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)

NOTICE OF WITHDRAWAL OF MOTION FOR A PRELIMINARY INJUNCTION AND MOTION FOR EXPEDITED BRIEFING SCHEDULE

In light of this Court's comments during the hearing on the motion for a preliminary injunction in this case held on October 26, 2018, plaintiffs hereby withdraw their motion for a preliminary injunction and respectfully move the Court for an order setting an expedited briefing schedule for resolution of the merits of this litigation. Plaintiffs propose the following schedule:

Defendants' answer to the Complaint	November 14, 2018
Parties' cross-motions for summary judgment	November 28, 2018
Parties' responses to summary judgment motions	December 10, 2018

1. As the Court is aware, 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—non-profit insurance companies, healthcare providers, and at-risk individuals—will suffer substantial harm from the implementation of this rule. Accordingly, they filed their complaint on September 14, 2018, more than two weeks before the STLDI Rule's effective date of October 2, 2018, and more than three months before the conclusion of the "open enrollment" period for Affordable Care Act-compliant plans for calendar year 2019. Plaintiffs also filed a motion for preliminary injunction, hoping to restore the status quo for at least some of the open enrollment period then about to begin.

The motion for preliminary injunction came before this Court for hearing on October 26, 2018. During that hearing, the Court indicated that, as a practical matter, resolution of plaintiff's motion for preliminary injunction could not be completed before the close of open enrollment. *See, e.g.*, Tr. 59-60 (explaining "the reality" that "if you think I'm going to turn out an opinion in this case in the next few weeks, it's not possible, no judge could do it. It's too complicated, it's too large, it's too consequential, it can't be done in a matter of a few weeks, especially when I'm in the middle of a trial."). Thus, the Court suggested that a ruling on the preliminary injunction—particularly since "whichever side loses" would appeal the ruling and the preliminary posture of the Court's ruling would require "a second opinion later on the merits"—would not be of practical use to the parties. Tr. 54.

Instead, the Court suggested, plaintiffs should consider withdrawing the preliminary injunction motion and proceeding to a decision on the merits. As the Court put it: "Why wouldn't it make more sense to withdraw the PI and just litigate this case and get a ruling sometime near the end of the year?" Tr. 53. The Court added: "We can litigate the case in the normal c[ourse]. I can expedite the briefing. We can do final briefing. And you'll get an opinion probably sometime at the beginning of the year." Tr. 54; *see also* Tr. 58 (explaining that if the parties proceeded to

final resolution, they would "get an opinion in the normal course of things, somewhere near the end of the year, beginning of January"). The Court invited plaintiffs' counsel to "talk to your clients" regarding the appropriate way forward. Tr. 60.

2. Plaintiffs' counsel have done so. Although plaintiffs continue to believe that they have satisfied the standard for a preliminary injunction and that they will suffer irreparable harm if the STLDI Rule is in effect for the entire 2018 open enrollment period, they recognize the practical difficulties identified by the Court that preclude resolution of the motion prior to the close of open enrollment. Accordingly, plaintiffs now follow the Court's suggestion and withdraw the preliminary injunction motion.

It remains vitally important, however, that the case be resolved quickly. Although it is too late to affect the current open enrollment period, issuers (including plaintiffs here) must submit details regarding their Affordable Care Act-compliant plans, including coverage and rate information, during a federal application submission window that will likely run from May to June of 2019.[1] The deadlines for some insurers are even earlier, as some states impose earlier filing dates; insurer plaintiffs in Vermont, for example, must submit applications in March.[2]

To meet those deadlines, issuers will begin work on next year's rates and offerings immediately after the close of open enrollment in 2018. As a consequence, absent a decision on the validity of the STLDI Rule by early 2019, plaintiffs and other insurers will be forced to set

[1] Defendants have not yet published the schedule for 2019, so the precise dates remain uncertain. In 2018, the application submission window was from May 9, 2018 to June 20, 2018. *See* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Key-Dates-Table-for-CY2018.pdf.

[2] The 2018 deadline in Vermont was March 9, 2018. *See* https://ratereview.vermont.gov/sites/dfr/files/2018/2019%20QHP%20Certification%20Timeline%20October%202017.pdf. The deadline for 2019 has not been announced, but Vermont has provided no reason to expect a materially different schedule.

rates and offerings without guidance on the status of STLDI plans, which will cause confusion and lead to substantial injury.

In addition, guidance recently issued by defendants explains that they are more likely to approve requests for exemption from certain Affordable Care Act requirements (so-called "Section 1332 waivers") from states that permit STLDI plans in their health insurance markets; accordingly, states seeking such waivers require certainty regarding the meaning, and legality, of STLDI plans.[3] Defendants have directed states to "plan to submit their initial waiver applications" in "the first quarter of the year prior to the year health plans affected by the waiver would take effect."[4] Thus, states currently preparing applications for a section 1332 waiver must submit their applications by April 1, 2019, to receive waivers for health care plans beginning in 2020. In short, the public interest strongly favors final resolution of this matter as soon as possible, even if resolution before the conclusion of open enrollment in 2018 is not feasible.

For the foregoing reasons, plaintiffs believe that expedited briefing following the schedule proposed above, which would conclude summary judgment briefing in early December of this year, is appropriate. Such a schedule would, as the Court suggested, make possible a decision in the "beginning of January" timeframe that the Court mentioned during the hearing on plaintiffs' motion for a preliminary injunction, Tr. 58, and would thereby allow for resolution of any appeal to the D.C. Circuit in time for the result to be taken into account in the finalization of 2020 insurance plans. Moreover, plaintiffs note that, given the wholly legal nature of the claims

[3] *See* Guidance, State Relief and Empowerment Waivers, 83 FR 53,575 at 53,577 (October 22, 2018) (explaining that a "section 1332 state plan should foster health coverage through competitive private coverage, *including AHPs and STLDI plans*") (emphasis added). The guidance's definition of short-term, limited-duration insurance comes from the rule at issue in this litigation, meaning that states wishing to follow the Defendants' directive must await clarification of that term's meaning from this lawsuit before preparing their waiver applications. *Id.* at 53,576 n.11.

[4] Guidance, 83 FR 53,575 at 53,582.

in this litigation, the parties' briefing on the merits is likely to be substantially similar to their preliminary injunction briefing; expedited briefing of the merits therefore would not impose an undue burden on either party.

Plaintiffs have consulted with counsel for the government but have been unable to reach agreement on a proposed expedited briefing schedule; the government does not agree to the schedule proposed here by plaintiffs.[5]

For the reasons stated above, plaintiffs respectfully request that the Court enter the attached order setting an expedited briefing schedule for motions for summary judgment in this matter.

[5] The government has expressed the view that summary judgment motions should not be briefed prior to formal submission of the administrative record in this case, which it does not anticipate occurring until December 2018. It is not apparent, however, what information will appear in the formal administrative record that is not already in the database of public comments available on defendants' website, of which the Court can take judicial notice. Moreover, even if the Court should not *decide* the motions for summary judgment before receiving the administrative record, there is no reason that the parties cannot *brief* those motions, citing to the publicly available versions of the comments in question as they did in their briefing regarding the motions for a preliminary injunction. Thus, plaintiffs respectfully submit that defendants' delay in compiling the administrative record in this case is no reason to delay expeditious resolution of the litigation, particularly in light of the harm that delay would cause the public interest.

Respectfully submitted,

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

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

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[PROPOSED] ORDER SETTING EXPEDITED BRIEFING SCHEDULE

UPON CONSIDERATION of the Motion For Expedited Briefing And To Withdraw Plaintiffs' Motion For A Preliminary Injunction, it is:

ORDERED that the motion is GRANTED. Plaintiff's Motion for Preliminary Injunction is hereby deemed withdrawn, and the parties will proceed to briefing cross-motions for summary judgment according to the following schedule:

Defendants' answer to the Complaint	November 14, 2018
Parties' cross-motions for summary judgment	November 28, 2018
Parties' responses to summary judgment motions	December 10, 2018

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Richard J. Leon
United States District Judge