

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

BAGLY, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. 20-cv-11297-PBS
)	
UNITED STATES DEPARTMENT)	
OF HEALTH AND HUMAN SERVICES,)	
<i>et al.</i> ,)	
)	
Defendants.)	

MOTION FOR AN ENLARGEMNT OF TIME

Defendants expect to make public a Notice of Proposed Rulemaking (“Proposed Rule”) implementing Section 1557 of the Affordable Care Act, which would replace the provisions challenged in this case, on or before July 25, 2022. *See* Exhibit 1, Declaration of Melanie Fontes Rainer, Counselor to the Secretary, U.S. Department of Health and Human Services (“Rainer Decl.”) ¶ 7. In light of that impending action, Defendants hereby respectfully file this motion for an order under Fed. R. Civ. P. 6(b), extending Defendants’ time to file a responsive pleading to the Amended Complaint, ECF No. 18, until (1) 10 days after the Court denies Defendant United States Department of Health and Human Services (“HHS” or the “agency”)’s forthcoming motion to dismiss or, in the alternative, for voluntary remand or, in the alternative, for a stay of proceedings, provided that the Proposed Rule is issued on or before July 25, 2022, or (2) July 28, 2022, provided that the Proposed Rule is not issued on or before July 25, 2022. Given this development and the Court’s prior discussions with the parties, Defendants believe an enlargement of time is appropriate to allow the Court to consider how to proceed in light of the forthcoming Proposed Rule before Defendants are required to file a responsive pleading. Defendants submit the following in support of this motion:

1. Plaintiffs filed an Amended Complaint on September 18, 2020. The Amended Complaint is 107 pages and includes 427 paragraphs. The Amended Complaint brings claims against more than ten unique modifications to regulations implementing Section 1557 of the Affordable Care Act and includes four counts. ECF No. 18.
2. The Amended Complaint joins nine Plaintiffs from across the country. ECF No. 18.
3. On October 14, 2020, Defendants moved to dismiss all of Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1) and some claims pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 21.
4. On August 18, 2021, the Court issued a Memorandum and Order deciding Defendants' motion to dismiss. ECF No. 63. The Court concluded that Plaintiffs' challenges to some provisions of the challenged rule could proceed, but that others could not. *Id.* at 3-4, 10.
5. Over a year ago, HHS completed an initial review of the 2020 Rule challenged in this litigation, and HHS has opened a rulemaking docket to reconsider the rule. *See Rainer Decl.* ¶ 6.
6. Given the agency's reconsideration, on September 15, 2021, Defendants moved for voluntary remand or, in the alternative, a stay of proceedings. ECF No. 66. On October 29, 2021, the Court denied Defendants' motion for voluntary remand without prejudice but granted Defendants' motion for a stay of proceedings pending the issuance of a Notice of Proposed Rulemaking in April 2022. ECF No. 83 at 2. The Court reasoned that it denied voluntary remand because Plaintiffs' "risk of harm, in the face of uncertainty that the proposed rule will address, let alone resolve, all the claims before the Court, cautions against remand." *Id.* at 2. The Court recognized that "it makes little sense for the Court to require merits briefs and expend resources resolving complicated legal issues that may well be moot around the same time this Court would reach a decision." *Id.* at 3.

7. On June 2, 2022, the Court held a status conference. The Court viewed the agency's rulemaking as proceeding too slowly. *See* Transcript of June Status Conference ("Tr.") at 5:16-20. The Court set a schedule for proceedings because "ideally speaking, [the schedule] will help move [the rulemaking] along." *Id.* at 17:4-5. But the Court emphasized that it is "totally open to a stay or a remand if in fact [the rulemaking] moves at some sort of speed[.]" *Id.* at 17:7-9.
8. On or before July 25, 2022, HHS anticipates issuing a Proposed Rule implementing Section 1557 of the Affordable Care Act, which, if finalized, would replace the provisions challenged in this action. *See* Rainer Decl. ¶ 7.
9. Once the Proposed Rule is issued, HHS anticipates filing a motion to dismiss or, in the alternative, for voluntary remand or, in the alternative, for a stay of proceedings. At that time, Defendants will attach a memorandum of reasons, including citation of supporting authorities, fully addressing why the relief Defendants will seek is appropriate in light of the new Proposed Rule.
10. Defendants' responsive pleading is currently due July 18, 2022. ECF No. 97.
11. HHS intends to issue the Proposed Rule on or before July 25, 2022. HHS anticipates filing its motion to dismiss or, in the alternative, for voluntary remand or, in the alternative, for a stay of proceedings, no later than July 28, 2022. Accordingly, Defendants respectfully request that Defendants' time to file a responsive pleading to the Amended Complaint, ECF No. 18, be extended until 10 days after the Court denies Defendants' forthcoming motion to dismiss or, in the alternative, for voluntary remand or, in the alternative, for a stay of proceedings, provided that the Proposed Rule is issued on or before July 25 as planned.
12. This proposed extension of the responsive pleading deadline may conserve Government resources, as filing a responsive pleading may not be necessary if the Court grants any of the relief that Defendants will seek.

13. Although Defendants currently intend to issue the Proposed Rule on or before July 25, 2022, Defendants are also cognizant of the Court's desire, as expressed at the June 2, 2022 status conference, to "move [the rulemaking] along." Accordingly, to address the Court's concerns, Defendants also propose that, if HHS does not issue the Proposed Rule on or before July 25, 2022, then Defendants' answer deadline be set for July 28, 2022.
14. Defendants recognize and appreciate the Court's patience as they proceed with the rulemaking process.
15. The proposed extension will not affect other deadlines in this matter. The parties' summary judgment briefing deadline runs from the date that Defendants produce the administrative record to Plaintiffs, which would not be affected if the Court were to grant this motion.

For the foregoing reasons, Defendants respectfully request that the Court issue an order enlarging the time to file a responsive pleading until (1) 10 days after the Court denies Defendants' forthcoming motion, provided that the Proposed Rule is issued on or before July 25, 2022, or (2) July 28, 2022, if the Proposed Rule is not issued on or before July 25, 2022.

A proposed order is attached.

Dated: July 15, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Liam C. Holland

LIAM C. HOLLAND B.B.O. #704799

Trial Attorney

United States Department of Justice
Civil Division, Federal Programs Branch

1100 L Street, NW

Washington, DC 20530

Tel.: (202) 514-4964

Fax: (202) 616-8470

Email: Liam.C.Holland@usdoj.gov

Counsel for Defendants

LOCAL RULE 7.1(a)(2) CERTIFICATE

I hereby certify that I communicated with Plaintiffs' counsel, J.A. Sagar, to provide notice of defendants' intent to file this motion, and respectfully requested that the parties confer in good faith to resolve or narrow the issue. Plaintiffs instructed Defendants to represent their position as follows: "Plaintiffs oppose the Government's request for an extension of time because (1) HHS has missed similar deadlines in the past; (2) the representations made in the Government's answer will bear on Plaintiffs' analysis of the administrative record and the drafting of Plaintiffs' forthcoming motion for summary judgment, and (3) the parties can litigate any motion for a stay even after the Government has answered the complaint."

/s/ Liam C. Holland

LIAM C. HOLLAND

Exhibit 1

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

BAGLY, *et al.*,
Plaintiffs,

V.

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,
et al.,

Defendants.

C.A. No. 20-cv-11297-PBS

DECLARATION OF MELANIE FONTES RAINER

I, Melanie Fontes Rainer, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the United States Department of Health and Human Services (“HHS”), and information supplied to me by current HHS employees:

1. I serve as Counselor to the Secretary of HHS. In this position, which I have held since May 2021, I report directly to the Secretary and oversee the work of several components of the Department, including the Office for Civil Rights (“OCR”).

2. Within HHS, OCR has primary responsibility for the rulemaking process related to Section 1557 of the Patient Protection and Affordable Care Act (“Section 1557”).

3. As part of my responsibilities as Counselor to the Secretary, I have been overseeing OCR's process of drafting a Notice of Proposed Rulemaking ("NPRM") to implement Section 1557.

4. On May 18, 2016, under the President Obama Administration, HHS promulgated a final rule (81 Fed. Reg. 31,375 (May 18, 2016)) implementing Section 1557 (“2016 Rule”).

5. On June 19, 2020, under the President Trump Administration, HHS promulgated a final rule (85 Fed. Reg. 37,160 (June 19, 2020)), which comprehensively revised the 2016 Rule

(“2020 Rule”).

6. Over a year ago, HHS completed an initial review of the 2020 Rule. HHS has opened a rulemaking docket to reconsider the rule.

7. HHS expects to make public an NPRM implementing Section 1557 of the Affordable Care Act, which would replace the provisions of the 2020 Rule, on or before July 25, 2022.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and information provided to me by employees at HHS.

A handwritten signature in black ink, appearing to read "Melanie F. Rainer", is written over a horizontal line.

Melanie Fontes Rainer
Counselor to the Secretary
U.S. Department of Health and Human Services

Dated: July 14, 2022

