The federal government relies on both political appointees and career civil servants to operate effectively. Federal law provides for over 1,200 agency positions whose occupants must be appointed by the President with the advice and consent of the Senate (PAS positions). But there are often numerous vacancies in these positions—not only at the start of every administration, but also at other times, including after initial appointees leave and particularly during the final months of a President’s tenure. Government officials routinely vacate offices before a successor has been chosen. Research has shown that PAS positions in executive departments and agencies are not staffed with Senate-confirmed or recess appointees one-fifth of the time. These pervasive vacancies exist for several reasons, including increasing delays related to the presidential-nomination and Senate-confirmation process.

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3 Id. at 16 (citing ANNE JOSEPH O’CONNELL, BROOKINGS INST., STAFFING FEDERAL AGENCIES: LESSONS FROM 1981–2016 (2017)).
Vacancies in PAS and other high-level positions may lead to agency inaction, generate confusion among nonpolitical personnel, and lessen public accountability. At many agencies, acting officials can temporarily fill the positions. Indeed, between January 20, 1981, and July 19, 2019, there were 168 confirmed cabinet secretaries, 3 recess-appointed cabinet secretaries, and 145 acting cabinet secretaries. In other words, acting officials constituted 46% of all the top leaders in this period, though many of these interim officials served for short periods. Acting officials are also prevalent in lower-level positions throughout the federal government. Similarly, in the face of vacancies, agency leadership often can lawfully delegate certain duties that would otherwise be done by a PAS or other high-ranking official to other officials within the agency.

The Federal Vacancies Reform Act of 1998 (Vacancies Act) provides for temporary leadership primarily in single-headed executive departments and agencies. When it applies, the Vacancies Act specifies who can serve in an acting capacity, for how long, and in what positions. Congress has also enacted other agency-specific statutes to address vacancies, which sometimes provide the exclusive succession process. Unfortunately, navigating these statutes can be challenging because their requirements are often complex, and it can be technologically difficult to provide required reports. Currently, the government offers no formal training programs to agencies on the Vacancies Act, other vacancy-related statutes, or delegations of authority in the face of staffing vacancies.

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5 5 U.S.C. §§ 3341–3349d.
6 The Department of Justice’s Office of Legal Counsel provided substantial guidance on the Act in 1999, on which agencies continue to rely. See Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999); see also O’Connell, Acting Agency Officials, supra note 2, at 38, 41 (describing interviews with agency officials and noting agencies’ continued reliance on OLC guidance from 1999). Certain portions of the 1999 Guidance have been superseded. See, e.g., Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001) (concluding that question 13 of the 1999 Guidance was incorrect in concluding that a first assistant could only serve as an acting officer under section 3345(a)(1) if he or she had served as first assistant before the vacancy arose); NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017) (holding that the prohibition in section 3345(b) on acting service during a nomination is not limited to first assistants, contrary to OLC’s conclusion in question 15 of the 1999 Guidance).
The stakes for compliance, however, can be high. Under the Vacancies Act, for instance, certain actions taken by an acting official not serving under its terms “shall have no force or effect” and may be susceptible to legal challenge. Even if the agency does not face legal challenge, moreover, it could receive a formal violation letter from the Government Accountability Office (GAO). The Vacancies Act requires agencies to report vacancies, nominations, and acting officials in covered positions to the Comptroller General; the Comptroller General is charged with reporting violations of the time limits to various House and Senate Committees, the President, and the Office of Personnel Management.

The Vacancies Act

Under the Vacancies Act, acting officials generally may come from three categories of government officials: (1) first assistants to the vacant positions; (2) Senate-confirmed officials designated by the President; and (3) certain senior agency officials designated by the President. The “first assistant” to the vacant job is the default acting official. The Vacancies Act provides two main alternatives to the first assistant for acting service, but the President must actively select them. First, “the President (and only the President) may direct” another Senate-confirmed official—within the agency or outside it—to serve as the acting official. Second, “the President (and only the President)” may select “an officer or employee” who has not been Senate-confirmed to serve in an acting capacity, but only if that person has worked in the agency for at least seven years.

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7 5 U.S.C. § 3348(d)(1); O’Connell, Acting Agency Officials, supra note 2, at 3 n.8. Some positions are excluded from this provision. See 5 U.S.C. § 3348(e).
8 5 U.S.C. § 3349(b).
9 Id. § 3345(a); see also NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); O’Connell, Acting Agency Officials, supra note 2, at 5. There is a fourth category of allowed acting officials involving holdover appointees: an official serving a fixed term in a covered agency, who may stay in that position in an acting capacity after the term expires if the President has nominated her or him to an additional term. 5 U.S.C. § 3345(c)(1); see also O’Connell, Acting Agency Officials, supra note 2, at 5 n.24.
11 Id. § 3345(a)(2).
least 90 days during the year-long period before the vacancy arose and earns a salary at the GS-15 level or higher.12

Acting officials can typically serve and use the title “acting” for 210 days from the vacancy’s start.13 If the vacancy exists when a new President enters office, or occurs within the next 60 days, the limit extends to 300 days. Nominations also extend these limits: an acting official can continue serving through two pending nominations to the vacant job. If the nomination is rejected or returned to the President under Senate rules, a new 210-day period of permitted tenure begins from the date of rejection or return. In other words, an acting official could conceivably serve for 210 (or 300) days before there is a nomination, during the pendency of a first nomination, for 210 days after that nomination is returned, during the pendency of a second nomination, and for a final 210 days if the second nomination is returned as well.14 These extensions require careful tracking of nominations and Senate actions.

After the time limits established by the Vacancies Act have passed, agencies can often continue to perform the functions of the vacant offices through delegations of authority, often by the agency head.15 If the duties of the Senate-confirmed position are not exclusive to that job—by statute or regulation—they can typically be delegated to a lower-level official. Even if some duties are exclusive to a position, its other duties can be reassigned, leaving the delegate with nearly the same power as an acting official. Delegations can operate far longer than acting officials can serve.

The Vacancies Act requires the head of each executive agency to report certain information about vacancies in covered offices and notify the Comptroller General of the United States.16

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12 Id. § 3345(a)(3).
13 Id. § 3346(a)(1).
14 O’Connell, Acting Agency Officials, supra note 2, at 7. The time limits do not apply when the vacancy has been “caused by sickness.” 5 U.S.C. § 3346(a); see also Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 66–67 (1999) (noting that an “acting officer may continue to serve until the sick PAS officer recovers” and is able to resume performing the office’s functions and duties).
15 O’Connell, Acting Agency Officials, supra note 2, at 11–12; see also id. at 13–15 (identifying several constitutional and statutory issues concerning delegation beyond the scope of this Recommendation).
States and each House of Congress. The GAO, headed by the Comptroller General, currently
receives this information in hard copy. The GAO maintains these reports in an online searchable
database.17

Agency-Specific Statutes

In addition to the Vacancies Act, Congress has also enacted various agency-specific
statutes that, when applicable, may provide for temporary leadership, including for chairpersons
at some independent regulatory commissions.18 Some statutes may provide the exclusive
mechanism for agency succession, whereas other statutes may provide a non-exclusive
mechanism.19 Because these agency-specific statutes vary, it is difficult to draw cross-cutting
conclusions about them. Their existence, however, further complicates the use of acting officials
and delegations.

The Need for Increased Transparency and Training on Vacancies Act Requirements

As the foregoing description shows, how and when agencies can use acting officials or
delegate authority can be complicated. There is often confusion about which positions and
agencies the Vacancies Act applies to and how the Act interacts with other agency-specific
statutes. Technological shortcomings also make compliance with agency reporting obligations
difficult. Some agencies have raised concerns that “[a]lthough the forms are online, the agency
must download them, fill them out, and send them in hard copy to the GAO (and to Congress).”20
Agencies also vary in how transparent they are about their use of acting officials and delegations

18 Id. at 9–10; see also id. at 13–14 (identifying the legal issue of the applicability of the Vacancies Act in many of
these circumstances where an agency-specific succession statute exists, which is beyond the scope of this
Recommendation).
19 Id. at 9.
20 Id. at 59.
of authority. Some agencies do not disclose publicly acting titles and delegations of authority, and there is currently no good source for comprehensive information about acting officials.

The goals of this Recommendation are to promote compliance with the Vacancies Act and agency-specific succession statutes and, consistent with the Conference’s recent efforts to promote access to agency information, to improve transparency regarding the use of acting officials and agency delegations of authority in the face of staffing vacancies. This Recommendation does not purport to address any legal questions that may arise in the application of the Vacancies Act.

This Recommendation is a companion to Recommendation 2019-__, Listing Agency Officials, which encourages federal agencies and the Office of Personnel Management to publish and maintain on their websites real-time information about a broad range of high-level agency officials.

21 Id. at 44–46, 64–66. Although some agencies lack disclosure policies, some agencies have a practice of publishing permanent or standing delegations in the Federal Register or on the agency’s website. Id. at 65; see also Jennifer Nou, Subdelegating Powers, 117 COLUM. L. REV. 473, 502–03 (2017) (contrasting agency practices at SEC and EPA).


RECOMMENDATION

Acting Officials under the Vacancies Act

1. As a preliminary matter, agencies should determine if they are subject to the Federal Vacancies Reform Act (Vacancies Act).

2. Agencies with at least one presidentially-appointed, Senate-confirmed (PAS) position covered by the Vacancies Act should establish processes and procedures to comply with the Act. Agencies should consider assigning responsibility for compliance with the Vacancies Act to a position within the agency, rather than a particular person, and identify that position on its website.

3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that officials responsible for compliance with the Vacancies Act have adequate training.
   a. Officials assigned to track time limits should understand the Senate confirmation process (including the likelihood of multiple returns) and how to access important dates (official submission dates of nomination, returns, etc.).
   b. Agencies should, when needed, coordinate with the Government Accountability Office (GAO) on their reporting requirements.
   c. A government agency or other organization should provide government-wide training on these issues. Agencies should avail themselves of this training.

4. For PAS positions covered by the Vacancies Act but not addressed in a presidential order of succession, agencies should formally name and disclose a first assistant position.
   a. If there are multiple deputy positions to a covered position, agencies should specify which deputy position is the first assistant position.
   b. In the description of each first assistant position, agencies should explain that the first assistant is the default acting official under the Vacancies Act.

5. Agencies with at least one PAS position covered by the Vacancies Act should communicate the requirements of the Act to the relevant acting official(s).

6. Agencies with at least one PAS position covered by the Vacancies Act should disclose on their websites the names of acting officials and the officials’ start dates acting officials on

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their websites, as well as start and, to the extent identifiable, projected end dates. If an end date is not identifiable, an agency should instead explain why by providing a brief description of the contingency or triggering event at issue (e.g., a first/second nomination is pending, during which time the acting official may serve until the nomination is confirmed, rejected, withdrawn, or returned under Senate rules). If a vacancy is not filled by an acting officer and the agency has identified an official to perform the delegable functions of the office, the agency should disclose that official on its website.

**Acting Officials Outside the Vacancies Act**

7. Agencies that have PAS positions that are not covered by the Vacancies Act and for which Congress has provided some alternative mechanism for designating acting officials (e.g., acting chairperson) should, to the extent applicable, apply the foregoing recommendations 2 through 6.

**Succession Planning**

8. All agencies should consider having clear and easily accessible succession plans on their websites for PAS positions.

**Delegations of Authority Related to Staffing Vacancies**

9. All agencies should determine which functions and duties, if any, are exclusive to each PAS position and which of the nonexclusive functions and duties, if any, should be delegated in the face of staffing vacancies.

10. To the extent reasonably possible, agencies should make their delegations of authority in the face of staffing vacancies in PAS positions easily accessible on their websites and also, for standing delegations, the Code of Federal Regulations.
11. The GAO should consider changing its reporting system so that agencies can report information online for vacancies, acting officials (including start and end dates), and nominations.