Visited 09/19/2018

Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1988--Commissioner, Social Security Administration

B-329853: Mar 6, 2018

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 (herein "the Vacancies Reform Act" or "Act") at the U.S. Social Security Administration (SSA) with respect to the Commissioner position. Specifically, we are reporting that the service of Nancy A. Berryhill as Acting Commissioner at SSA after November 17, 2017, is in violation of the Act.

B-329853

March 6, 2018

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998—Commissioner, Social Security Administration*

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[1] (#_ftn1) (herein “the Vacancies Reform Act” or “Act”) at the U.S. Social Security Administration (SSA) with respect to the Commissioner position. Specifically, we are reporting that the service of Nancy A. Berryhill as Acting Commissioner at SSA after November 17, 2017, is in violation of the Act.

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). In the year of a transitional Presidential inauguration, that time period is extended to 300 days after the vacancy occurs with respect to any vacancy that exists during the 60-day period beginning on thetransitional inauguration date. 5 U.S.C. § 3349a(b). 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 of service, to report such findings to Congress, the President, and the Office of Personnel Management.

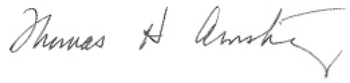
In response to our recent inquiry to all federal departments and agencies with positions subject to the Vacancies Reform Act to update the status of any vacancies, acting officials, or nominations, the General Counsel of SSA reported that the position of Commissioner remains vacant.[2] (#_ftn2) Our research indicates that the position was vacant on January 20, 2017, and Nancy A. Berryhill became Acting Commissioner on January 21, 2017. To date there have been no nominations submitted for that position. According to SSA, Ms. Berryhill became Acting Commissioner pursuant to a memorandum of December 23, 2016, issued by President Obama establishing an order of succession for the performance of the functions and duties of the office of the Commissioner of Social Security (Memorandum of Succession).[3] (#_ftn3) We note that the Memorandum of Succession specifies that its provisions are subject to the limitations of the Vacancies Reform Act.

In accordance with the Vacancies Reform Act, the 210-day period began to run 90 days after the vacancy occurred on January 20, 2017—on April 20, 2017—and ended on November 16, 2017. Thus, the position of Commissioner should have been vacant beginning November 17, 2017. SSA’s website indicates that Ms. Berryhill continued serving as Acting Commissioner after November 16, 2017. 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.[4] (#_ftn4) Therefore Ms. Berryhill was not authorized to continue serving using the title of Acting Commissioner after November 16. However, SSA can provide for performance of the delegable functions and duties of the Commissioner position in accordance with the Memorandum of Succession or other applicable authority.

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 Committee on Ways and Means, and the Director of Office of Personnel Management.

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

Sincerely yours,



Thomas H. Armstrong
General Counsel

Visited 09/19/2018

[1] (#_ftnref1) Pub.L.No. 105-277, Div. C, Title I, 112 Stat. 2681-611 (Oct. 21, 1998), as amended, 5 U.S.C. §§ 3345-3349d.

[2] (#_ftnref2) We contacted the SSA General Counsel by letter dated February 6, 2017, requesting updated information on thevacancies in Presidentially appointed, Senate confirmed positions at SSA. SSA responded by letter dated February 12, 2018, stating that these positions at SSA (Commissioner, Deputy Commissioner, and Inspector General) remain vacant. SSA did not provide any information regarding the names of those in acting positions or periods of acting service.

[3] (#_ftnref3) *Memorandum of December 23, 2016, Providing an Order of Succession Within the Social Security Administration,* 81 Fed. Reg. 96,337 (Dec. 30, 2016). Email from Executive Counselor to the Commissioner, SSA, to Managing Associate General Counsel, GAO, *Subject: Quick Question*, Mar. 5, 2018.

[4] (#_ftnref4) *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.