerical error. See, e.g., B-332618, Jan. 19, 2021; see also B-334690, Feb. 8, 2023. However, although unauthorized, Mr. Van Nostrand's use of the acting title prior to May 24, 2023, did not violate the Vacancies Act's time limitations because it was within the permissible period of acting service.

Validity of Actions Taken

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. 5 U.S.C. § 3348(b). In that situation, "the office shall remain vacant" and only the head of the agency may perform the functions or duties of the position. *Id.* 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." 5 U.S.C. § 3348(d). 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). Agency officials who are not validly acting may, however, still be authorized to take certain actions in their official positions, so long as they are not performing a "function or duty" of the vacant position.

In response to our inquiry, Treasury reports that there are no functions or duties meeting the Vacancies Act definition with respect to the Assistant Secretary position.¹⁵ Based on Treasury's response, we have no basis to conclude that any actions taken by Mr. Van Nostrand prior to May 24, 2023, or between October 26, 2023, and November 19, 2023, must be nullified or viewed as having no force or effect.

CONCLUSION

An agency's identification of an individual as an acting officer on official agency documents or the agency website after the end of the period of permissible acting service constitutes a violation of the Vacancies Act's time limitations. Because Treasury identified Mr. Van Nostrand as Acting Assistant Secretary after the end of the period of permissible acting service, Mr. Van Nostrand's use of the acting title from October 26, 2023, through November 19, 2023, was not authorized by the Vacancies Act and violated 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 Accountability, the Senate and House Committees on

¹⁵ Treasury Response.

Appropriations, the Senate Committee on Finance, the House Committee on Financial Services, 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