

U.S. Healthcare and the Affordable Care Act

A Discussion with William Schultz, General Counsel of the U.S. Department of Health and Human Services

William Schultz was confirmed as general counsel of the U.S. Department of Health and Human Services (HHS) in April 2013 after serving as acting general counsel since March 2011. For 10 years prior to joining HHS, Mr. Schultz was a partner at the law firm Zuckerman Spaeder. From 1999 to 2000, he was deputy assistant attorney general for the Civil Division at the U.S. Department of Justice, where he was responsible for overseeing all Civil Division appellate litigation and the department's Tobacco Litigation Team. From 1994 to 1999, Schultz served as deputy commissioner for policy at the U.S. Food and Drug Administration, where he was responsible for directing and overseeing all of the agency's major policy initiatives, including initiatives on tobacco and food safety. Prior to his tenure at FDA, he served as Counsel for the Energy and Commerce

Committee's Subcommittee on Health and the Environment in the U.S. House of Representatives under Chairman Henry A. Waxman (D-Calif.). Schultz began his career as a law clerk to Judge William B. Bryant of the U.S. District Court for the District of Columbia, and for 14 years he litigated public interest law cases at Public Citizen Litigation Group. Mr. Schultz was also an Adjunct Professor at Georgetown University Law Center for 10 years, teaching courses in litigation and food and drug law. Schultz received his B.A. from Yale University and his J.D. from the University of Virginia School of Law.



Interview conducted by John Okray and Rachel Rose, chair and vice chair for publications, respectively, of the FBA Corporate and Association Counsel Division.

How many attorneys work throughout the U.S. Department of Health and Human Services (HHS), and can you describe the range of legal services attorneys at HHS and its 11 operating divisions perform?

There are approximately 500 attorneys in the HHS Office of General Counsel, which includes 135 in the 10 regional offices. We serve as counsel to the secretary and all senior leaders in the department on matters ranging from the legality of policy and regulations, representing the department in litigation in all courts, including the U.S. Supreme Court. Our attorneys have deep substantive knowledge in all fields related to public health under the department's authority, including the Affordable Care Act (ACA); Medicare and Medicaid; the regulation of food, drugs, cosmetics, medical devices, and tobacco; Indian health; civil rights; organ donation; the anti-kickback and other anti-fraud statutes; Head Start; and child welfare. They are also the agency's experts on ethics, contracts, and grants as well as information access, such as the Freedom of Information Act and the Privacy Act.

Some federal agencies have had challenges retaining for the long term attorneys who may leave for law firms or corporations in the same industry in search of greater compensation. Has this been a problem for HHS or any of its divisions, such as the FDA? How would you describe HHS' attorney recruitment and retention efforts?

The attorneys who work here generally love their job and many stay for their entire career. Almost half of the attorneys have been in government for 10 years, and more than 20 percent have been here for more than 20 years. We have 32 attorneys who have served in the government for more than 30 years and a few who have exceeded 40 years. I suspect that few legal organizations can boast this kind of longevity.

Recruitment is not an issue for our office. It is not uncommon to have hundreds of applicants apply to our vacancies. Recently almost 200 attorneys applied for a single position.

There has been a lot of information or misinformation in the news about the perceived benefits or harms the Affordable Care Act will have on employers and employees. How would you describe its impact on covered employers and employees?

I agree that there has been a lot of misinformation! Let me try to correct some of it. First, for the 85 percent of Americans who already have health coverage—most of whom receive it through an employer—the law makes that coverage even stronger. For example, millions of them are now getting recommended preventive screenings, like diabetes screenings, mammograms, and colonoscopies, without a co-payment or deductible. They also no longer have to worry about lifetime dollar limits on their coverage.

Second, there has been a lot of misinformation about the employer payment, which will not begin until 2015 and will apply to large employers that don't offer adequate health coverage to their full-time employees. It's important to note that more than 96 percent of large firms, those with 50 or more employees, already offer health

coverage to their workers. Thus, only 4 percent of such firms will need to start offering health coverage to their workers to avoid the employer payment.

There has been news of some companies trying to limit the impact of the ACA by (1) staying below 50 full-time employees, (2) having employees work less than 30 hours per week on average, and/or (3) eliminating or applying a surcharge for spousal coverage if an employee's spouse has access to coverage through his or her own employer. Would you consider these structural flaws in the ACA that can be addressed, or are these issues being exaggerated in your opinion?

The ACA will make it easier for employers to provide coverage to their workers. As we saw in the case of Massachusetts health care law, which was the model for the Affordable Care Act, employer coverage increased when similar reforms were adopted.

To the extent that some employers drop coverage, studies suggest that current patterns started before the ACA was enacted. One of the reasons we needed the Affordable Care Act was to help employers and employees get quality coverage that they could afford. The Health Insurance Marketplaces pool together millions of individuals and small businesses and their employees to increase purchasing power and competition, a luxury that only large employers have previously enjoyed. Increased purchasing power and competition, in turn, will make premiums more affordable.

With small business tax credits available to many firms and the opening of the Small Business Health Options Program, the law is making it easier for small businesses to offer coverage to their employees. The bottom line is these concerns are largely anecdotal and it's too early to know for sure. What we've seen from Massachusetts and various studies, though, indicates that the ACA will have a positive impact on employers.

Does HHS have any estimates or insight into what percentage of covered employers will be in compliance with the employer mandate when implemented in 2015 versus those that might opt for either the "No Coverage" or "Insufficient Coverage" penalty?

No we don't, but I note that the law exempts all firms that have fewer than 50 full-time-equivalent employees from the employer payment. These 96 percent of businesses account for 5.8 million firms employing nearly 34 million workers. Also, as I mentioned before, more than 96 percent of firms with 50 or more employees already offer health coverage to their workers. Overall, less than 0.2 percent of all firms (about 10,000 out of 6 million) will need to start offering health coverage to their workers to avoid risking the employer payment.

Does HHS anticipate that small employers will take advantage of the exchanges now and/or that large employers will use them beginning in 2017?

Yes. The law expands small business owners' coverage options, increasing their purchasing power and lowering their costs. We've already seen hundreds of thousands of small business owners that

have benefited from the law's small business tax credits, which currently cover up to 35 percent of their premium contributions toward their employees' health coverage.

The Small Business Health Options Program (SHOP) simplifies the process of buying health insurance for small businesses. It provides employers with 50 or fewer workers a new way to shop for and compare insurance options. Business owners can compare health plans online on an apples-to-apples basis, and they may qualify for a small business tax credit worth up to 50 percent of their premium costs. By pooling their risk together with other small businesses in the SHOP, small employers finally have the leverage historically enjoyed by their larger competitors. Starting in 2017, each marketplace will have the option of opening the SHOP to large employers.

What would you advise corporate counsel to focus on now so their companies are fully prepared for the implementation of the ACA employer mandate in 2015?

The provision of an additional year before the ACA's employer and insurer reporting requirements begin allows the Internal Revenue Service (IRS) to continue to consider ways to simplify the new reporting requirements, consistent with the law. It also provides time to employers to adapt their reporting systems as well as their health coverage to ensure that it's affordable and of at least minimum value for their employees.

In the meantime, the IRS is working with employers, insurers, and other reporting entities to strongly encourage them to voluntarily implement information reporting for 2014, in preparation for the full application of the reporting provisions in 2015. During the 2014 transition period, we strongly encourage employers to maintain or expand health coverage.

What have been some of HHS' greatest challenges and successes in implementing the ACA thus far? Are there any other areas of the ACA of interest to employers and employees that HHS is working to improve?

Certainly, the technical problems with Health Insurance Marketplace website, HealthCare.gov, represent our biggest current challenge, and the online process for enrolling in coverage through that website must be improved for the program to be successful. We've already made significant progress, and we will continue to improve the website. The case that the Supreme Court decided in June 2012 was a challenge that we took very seriously at the time, although today the case feels like distant history.

The good news is that, because of the law, we now have a market that's more consumer-friendly and can better drive competition. Before the Affordable Care Act, there was no way to easily compare plans from different insurers. Thanks to the Affordable Care Act, this is no longer the case.

In addition to the new coverage options that the law gives to small businesses, the Affordable Care Act creates new incentives and builds on existing wellness program policies to promote employer wellness programs and encourage opportunities to support healthier workplaces. Evidence shows that workplace health programs have the potential to promote healthy behaviors; improve employees' health knowledge and skills; help employees get necessary health screenings, immunizations, and follow-up care; and reduce workplace exposure to substances and hazards that can cause diseases and injuries.

What will be a fair measure of success for the ACA in your opinion?

The ACA has already been successful in many ways. We've already seen more than 3 million previously uninsured young adults get coverage through their parents' plans. More than 105 million Americans no longer have to worry about lifetime dollar limits on their coverage, and millions of Americans, both those with private coverage and those on Medicare, are able to get recommended preventive services like mammograms and flu shots without having to pay a co-pay or deductible.

In the coming months, we will see millions of Americans gaining coverage through the Health Insurance Marketplaces, many enjoying generous federal financial assistance and enrolling in Medicaid. The measures of the success of the law will be whether the vast majority of Americans have adequate health coverage and ultimately whether it improves the health of our citizens.

Implementation of the Medicare Shared Savings Program and Accountable Care Organizations (ACOs) has been another big initiative for HHS. How would you describe the benefits of these programs and do you expect employers or employees to benefit from ACOs that participate in the commercial insurance space?

Accountable Care Organizations are groups of doctors, hospitals, and other health care providers, that come together voluntarily to provide coordinated high-quality care to their Medicare patients. Under this program, ACOs are given a strong financial incentive to provide such care.

The goal of this coordinated care is to ensure that patients, especially the chronically ill, get the right care at the right time, while avoiding unnecessary duplication of services and preventing medical errors. Whereas doctors, hospitals and other health care providers have sometimes had an incentive to prescribe additional procedures, now they will have an incentive to eliminate unnecessary procedures, reducing health care costs.

When an ACO succeeds in both delivering high-quality care and spending health care dollars more wisely, it will share in the savings that it achieves for the Medicare program. Not only do providers and the Medicare program benefit from such savings, but patients benefit from fewer repeated medical tests and better coordinated care. If this model is successful in the Medicare program, I have no doubt that insurers will wish to explore whether similar programs could benefit the private sector.

Why do the benefits of ACOs outweigh potential antitrust concerns?

ACOs have the potential to provide better care while providing significant savings to the Medicare program. The HHS Inspector General, Federal Trade Commission, and Department of Justice were consulted in the development of this program. They and the HHS will be watching to ensure that the benefits of ACOs outweigh potential antitrust concerns.

Do you anticipate the quality of care or cost-savings components of ACOs will have a greater impact on health care providers and patients?

Yes. When doctors and other health care providers can work together to coordinate patient care, patients receive higher quality care, and we all see lower costs.

What have you been most proud of during your tenure at HHS, and what is your biggest goal as general counsel?

Since the day I started at the Office of General Counsel (OGC), my most important goal has been to lead the office in doing everything we can to assist in the successful implementation of the Affordable Care Act. I'm extremely proud of the work we have done insuring that the regulations and policies issued to implement the act are consistent with the law and will withstand legal challenge. Of course, the highlight was the June 2012 Supreme Court decision upholding the constitutionality of the ACA.

I am also proud of the terrific team we have built in the OGC. I inherited a talented pool of lawyers, so I was in a great shape when I walked in the door. In addition, a number of outstanding lawyers have joined OGC during my tenure, including the deputy general counsels and the associate general counsels whom I have appointed. As a team we have been able to provide critical support to the programs at the Food and Drug Administration, including the new, exciting program to regulate tobacco products, to the Medicare and Medicaid programs, and to the truly astonishing range of other pro-

grams at the department, including programs for children, mentally ill patients, refugees, Native Americans/Alaska Natives, and many other Americans in need of health care and other services.

We have experienced great success in most of our significant Supreme Court cases. Last term alone, HHS participated in seven Supreme Court cases as a party or *amicus*, and we had a significant interest in three more. In almost all but one of these cases, our position prevailed or the Court's decision aligned with our interest. We also played a critical role during the recent government shutdown by advising our clients how to ensure that life-saving activities continued consistent with the legal requirements.

My goal as general counsel will continue to be to ensure that we provide our clients the highest quality legal services in a timely and effective manner so that their important policies can be implemented and withstand potential legal challenge. I am confident that the strong legal team we are building will continue to provide excellent legal advice for many years in the future. ☉

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Or you can try to motivate a shareholder to vote on their own and to give their opinion. The board wants that communication to find out what is on the minds of shareholders. So we developed a program that gives voting registered shareholders the option of having a donation made to plant a tree or they can get an environmentally friendly reusable bag that has the logo of our sustainability program on it.

Additionally, it has increased the engagement with individual shareholders and led to an increase in comments from shareholders and a greater participation rate to satisfy the shareholder quorum requirement. This will be the fourth year of the program, and not only has it been effective, it is also cost effective. It's a great way to get the vote, but also get the information from shareholders on what is on their minds.

Do you believe that sound corporate governance practices translate into shareholder value? Or put another way, do you believe that investors should avoid corporations with poor governance practices?

Yes, companies with sound corporate governance practices are generally committed to transparency, and this can significantly contribute to creating value for shareholders. I believe that having sound and best practices in the corporate governance area not only helps you navigate through the usual issues, but also when you get into difficult issues because you have the processes and procedures in place for those types of dilemmas.

If you could make all companies adopt three corporate governance best practices today, what would they be?

Usually the simplest concepts are the best ones. The first example is executive sessions, where the board meets by themselves, discusses the issues, and develops suggestions that go to the CEO and other executive officers. I think this has been one of the best practices that boards have adopted in the past 10 years. Some boards were not holding executive sessions, but now it is more the rule.

The second practice is transparency—writing documents in ways that people will actually understand them. I'm very proud of Prudential; we were one of the leaders in this area, creating proxy statements and other documents that shareholders could understand. They do not have to pour through a document to find something on page 72, footnote 2. Transparency is using understandable language in summary form, charts that people can understand, etc.

The third corporate governance best practice involves the skills and experiences of your board, really looking at an issue and matching it to your short-term and long-term corporate objectives so you really have the right oversight. It is important to have those skills and experiences and a diverse board with the broad range of perspectives so that you can really analyze and use consensus building to get to the right decision.

What have you been most proud of during your career as a corporate governance professional? Are you seeing any trends in the industry?

It would be increasing the level of communication with shareholders, enhanced engagement by the board, and improving the transparency and usability of information provided to shareholders and stakeholders. Boards and management have improved their connection to the mission of their companies.

Boards are really taking their jobs very seriously, and you are seeing a tremendous amount of board engagement. They recognize what their role is and how important oversight is. I think every year you are seeing more of that. For example, in the letter from the board to shareholders that starts off the Prudential proxy statement, the board is essentially giving their state of the union address, recognizing they are stewards for the shareholders and discussing what they have done over the past year. You are seeing boards generally recognizing their roles and how they can communicate better with shareholders. ☉