

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION FOR COMMUNITY
AFFILIATED PLANS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
TREASURY, *et al.*,

Defendants.

Civil Action No. 18-2133 (RJL)

**MOTION FOR ORDER APPROVING PROPOSED AGREED-UPON BRIEFING
SCHEDULE FOR PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs respectfully move this Court for an order approving a proposed schedule agreed upon by the parties for the briefing of Plaintiffs' motion for a preliminary injunction. The parties reached agreement on the following schedule:

Plaintiffs' motion for a preliminary injunction	September 28, 2018
Defendants' response	October 15, 2018 at noon
Plaintiffs' reply	October 22, 2018 at 9 am.

This is an action under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, seeking judicial review of a final rule issued by the Departments of Labor, Treasury, and Health and Human Services. That rule—the short-term, limited-duration insurance rule (“STLDI Rule”)—redefines the scope of the Affordable Care Act’s exemption for short-term, limited-duration

insurance plans. *See* Final Rule, Short-Term, Limited Duration Insurance, 33 Fed. Reg. 38,212 (Aug. 3, 2018).

Plaintiffs will begin to incur irreparable injuries if the short-term, limited-duration insurance plans permitted under the Rule are marketed to consumers when consumers are able to enroll in Affordable Care Act-compliant plans for calendar year 2019—which occurs when “open enrollment” begins on November 1, 2018. The motion for a preliminary injunction will therefore seek an order suspending the Rule until this Court renders a final decision on the merits of Plaintiffs’ APA claims.

The Affordable Care Act (“ACA”), among other things, establishes standards that govern the terms on which health insurance plans may be offered in the individual market. For example, the ACA requires that these plans cover a set of “essential health benefits,” and it prohibits insurers from denying coverage or charging higher rates based on a person’s medical condition or history. Narrow categories of insurance products are exempt from these standards. One such narrow exemption is for “short-term, limited duration insurance,” a phrase that refers to “a type of insurance that was primarily designed to fill temporary gaps in coverage that may occur when an individual is transitioning from one plan or coverage to another plan or coverage.” Final Rule, 33 Fed. Reg. at 38,213.

The federal agencies implementing the ACA realized that they would have to implement a definition of “short-term, limited duration insurance” (STLDI) that is consistent with Congress’s new comprehensive reforms of the insurance market in the ACA. That process culminated in a final regulation promulgated in 2016 stating that, to qualify as an STLDI plan, “coverage must be less than three months in duration, including any period for which the policy may be renewed.” 81 Fed. Reg. at 75,318.

In that regulation, which is not challenged by this suit, the Departments explained that, prior to their rulemaking, STLDI plans were being purchased by some individuals “as their primary form of health coverage,” even though these plans did not provide “the protections of the Affordable Care Act” and thus “may not provide meaningful health coverage.” *Id.* at 75,317-18. Moreover, the pricing of STLDI plans based on the insured’s health history would allow these plans to target “healthier individuals,” thereby “adversely impacting the risk pool for Affordable Care Act-compliant coverage.” *Id.* at 75,318. Thus, the Departments determined that a narrow interpretation of STLDI was necessary to “improve the Affordable Care Act’s single risk pool” and keep premiums for all participants in the individual health market at an appropriate and affordable level. *Id.* Accordingly, the Departments finalized a rule defining STLDI plans as limited to an initial term of 3 months and to a total length, including extensions, of 12 months or fewer. *Id.* at 75,316.

After President Trump’s inauguration, Congress considered, but ultimately rejected, a number of bills to repeal the ACA. Soon after those efforts failed, President Trump signed Executive Order 13813 on October 12, 2017, directing his Administration to expand access to STLDI plans. Exec. Order No. 13813, *Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States* (Oct. 12, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-healthcare-choice-competition-across-united-states>. The Executive Order directed this expansion on the ground that STLDI plans are exempt from the “insurance mandates and regulations included in title I of the [ACA],” and sought to make STLDI plans an “alternative” to ACA-compliant health care for consumers in the individual insurance marketplaces. *Id.*

On August 3, 2018, following notice and comment, the Departments of Labor, Treasury, and Health and Human Services promulgated the STLDI Rule, which rule interprets “short-term” as permitting plans with a contract term of up to 364 days—1 day less than a qualified health plan under the ACA. The rule also interprets “limited duration” as including plans that can be renewed for up to 36 months, and specifically permits the purchase of multiple 36-month contracts at the original point of sale.

The STLDI Rule becomes effective on October 2, 2018.

Plaintiffs contend that the Rule must be set aside under the APA because it is arbitrary and capricious and contrary to law for multiple reasons. *First*, an administrative agency lacks the power to adopt a rule that subverts Congress’s determinations embodied in the text and structure of an enacted law. But that is the precise intent and effect of the STLDI Rule. As the Complaint explains (*see* Dkt 1 ¶¶ 3, 87-95), the STLDI Rule rests on agency determinations directly contrary to Congress’s decisions embodied in the text and structure of the ACA. *Second*, insurance plans that last for 364 days and can be renewed for 36 months fall far outside the plain meaning of the terms “short-term” and “limited-duration.” *Third*, the justifications for the rule are arbitrary and capricious, particularly in light of the recently-adopted rule defining short-term, limited-duration insurance as a policy lasting less than three months. *See* Complaint (Dkt. 1) ¶¶ 82-95, 112-122.

The Rule will inflict several types of irreparable injuries on Plaintiffs if it is effective during open enrollment for 2019 ACA marketplace insurance plans:

- Plaintiff Association for Community Affiliated Plans (“ACAP”) is an association of nonprofit and community-based insurers that provide qualified health coverage to individuals through the ACA marketplaces. The insurance policies permitted by the rule

will compete with the insurance offered by ACAP's members, and ACAP members will be harmed by the loss of customers to insurers selling STLDI policies. STLDI policies will be less expensive for some consumers because premiums can be set based on health history, age (beyond the ACA-specified limits), and gender (resulting in lower premiums for healthy, young men); the policies can exclude some of the essential health benefits that ACA marketplace insurance provides; and the policies can impose annual dollar limits on benefits. *See* Complaint (Dkt. 1) ¶¶ 21-30.

- Plaintiffs Mental Health America, American Psychiatric Association, and AIDS United are associations that include as members health care providers who treat mental health and substance use disorders. The medical services they provide are typically excluded from STLDI plans. *See* Complaint (Dkt. 1) ¶¶ 15, 37-45. As a result, expanded use of these policies—rather than ACA marketplace insurance plans—will result in more individuals who require uncompensated care, imposing financial burdens on these Plaintiffs' members. *Id.*
- Plaintiffs National Alliance on Mental Illness, Mental Health America, AIDS United, National Partnership for Women & Families, and Little Lobbyists include as members individuals who are consumers of health care services, including individuals living with mental illness and substance use disorders, HIV, and other pre-existing conditions. *See* Complaint (Dkt. 1) ¶¶ 15, 31-38, 43-53. These individuals will face higher health insurance costs as a result of the increase in premiums for ACA marketplace plans; they will not be able to purchase STLDI plans because such plans typically are not available to individuals with pre-existing conditions and do not provide the coverage that such individuals need. And individuals who are unaware that they have these conditions may

purchase STLDI plans and then find that they lack insurance coverage for critically-needed health care. *Id.*

Significantly, several commenters, including the non-partisan National Association of Insurance Commissioners, sought a delay of the final rule's effective date to allow time for States to enact protective regulations as well as to eliminate uncertainty the STLDI Rule caused in the insurance market for 2018 and 2019. *Comment of National Association of Insurance Commissioners*, Apr. 23, 2018. The Rule nonetheless becomes effective on October 2.

For all of these reasons, Plaintiffs will seek preliminary injunctive relief.

Plaintiffs' counsel conferred with counsel for Defendants and the parties agreed on the briefing schedule proposed in this motion.

For the reasons stated above, Plaintiffs respectfully request that the Court enter the attached order setting a briefing schedule for the motion for a preliminary injunction.

Respectfully submitted,

/s/ Andrew J. Pincus

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Dated: September 24, 2018

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**Member of the District of Columbia Bar; application for admission to this Court's Bar pending.

Certificate of Service

I, Andrew J. Pincus, an attorney admitted to this Court, do hereby certify that on this 24th day of September, 2018, a copy of the foregoing Motion For Order Approving Proposed Agreed-Upon Briefing Schedule For Plaintiffs' Motion For A Preliminary Injunction and [Proposed] Order Approving Proposed Agreed-Upon Briefing Schedule For Plaintiffs' Motion For A Preliminary Injunction was served electronically by email on the following individual, who is counsel for Defendants and who consented to service of this motion by email:

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Respectfully submitted,

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**[PROPOSED] ORDER APPROVING PROPOSED AGREED-UPON BRIEFING
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UPON CONSIDERATION of the Motion for Order Approving Proposed Agreed-Upon Briefing Schedule for Plaintiffs' Motion for a Preliminary Injunction, it is:

ORDERED that the motion is GRANTED. Plaintiff's Motion for Preliminary Injunction shall be briefed according to the following schedule:

Plaintiffs' motion for a preliminary injunction	September 28, 2018
Defendants' response	October 15, 2018 at noon
Plaintiffs' reply	October 22, 2018 at 9 am.

Richard J. Leon
United States District Court Judge