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United States Government Accountability Office
Washington, DC 20548

B-305939

March 17, 2006

The President
The White House

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

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 at the Food and Drug Administration (FDA). 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. 5 U.S.C. § 3346. 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.

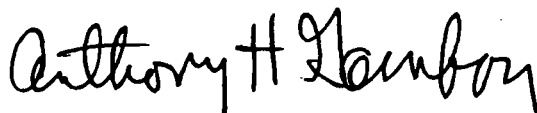
As required by the Vacancies Reform Act, the Department of Health and Human Services reported to us that a vacancy in the position of FDA Commissioner began on March 25, 2004, when Commissioner Mark McClellan resigned. This position requires Presidential appointment and Senate confirmation under the provisions of 21 U.S.C. § 393(d)(1), and thus is subject to the Vacancies Reform Act. 5 U.S.C. § 3345(a). The Department also reported to us that on March 26, 2004, Lester Crawford, Deputy FDA Commissioner, began serving as Acting Commissioner.

The Vacancies Reform Act generally limits the service of acting officials to 210 days from the date of the vacancy. 5 U.S.C. § 3346. In this instance, the 210-day period ended on November 17, 2004, taking the Senate recess into consideration. 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. 5 U.S.C. § 3346(a)(2). Thus, Mr. Crawford could resume his service as acting Commissioner on February 15, 2005, when the President submitted his nomination to the Senate. However, Mr. Crawford's service as acting Commissioner from November 17, 2004, until February 15, 2005, was in violation of the time limitation in the Vacancies Reform Act.

On August 22, 2005, we sent a development letter to HHS, requesting confirmation of the dates of service in an acting capacity of Mr. Crawford and an identification of any actions taken by Mr. Crawford between November 17, 2004, and February 15, 2005, that might be subject to the nullification provisions of the Vacancies Reform Act, 5 U.S.C. § 3348(d). To date, HHS has not responded to this letter.

In accordance with the requirements of the Vacancies Reform Act, we are sending identical letters to the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Government Reform, the House and Senate Appropriations Committees, the Senate Committee on Health, Education, Labor, and Pensions, the House Committee on Energy and Commerce, and the Office of Personnel Management. If you should have any questions regarding this matter, please call me on 202-512-5400, or Associate General Counsel Robert J. Cramer on 202-512-7227.

Sincerely yours,

A handwritten signature in black ink that reads "Anthony H Gamboa". The signature is written in a cursive, slightly slanted style.

Anthony H. Gamboa
General Counsel