

**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)

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR
EXPEDITED BRIEFING SCHEDULE AND PROPOSED ALTERNATIVE SCHEDULE**

Defendants, the Departments of Health and Human Services, Labor, and the Treasury and their respective Secretaries, oppose Plaintiffs' Motion for Expedited Briefing Schedule, ECF No. 28. Plaintiffs' proposed schedule would require the parties' briefing to occur even before the administrative record is compiled and is so truncated that it would not allow the parties to fully present the complicated issues in this case to the Court for consideration of dispositive motions.

Plaintiffs brought this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, seeking judicial review of a final agency rule—the short-term, limited duration rule—which had gone through an extensive rulemaking process that generated thousands of pages of materials. *See generally* Compl., ECF No. 1. It is "black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013). Despite the fact that "the focal point for judicial review should be the administrative record," *Camp v. Pitts*, 411 U.S. 138, 142 (1973), Plaintiffs propose that the parties

file simultaneous cross-motions for summary judgment on November 28, 2018, with simultaneous responses due on December 10, 2018, all *before* the administrative record will be available. As undersigned counsel has informed Plaintiffs' counsel, the agencies will not be able to produce the administrative record until December 19, 2018 at the earliest because of the expected volume of the administrative record. For that reason, Defendants also would not be able to file a certified list of the contents of the administrative record with their dispositive motion, as required by Civil Local Rule 7(n)(1), if their motion is due more than a month before the administrative record is available as Plaintiffs propose. More importantly, under Plaintiffs' proposed schedule, neither party would have the benefit of the administrative record for their briefing, which would hardly assist the Court's full consideration of Plaintiffs' claims and Defendants' responses.

Plaintiffs suggest that the Court could itself review the administrative record after briefing is complete. *See* Pl.'s Mot. at 5 n.5 (“[E]ven 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[.]”). But that is contrary to the orderly proceeding of summary judgment motions in APA cases. Indeed, Local Rule 7(h)(2) requires that in cases “in which judicial review is based solely on the administrative record . . . motions for summary judgment and oppositions thereto shall include a statement of facts with references to the administrative record.” Local Rule 7(n)(1) further requires the parties to provide the Court with an appendix containing copies of those portions of the administrative record that are cited in the parties' briefs, and “unless so requested by the Court, the entire administrative record shall not be filed with the Court.” These rules exist for a reason, which is to allow the Court to efficiently evaluate the parties' arguments on the basis of the administrative record without the need to dig through thousands of pages of materials on its own.

Plaintiffs claim that they require expedited briefing and that “it is vitally important [] that the case be resolved quickly.” Pls.’ Mot at 3. But their request for expedited briefing is at odds with the withdrawal of their preliminary injunction motion. The Federal Rules of Civil Procedure provide an avenue in Rule 65 for expedited relief, and Plaintiffs took advantage of that procedural mechanism by moving for a preliminary injunction. *See* Fed. R. Civ. P. 65. Having now withdrawn that motion, this case should proceed in an orderly manner with reasonable briefing deadlines, consistent with the federal rules. This is particularly the case given the Court’s observation at the October 26, 2018 hearing that this case presents issues of “complexity,” “enormity,” “sensitivity and national significance.” Tr. 39, 58. Accepting Plaintiffs’ unreasonably curtailed schedule, after Plaintiffs have withdrawn their motion for a preliminary injunction, risks rushing consideration of those issues.

Plaintiffs also propose to shorten the time for Defendants to respond to the Complaint, which, under Federal Rule of Civil Procedure 12(a)(2), is not due until November 19, 2018. *See* Fed. R. Civ. P. 12(a)(2); *see also* Fed. R. Civ. P. 6(a)(1)(C). Plaintiffs provide no legitimate basis for reducing the time granted by the federal rules for the government to file a responsive pleading.

Finally, the Court should reject Plaintiffs’ proposal that the parties file simultaneous cross motions for summary judgment and simultaneous responses. Simultaneous cross briefing runs the risk of the parties arguing past each other as well as being repetitive. Sequential briefing, on other hand, would allow the parties to fully flesh out their arguments and responses, ultimately facilitating the Court’s consideration and adjudication of the dispositive motions.

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs’ motion. To allow full, deliberate consideration of the complex issues in this case, Defendants propose the following briefing deadlines:

Defendants produce the administrative record:	December 19, 2018
Plaintiffs move for summary judgment:	January 18, 2019
Defendants respond to Plaintiffs' motion, cross move for summary judgment, and file a certified list of the contents of the administrative record:	February 17, 2019, or thirty days after Plaintiffs move for summary judgment, whichever is earlier.
Plaintiffs reply to Defendants' opposition and respond to Defendants' summary judgment motion:	Fourteen days after Defendants respond to Plaintiffs' motion and cross move for summary judgment.
Defendants reply to Plaintiffs' opposition:	Fourteen days after Plaintiffs reply to Defendants' opposition and respond to Defendants' summary judgment motion.
Plaintiffs and Defendants jointly file appendix containing copies of cited portions of the administrative record:	Fourteen days after briefing is complete, as required by Local Rule 7(n)(2).

Dated: November 9, 2018

Respectfully Submitted,

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[PROPOSED] ORDER

UPON CONSIDERATION of Plaintiffs' Motion for Expedited Briefing Schedule and Defendants' Opposition and Proposed Alternative Schedule, and the entire record herein, it is hereby ORDERED that Plaintiffs' Motion is DENIED and Defendants' request for a proposed alternative schedule is GRANTED.

Dated: _____

Richard J. Leon
United States District Court Judge