



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

B-318244

June 18, 2014

The President
The White House

Subject: Violations of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—General Counsel, Department of Health and Human Services

Dear Mr. President:

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting violations of the Federal Vacancies Reform Act of 1998¹ (“the Vacancies Reform Act” or “the Act”) at the Department of Health and Human Services (HHS) with respect to the General Counsel position. This position requires Presidential appointment and Senate confirmation under the provisions of 42 U.S.C. § 3504, and thus is subject to the Vacancies Reform Act. Specifically, we are reporting that the service of four officials as Acting General Counsel of HHS after November 16, 2009, until April 25, 2013, was in violation of the Act. Since William Schultz has now been confirmed as General Counsel, we believe no further action on this issue is necessary.

Background

The Vacancies Reform Act establishes requirements for temporarily authorizing an acting officer to perform the functions and duties of certain vacant positions that require Presidential appointment and Senate confirmation (PAS). It generally limits the period of time that such a position may be filled with an acting officer to 210 days. 5 U.S.C. § 3346(a)(1). However, with respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day,² 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). 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 officer

¹ Pub. L. No. 105-277, Div. C, Title I, Oct. 21, 1998, as amended, 5 U.S.C. §§ 3345-3349d.

² “[T]he term ‘transitional inauguration day’ means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.” 5 U.S.C. § 3349a(a).

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.

The Vacancies Reform Act also identifies who may serve as an acting officer. Specifically, the only persons who may perform the functions and duties of an office in an acting capacity are: (1) the first assistant to the vacant office; (2) a person serving in a position requiring Presidential appointment and Senate confirmation who is directed by the President (and only the President) to serve as the acting officer; or (3) an officer or employee of such executive agency who is directed by the President (and only the President) to serve as an acting officer.³ 5 U.S.C. § 3345(a).

At issue here is the service of four officials who performed duties of the General Counsel under the Vacancies Reform Act. These four officials were David Cade, Mark Childress, Sally Howard, and William Schultz.⁴ The following is a chronology of their service, their position immediately prior to performing duties of the General Counsel, and other relevant events relating to the vacancy in the General Counsel position.⁵

³ The Vacancies Reform Act does not define the term “first assistant.” Section 3347 also authorizes an official to serve as an acting officer under a recess appointment or by express statutory designation.

⁴ HHS did not notify GAO as required by 5 U.S.C. § 3349(a) when Sally Howard ceased serving as the acting officer; when William Schultz was designated as the acting officer; when Mr. Schultz’s nomination was returned by the Senate; when he was nominated to fill the vacancy for a second time; or when he was confirmed as General Counsel.

⁵ The facts set forth in this chronology are based on information provided by HHS in response to our request. In accordance with our regular practice, we solicited information, views, and comments from HHS. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/lawresources/resources.html. HHS responded to our requests in two letters and a telephone call from Deputy General Counsel, David S. Cade. HHS’s first response was signed by David S. Cade, Deputy General Counsel for HHS, and dated April 16, 2012. Letter from Deputy General Counsel, Department of Health and Human Services, to Assistant General Counsel for Strategic Issues, GAO (Apr. 16, 2012) (2012 HHS Response Letter).

We sought additional information from HHS in an e-mail dated June 20, 2013. HHS responded in both a phone call from David S. Cade on September 3, 2013 (2013 HHS Conversation), and in a letter signed by Mr. Cade dated September 3, 2013. Letter from Deputy General Counsel, Department of Health and Human Services, to Assistant General Counsel for Strategic Issues, GAO (Sept. 3, 2013) (2013 HHS Response Letter).

- David Cade, who had been a Deputy General Counsel at HHS and the first assistant to the General Counsel, performed duties of the General Counsel from January 21, 2009, to May 4, 2010.
- Mark Childress, who had been senior adviser for health reform to the Senate Committee on Health, Education, Labor, and Pensions, performed duties of the General Counsel from May 7, 2010, to January 7, 2011.
- Sally Howard, who had been a Deputy General Counsel at HHS, performed duties of the General Counsel from January 7, 2011, to March 15, 2011.
- William Schultz, who had been a partner at Zuckerman Spaeder LLP law firm, performed duties of the General Counsel from March 15, 2011, to April 25, 2013.
- William Schultz was nominated for the position of General Counsel on April 18, 2012.
- Mr. Schultz's nomination was returned by the Senate on January 3, 2013.
- William Schultz was nominated a second time for the position of General Counsel on January 22, 2013.
- Mr. Schultz's nomination as General Counsel was confirmed by the Senate on April 25, 2013.

Limitations on Acting Service Under the Vacancies Reform Act

We begin by addressing two issues that arise concerning the service of David Cade, Mark Childress, Sally Howard, and William Schultz: (1) whether these officials served as Acting General Counsel past the 210-day time limitation, and (2) whether these officials were eligible to serve as Acting General Counsel under the Act.

The 210-Day Time Limitation under the Vacancies Reform Act

David Cade's Service from January 21, 2009, until November 16, 2009, Complied with the Vacancies Reform Act

As previously mentioned, with respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day limit on the service of acting officers under the Vacancies Reform Act begins 90 days after the transitional inauguration day or the date the vacancy occurs, whichever is later. 5 U.S.C. § 3349a(b). In this instance, the HHS General Counsel vacancy existed on January 20, 2009, the transitional inauguration day.⁶ Accordingly, the 210-day period began to run 90 days after January 20, 2009—on April 20, 2009—and ended on

⁶ A vacancy in the General Counsel position also occurred on July 22, 2005, under President Bush's Administration. No individual had been confirmed by the Senate to serve in the position of General Counsel of HHS since that date until Mr. Schultz's nomination was confirmed on April 25, 2013. We also reviewed whether the service of officials as Acting General Counsel from July 22, 2005, through January 20, 2009, complied with the Vacancies Reform Act and determined that no violations of the Act occurred.

November 16, 2009.⁷ Consequently, Mr. Cade’s service from January 21, 2009, to November 16, 2009, was in compliance with the Vacancies Reform Act.

**The Service of Officials after November 16, 2009, until April 25, 2013,
Violated the Time Limitations of the Vacancies Reform Act**

HHS asserts that there was no Acting General Counsel “for Vacancies [Reform] Act purposes” during the period after November 16, 2009, until April 25, 2013, and that the functions and duties of the General Counsel were the responsibility of the Secretary. During that period of time, Mr. Cade continued to serve until May 4, 2010; Mr. Childress served from May 7, 2010, until January 7, 2011; Ms. Howard served from January 7, 2011, until March 15, 2011; and Mr. Schultz served from March 15, 2011, until April 25, 2013. HHS argues that the Secretary delegated the delegable functions and duties of the General Counsel position to these four officials who served as the “Principal Deputy General Counsel” during that period.⁸ However, HHS held these officials out to the public as “Acting General Counsel.” HHS states that it referred to these officials as “Acting General Counsel” in order “to convey the scope of the delegated functions and duties.”⁹

HHS has not provided—and we have not found—any legal basis supporting its position that, while it referred to these officials and held them out to the public as the Acting General Counsel, they did not serve as acting officers as contemplated by the Vacancies Reform Act. It is clear, and HHS concedes, that it held these officials out to be the Acting General Counsel after the expiration of the 210-day period. 2012 HHS Response Letter at 1. For example, HHS’s notifications to us under the Vacancies Reform Act designated Mr. Childress and Ms. Howard as “Acting Officer” for the vacant General Counsel position after the expiration of the 210-day period.¹⁰ Additionally, we have found other references indicating that Mr. Cade, Mr. Childress, Ms. Howard, and Mr. Schultz each held themselves out to be Acting General Counsel after the expiration of the 210-day period.¹¹

⁷ HHS indicated in its 2012 Response Letter that November 4, 2009, was the end of the 210-day period. However, we calculate that the 210-day period expired on November 16, 2009.

⁸ 2012 HHS Response Letter at 1.

⁹ *Id.* HHS also states that the Secretary’s authority to delegate derives from section 6 of Reorganization Plan No. 1 of 1953, *codified at* 5 U.S.C. app. § 1. 2013 HHS Response Letter at 2.

¹⁰ HHS Submissions under the Federal Vacancies Reform Act to GAO, May 20, 2010, and January 13, 2011.

¹¹ For example, David Cade signed a February 5, 2010, letter to Senator Grassley as the Acting General Counsel. David Cade Letter to Senator Grassley, Feb. 5, 2010. In the October 2011 U.S. Government Manual, Mark Childress is listed as (continued)

We have consistently found violations of the time limitations of the Vacancies Reform Act where officials held themselves out to be an acting officer after the expiration of the 210-day period. For example, in B-287720, May 18, 2001, officials at the Institute of Museum and Library Services asserted that the Deputy Director of the Office of Museum Services, who had been delegated the duties of the Director, ceased to serve as Acting Director upon the expiration of the 210-day limit.¹² However, we found that in introducing herself during testimony before a congressional subcommittee and in other instances, the official had held herself out as the Acting Director more than 1 year after she became an acting officer, well past the 210-day limit, in violation of the Vacancies Reform Act.¹³

Additionally, in B-309701, Nov. 18, 2008, we found that the service of an official as Acting Director at the National Institute of Justice, after the 210-day period had expired and prior to the submission of a nomination for the position to the Senate, was a violation of the time limitation of the Vacancies Reform Act.¹⁴ We also concluded in that report that the service of a subsequent official, who did not use the Acting Director title, but instead served as the senior staff member under the title of Principal Deputy Director, complied with the requirements of the Vacancies Reform Act.¹⁵

(continued)

Acting General Counsel, *available at* <http://www.gpo.gov/fdsys/pkg/GOVMAN-2011-10-05/xml/GOVMAN-2011-10-05-117.xml>. Ms. Howard's biography on the FDA website and the HHS website, on February 23, 2012, indicated that she served as HHS Acting General Counsel and Deputy General Counsel immediately prior to serving as the Chief of Staff, her position beginning in April 2011. On February 23, 2012, the HHS website referred to Mr. Schultz as the Acting General Counsel, which was prior to his confirmation on April 25, 2013. (All references last visited May 8, 2014.)

¹² 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.

¹³ *Id.* at 3-4.

¹⁴ B-309701, *Violation of the 210-Day Limit Imposed by the Vacancies Reform Act of 1998—National Institute of Justice, Department of Justice*, Nov. 18, 2008 at 4.

¹⁵ *Id.* at 2. Similarly, we concluded that the service of an official who served as the Principal Deputy Assistant Attorney General while performing the delegable functions and duties of the Assistant Attorney General, Office of Legal Policy, after the 210-day period had expired complied with the Vacancies Reform Act requirements. We found no evidence that the official had used the title of Acting Assistant Attorney General and that he did not perform any non-delegable duties during any period in which the position was to be vacant. B-310780, *Federal Vacancies Reform Act of 1998—Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice*, June 13, 2008, at 3-5.

The common thread in these reports is that the Vacancies Reform Act is violated when officials hold themselves out as the acting official after the allowable period of acting service.¹⁶

Accordingly, the facts clearly establish that Mr. Cade, Mr. Childress, Ms. Howard, and Mr. Schultz each served as the Acting General Counsel at various times after the end of the 210-day period on November 16, 2009, and until Mr. Schulz's confirmation as General Counsel on April 25, 2013. We conclude that the service of each of these officers during that period was in violation of the time limitations imposed by the Vacancies Reform Act.

Eligibility to Serve as Acting General Counsel Under the Vacancies Reform Act

As previously discussed, the Vacancies Reform Act provides that the persons who may serve as an acting officer of an executive agency are: (1) the first assistant to the vacant office; (2) a person serving in a PAS position who is directed by the President (and only the President) to serve as the acting officer; or (3) an officer or employee of the executive agency who is directed by the President (and only the President) to serve as the acting officer. 5 U.S.C. § 3345 (a).

HHS informed us that none of the four officials who served as the Acting General Counsel were directed by the President to serve in that capacity.¹⁷ Therefore, our inquiry into the eligibility of these four officials to serve as Acting General Counsel is limited to determining whether they were serving as first assistant to the office of the General Counsel.

HHS indicated that, although the title Deputy General Counsel is used to refer to more than one official in the office of the HHS General Counsel, only one Deputy General Counsel is designated as the first assistant to the office of General Counsel.¹⁸ HHS also explained that sometimes the title of Principal Deputy General Counsel is used and, when used, it indicates that an official is serving in the first assistant position. *Id.* According to HHS, Mr. Cade was the Deputy General Counsel who was designated as the first assistant to the General Counsel when the vacancy arose, and he assumed the Acting General Counsel position; and that Ms. Howard was also a Deputy General Counsel but did not serve as the first assistant.¹⁹

¹⁶ Under section 3348(b)(2), the head of the agency performs the functions and duties where the vacant office is not the head of the agency.

¹⁷ 2013 HHS Response Letter at 2. Additionally, none of these officials served pursuant to a recess appointment or express statutory authority.

¹⁸ 2013 HHS Conversation.

¹⁹ *Id.*

As the Deputy General Counsel who was the first assistant to the General Counsel when the vacancy arose, Mr. Cade was eligible to serve as Acting General Counsel pursuant to section 3345(a)(1). However, although Ms. Howard was also a Deputy General Counsel at HHS, she was not eligible to serve in the Acting General Counsel position because she was not the first assistant to the General Counsel.²⁰

Additionally, HHS informed us that Mr. Childress was senior advisor for the Senate Committee on Health, Education, Labor, and Pensions prior to becoming the Acting General Counsel, and that Mr. Schultz was a partner at Zuckerman Spaeder LLP prior to serving as the Acting General Counsel.²¹ Thus, neither Mr. Childress nor Mr. Schultz were serving as first assistant to the office of the General Counsel and were therefore ineligible to become the Acting General Counsel under section 3345(a)(1).

In sum, the service of Ms. Howard, Mr. Childress, and Mr. Schultz as Acting General Counsel also violated the Vacancies Reform Act because they were not eligible to serve in that capacity.

The Vacancies Reform Act Enforcement Provision

The Vacancies Reform Act contains an enforcement provision, whereby any action taken in performing a non-delegable function or duty of the vacant position by an acting officer serving in violation of the Vacancies Reform Act shall have no force or effect and may not be ratified.²² 5 U.S.C. § 3348(a)(2) and (d). HHS states that there are no non-delegable statutory functions or duties that can only be performed by the General Counsel,²³ and we are not aware of any statute or regulation that establishes a non-delegable function or duty of the position. Accordingly, we have no basis upon which to conclude that any actions performed by these officials must be nullified or viewed as having no force or effect.²⁴

Conclusion

For the reasons explained above, we conclude that the service of Mr. Cade, Ms. Howard, Mr. Childress, and Mr. Schultz as Acting General Counsel at HHS after the expiration of the 210-day period on November 16, 2009, was in violation of the time limitations of the Vacancies Reform Act, and that the service of Ms. Howard, Mr. Childress, and Mr. Schultz violated the eligibility requirements of the Act.

²⁰ *Id.*

²¹ 2013 HHS Response Letter at 1.

²² As discussed above, generally when a position is vacant and the applicable periods for temporary service have expired, no one but the head of an agency may perform any of the non-delegable functions or duties of the vacant position. 5 U.S.C. § 3348(b)(2).

²³ 2012 HHS Response Letter at 1.

²⁴ *Supra* note 11, 13, and 14.

In accordance with the requirements of the Act, we are also sending letters reporting these violations to the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Government Reform, the Senate and House Appropriations Committees, the Senate Committee on Health, Education, Labor, and Pensions, the House Committee on Education and the Workforce, 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 black ink, appearing to read "Susan A. Poling". The signature is written in a cursive, flowing style.

Susan A. Poling
General Counsel