

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:09-cv-54-VLB
)	
UNITED STATES OF AMERICA, et al.,)	
)	
Defendants.)	
)	

**FEDERAL DEFENDANTS' RESPONSE TO
NOVEMBER 3, 2010 SHOW CAUSE ORDER**

On September 22, 2010, the Court ordered the United States of America, the United States Department of Health and Human Services (HHS), and Kathleen Sebelius, Secretary of Health and Human Services (collectively, the "Federal Defendants") "to file bimonthly reports, on the first of alternating months beginning on November 1, 2010, updating the Court on the status of the proposed rulemaking by [HHS] that is relevant to this proceeding." See Doc. No. 131.

The Federal Defendants filed their first status report on November 1, 2010. It stated, among other things, that HHS "hope[d] to have an internal draft final rule prepared in the near future, but that the schedule is necessarily tentative given the possibility of unforeseen delays and the need to devote time and resources to other agency priorities." After reviewing that report, the Court, on November 3, 2010, ordered the Federal Defendants "to show cause by 12/2/10

why the Court should not set a scheduling order inasmuch as the Defendants do not foresee completion of the Federal Rulemaking process at any point in time.” (Doc. No. 134).

The Federal Defendants regret that they were not specific enough in their November 1, 2010 report in setting forth the agency’s anticipated time frame for completion of the pending rulemaking. For the reasons set forth in the November 1 report, HHS still cannot be certain of a date for completing the rulemaking. But the Federal Defendants can state that HHS expects to have a final rule published in the Federal Register within sixty to ninety days – i.e., as early as January 31, 2011, and no later than March 1, 2011. HHS is working hard to finalize the rule in this time frame and should be able to do so.

Although the Court understandably does not wish to have this case pending on its docket indefinitely, the Federal Defendants respectfully contend that HHS should be given “considerable deference in establishing a timetable for completing its proceedings.” *Cutler v. Hays*, 818 F.2d 879, 896 (D.C. Cir. 1987) (citing *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (1983) (although a court may have jurisdiction over a claim that an agency has unreasonably delayed action, “[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency’s control over the timetable of a rulemaking proceeding is entitled to considerable deference.”)). The Federal Defendants note that neither the original December 2008 rule nor the proposed rescission was mandated by

statute, nor is there any statutory deadline for completion of the current rulemaking.

In these circumstances, the Federal Defendants respectfully request that the Court not enter a scheduling order mandating completion of the rulemaking by a specific date, but rather allow HHS to continue evaluating, without a Court-imposed deadline, “the many complex questions surrounding the issue and the need for regulation in this area.” 74 Fed. Reg. 10207, 10209.

There are status reports due on January 3, 2011¹ and March 1, 2011. The Federal Defendants will of course notify the Court in the January report if there has been any change in the anticipated schedule. Likewise, if a final rule has not been issued by March 1, the Federal Defendants will file a report by that date explaining where the agency is in the rulemaking process and providing, if necessary, a revised anticipated schedule for completion. The Federal Defendants will, of course, also notify the Court promptly when the final rule regarding the proposed rescission is published.

¹ The Court’s September 22, 2010 Order directed the Federal Defendants to file “bimonthly reports, on the first of alternating months beginning on November 1, 2010.” Pursuant to Fed. R. Civ. P. 6(a)(1)(C), the Federal Defendants interpret that Order to mean that their next report is due not on January 1, 2011, a Saturday and legal holiday, but rather on January 3, 2011, “the next day that is not a Saturday, Sunday, or legal holiday.”

Respectfully submitted,

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