IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CRISWELL COLLEGE, Plaintiff, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 3:12-cv-04409-N

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION TO STAY

INTRODUCTION

Plaintiff challenges regulations that defendants are not enforcing against it, will never enforce against it in their current form, and that are presently being amended to accommodate the precise religious liberty concerns that form the basis of plaintiff's Complaint. Yet plaintiff continues to urge this Court to engage in a fiction and pretend that the current, soon to be defunct regulations have some current or future impact on plaintiff. Instead of either issuing a purely advisory opinion, or entering a stay for no purpose other than to facilitate plaintiff's hypothetical future challenge to some future regulation, the Court should dismiss this case.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION BECAUSE PLAINTIFF LACKS STANDING[1]

Plaintiff's standing allegations rest on a series of assertions that are insufficient to support standing, unsupportable by the facts, or both. As a preliminary matter, plaintiff alleges – for the first time, and in contrast to the allegations contained in its Complaint – that it does not qualify for the enforcement safe harbor because it has not provided the requisite notice to plan participants and has not self-certified in writing that it objects to providing certain contraceptive coverage on the basis of its religious beliefs.[2] Resp. at 6, 15-16. But plaintiff's refusal to self-

[1] To the extent that plaintiff vaguely suggests mootness, rather than standing, is the appropriate doctrinal inquiry, Pls.' Resp. to Defs.' Mot. to Dismiss & Br. in Supp. of Pls.' Mot. to Stay ("Resp.") at 10 n.43, Jan. 28, 2013, ECF No. 18, this argument is undeveloped and mistaken. While standing seeks to ensure "the parties have a concrete stake" in the matter, mootness serves the distinct interest of avoiding "abandon[ing] [a] case at an advanced stage" after it has been litigated "for years," where doing so "may prove more wasteful than frugal." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191-92 (2000). Because this case has not been litigated "for years" and is not at "an advanced stage," the interests served by the mootness doctrine simply are not implicated here. *See Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162, at *4 n.6 (D.D.C. Aug. 24, 2012) (rejecting mootness inquiry).

[2] In its Complaint, plaintiff says that, "*but for the temporary enforcement safe harbor, [it] would be required* to comply with the [regulations] as of [January 1, 2013,] or else face government

(continued on next page…)

certify or notify its employees that its health plan is protected by the enforcement safe harbor is a self-inflicted injury that does not give rise to standing. *See Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) ("An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries."); *see also Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements [of injury and traceability] for standing. . . . Here [appellant] has within its grasp an easy means for alleviating the alleged uncertainty. . . . As [appellant] has *chosen* to remain in the lurch, it cannot demonstrate an injury sufficient to confer standing.") (citations omitted) (emphasis in original). For this reason, the cases on which plaintiff relies, Resp. at 15, all of which address injury stemming from a party's coerced choices, are inapposite. Defendants have established an enforcement safe harbor, for which plaintiff qualifies, and are in the process of amending the regulations in an effort to accommodate concerns like plaintiff's; any dilemma that remains is of plaintiff's own making, rooted in plaintiff's refusal to avail itself of that safe harbor. Plaintiff cannot bootstrap itself into standing quite so brazenly.[3]

Plaintiff's alleged injuries fall into two categories: (1) alleged imminent injuries from the supposedly upcoming enforcement of the regulations in their current form, and (2) alleged current injuries from planning for the regulations in their current form. But both stem entirely

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enforcement actions." Compl. ¶ 57, Nov. 1, 2012, ECF No. 1 (emphasis added); *see id.* at ¶ 106. Nowhere in the Complaint does plaintiff allege that it is not protected by the enforcement safe harbor. Indeed, the Complaint's conditional language is at odds with plaintiff's late-breaking (and insufficient) assertion that it now feels it is not protected by the enforcement safe harbor.

[3] Plaintiff's assertion "that such a certification may violate its constitutional rights," Resp. at 16 n.60, is new, amorphous, and not contained in its Complaint. Moreover, because the burden to establish jurisdiction rests with plaintiff, *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012), it is up to plaintiff to explain how the self-certification requirement creates an injury. Plaintiff has not done so, much less explained how that requirement violates the Constitution.

from plaintiff's baseless speculation that the regulations will apply to plaintiff in their current form come August 2013. So too does the court's decision in *Archdiocese of New York*, on which plaintiff relies while entirely ignoring the fifteen other courts to have found such speculation to be unfounded, and the six other courts to have expressly found standing lacking for that reason.[4] Resp. at 10-19; *see Conlon v. Sebelius*, Case No. 12-cv-3932, slip op. at 8-10 (N.D. Ill. Feb. 8, 2013) (Ex. 1); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-CV-00924-JAR, 2013 WL 328926, at *6-7 (E.D. Mo. Jan. 29, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at *3-4 (N.D. Ind. Dec. 31, 2012); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *8-9, *11-12 (W.D. Pa. Nov. 27, 2012), *appeal noticed* (3d Cir. Jan. 23, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796, at *3-4 (M.D. Tenn. Nov. 21, 2012), *appeal docketed*, No. 12-6590 (6th Cir. Dec. 19, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *5-6 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, Nos. 13-1093, 13-1092 (6th Cir. Jan. 24, 2013). In *Archdiocese of New York*, although

[4] After plaintiff filed its opposition, another judge in this district denied defendants' motion to dismiss in a similar case on both standing and ripeness grounds. *See Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y (N.D. Tex. Jan. 31, 2013). For the reasons set out in this brief and in defendants' opening brief, that case was wrongly decided and is unpersuasive. As relevant to plaintiff's standing, the *Diocese of Fort Worth* court's scant analysis of the issue entirely ignores the protection of the enforcement safe harbor and the fact that, as defendants have repeatedly made clear, the regulations will never be enforced against plaintiff in their current form. Slip op. at 7. Moreover, although the D.C. Circuit held in *Wheaton College v. Sebelius*, No. 12-5273, 2012 WL 6652505, at *1 (D.C. Cir. filed Dec. 18, 2012), that the plaintiffs there had standing, that analysis was inapplicable in *Diocese of Fort Worth* and is inapplicable here. The D.C. Circuit held that, because standing is "assessed at the time of filing" and because the plaintiffs had filed suit *before* defendants issued and clarified the enforcement safe harbor, those plaintiffs had standing. *Id.* In *Diocese of Fort Worth* and here, by contrast, the plaintiffs filed their suits *after* defendants issued and clarified the enforcement safe harbor. Assessing their standing at the time of filing thus leads to the opposite conclusion. Finally, after the *Diocese of Fort Worth* decision was issued, defendants issued a notice of proposed rulemaking (NPRM), thus further advancing the regulatory amendment process. *See* 78 Fed. Reg. 8456 (Feb. 6, 2013); U.S. Dep't of Health & Human Servs., Administration Issues Notice of Proposed Rulemaking on Recommended Preventive Services Policy, http://www.hhs.gov/news/press/2013pres/02/20130201a.html (Feb. 1, 2013).

the court stated that it would "assume that the Departments issued the ANPRM in good faith and not as litigation posturing," *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864, at *15 (E.D.N.Y. Dec. 4, 2012) (citing *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009)), the court's ruling was instead based entirely on the erroneous view that there nonetheless is a "substantial possibility" that the current version of the regulations will in fact be enforced against the plaintiffs.[5] *Id.*; *see also id.* at *16, *18, *21. This premise, however, ignores the fact that defendants have repeatedly, consistently, and publicly stated – including in the rule itself – that they will *never* enforce the regulations in their current form against entities like plaintiff, and that defendants have already begun the process of amending the regulations for the very purpose of addressing concerns like plaintiff's.[6] Indeed, as noted above, *supra* note 4, defendants issued an NPRM on February 1, 2013, and expect to issue a final rule by August 2013. It is therefore not the case that defendants have "failed to act" or have taken "no formal steps" toward addressing concerns like plaintiff's. Resp. at 19 n.65. Plaintiff's baseless conjecture that defendants will not do what they say they will do – and are currently doing – is thus not an imminent injury for standing purposes, as nearly every other court to rule on the issue has held. *See supra* at 3 (collecting cases).

Plaintiff's argument that an injury can be imminent even if it would not occur for a number of years, Resp. at 15-16 & n.59, misses the point. The issue here is not just that the

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[5] For this reason, and many others, defendants have sought reconsideration of the decision in *Archdiocese of New York* or, alternatively, certification for immediate appeal under 28 U.S.C. § 1292(b). Defs.' Mot. to Reconsider, *Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC) (E.D.N.Y. Jan. 11, 2013), ECF No. 41.

[6] *See, e.g.*, 77 Fed. Reg. 16,501, 16,503-06 (Mar. 21, 2012); 77 Fed. Reg. 16,453, 16,457 (Mar. 21, 2012); 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012); Defs.' Mem. in Supp. of Mot. to Dismiss at 3, *Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC) (E.D.N.Y. Aug. 6, 2012), ECF No. 16-1; Defs.' Reply in Supp. of Mot. to Dismiss at 1, 6, 7, *Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC) (E.D.N.Y. Sept. 24, 2012), ECF No. 30; *see also* Mem. in Supp. of Defs.' Mot. to Dismiss at 1-3, 4 n.5, 9-10, 14-15, 19-20, 25, Jan. 7, 2013, ECF No. 12.

regulations will not be enforced against plaintiff right away, but that they will *never* be enforced against plaintiff in their present form. The Supreme Court has made clear that a time delay is only "irrelevant" to justiciability when "the inevitability of the operation of a statute against certain individuals is *patent*," *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143 (1974) (emphasis added), and when it "appear[s] that the [law] *certainly* would operate as the complainant [ ] apprehend[s] it would," *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (emphasis added). Not so here. Because amendments to the regulations are underway, plaintiff's injuries are not "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiff is not helped by the cases it cites in support of its imminent injury argument. *See* Resp. at 15-16. In *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *overruled on other grounds*, *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), the government did "not contest the standing" of some of the plaintiffs challenging portions of the Affordable Care Act. Here, of course, the jurisdictional facts are entirely different, and defendants do contest plaintiff's standing. In challenges like that one, there was "no reason to think the law will change," *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 538 (6th Cir. 2011), but here, the regulations are not being enforced by defendants against plaintiff, will never be enforced by defendants against plaintiff in their current form, and are being amended to address the concerns of the type raised by plaintiff.

Similarly, the cases plaintiff cites to argue that there is standing even in the face of the government's promise not to enforce, Resp. at 11, 15, 19 n.67, are inapposite. None involved a challenge to a law that was not being enforced by the government against the plaintiffs and was certain to change. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (no suggestion that law would not be enforced or would change); *Vt. Right to*

Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383 (2d Cir. 2000) (no indication that law would change, and only indication that state would not apply law to plaintiff was informal statement made in the context of litigation). Indeed, courts have found promises by the government not to enforce – similar to the enforcement safe harbor in place here – sufficient to defeat jurisdiction. *See, e.g.*, *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 490 (7th Cir. 2004); *Winsness v. Yocom*, 433 F.3d 727, 732-33 (10th Cir. 2006); *Presbytery of N.J. v. Florio*, 40 F.3d 1454, 1470-71 (3d Cir. 1994). And here, defendants have also taken significant and concrete steps to amend the current regulations, most recently in the NPRM. *See supra* note 4.

Finally, plaintiff has not established any *current* harm from the regulations either. *See* Resp. at 12-14.[7] In support, plaintiff offers only *Archdiocese of New York* and *Clinton v. City of New York*, 524 U.S. 417 (1998). The former was wrongly decided and is unpersuasive, as discussed above and as nearly every other court to rule on the issue has concluded, and the latter is inapposite because it did not involve the present effects of a law that is undergoing amendment and not being enforced by the government against the plaintiff during the amendment process. *Id.* at 431 n.16 (law operated to presently revive plaintiff's liability and there was no suggestion law would change); *see Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001) ("[Plaintiff] does not contend that it lost a benefit. Thus, *Clinton* is inapposite to the case at bar."). Plaintiff also argues it incurred "administrative costs in evaluating and responding to the [regulations]" because it had to "analyze" the law and "consider" its implications. Resp. at 12-13. But plaintiff

[7] Plaintiff suggests that defendants "do not dispute the fact that a favorable decision by this Court would redress Criswell's injuries." Resp. at 10. This is incorrect. Defendants' opening brief argues that any present planning injuries, even if cognizable, are not traceable to the challenged regulations. Mem. in Supp. at 17 n.13. After all, it is not the challenged regulations that are causing plaintiff to experience "uncertainty," Resp. at 7, but rather plaintiff's concerns about the content of the future rules. But no relief this Court could offer regarding the challenged regulations would ameliorate this alleged injury. *Notre Dame*, 2012 WL 6756332, at *4; *see Colo. Christian Univ. v. Sebelius* ["*CCU*"], Civil Action No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *8 n.10 (D. Colo. Jan. 7, 2013).

offers no support for the assertion that such costs constitute an injury for standing purposes, and for good reason: every new statute, regulation, or executive action may prompt an entity to evaluate and analyze the impact of that development. Were mere "analysis" sufficient to constitute an injury, every plaintiff could claim standing to challenge a law based simply on time spent considering that law – and the requirement of standing would be made meaningless. *See Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."). In any event, no relief this Court could provide would remedy any time spent evaluating soon-to-be-defunct regulations.

II. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION BECAUSE IT IS NOT RIPE

Even if the Court were to conclude that plaintiff has standing, plaintiff has not shown that this case is ripe for judicial review under the test articulated in *Abbott Laboratories*. Indeed, plaintiff's only response to the ripeness arguments contained in defendants' opening brief is a brief footnote relying, as did the court in *Archdiocese of New York*, 2012 WL 6042864, at *21, on the assertion that the challenged regulations are fit for judicial review because they are "final" and published in the Code of Federal Regulations, Resp. at 20 n.69. But that conclusion, once again, simply flies in the face of the government's public commitment to amend the regulations before the expiration of the safe harbor and thus "ignores the reality of the regulatory landscape." *CCU*, 2013 WL 93188, at *7. The emphasis placed by both plaintiff and the *Archdiocese of New York* court on the mere fact that the regulations were issued as final rules thus "elevates form over substance." *Id.* Indeed, such an argument ignores defendants' clear and repeated statements that (1) they will *never* enforce the regulations in their current form against entities

like plaintiff; (2) they have "committed to further amend" the regulations, before the rolling expiration of the safe harbor begins, to address the concerns raised by religious organizations like plaintiff; and (3) they have "initiated a rulemaking process to do so." *Id.* at *5, *8; *see also, e.g.*, *Wheaton*, 2012 WL 6652505, at *2; *Conlon*, Ex. 1, at 11; *Archdiocese of St. Louis*, 2013 WL 328926, at *5; *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240, at *5 (C.D. Ill. Jan. 3, 2013); *Zubik*, 2012 WL 5932977, at *8-9.[8]

Because that rulemaking process, in progress right now, will "alter the very regulations" at issue in this case, *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989), and has "not yet resulted in an order requiring compliance by the [plaintiffs]," *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 161 (7th Cir. 1976), plaintiff's challenge is not fit for review at this time, as the overwhelming majority of courts to have ruled on the issue have found.[9] Plaintiff provides no reason for the Court to depart from these well-reasoned decisions.

Moreover, the hardship of which plaintiff complains – advanced planning and impacts on current decision-making – is insufficient. Just as with plaintiff's standing argument, its alleged hardship stems from the mistaken assumption that defendants will enforce the regulations in their

[8] The decision in *Diocese of Fort Worth* likewise fails to engage with the fact that the challenged regulations will change before they could ever be enforced against the plaintiff there. Slip op. at 9-11. Moreover, the decision purports to distinguish the D.C. Circuit's conclusion in *Wheaton* that challenges to these regulations like this one are unripe on the basis that defendants committed in *Wheaton* to never enforce the regulations in their current form against the plaintiffs there. *Id.* at 11 n.6. But defendants' statement in *Wheaton* applied, by its terms, to all "similarly situated" entities. *Wheaton*, 2012 WL 6652505, at *1. And in any event, defendants made the same commitment in *Diocese of Fort Worth* and have done so here as well.

[9] *See Wheaton*, 2012 WL 6652505, at *2; *Conlon*, Ex. 1, at 10-12; *Archdiocese of St. Louis*, 2013 WL 328926, at *5; *Roman Catholic Archbishop of Wash. v. Sebelius*, Civil Action No. 12-0815(ABJ), 2013 WL 285599, at *3 (D.D.C. Jan. 25, 2013); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200, at *12-15, *18-19 (W.D. Pa. Jan. 22, 2013); *CCU*, 2013 WL 93188, at *5; *Catholic Diocese of Peoria*, 2013 WL 74240, at *5; *Notre Dame*, 2012 WL 6756332, at *3; *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12CV158, 2012 WL 6831407, at *7 (S.D. Miss. Dec. 20, 2012); *Zubik*, 2012 WL 5932977, at *8; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *5.

present form against plaintiff. This "hardship" is thus rooted in a desire to plan for contingencies that likely will never arise. *See Conlon*, Ex. 1, at 11-12; *Archdiocese of St. Louis*, 2013 WL 328926, at *5-6; *Persico*, 2013 WL 228200, at *15-17; *CCU*, 2013 WL 93188, at *8; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *5. Thus, any planning plaintiff undertakes (and any costs plaintiff chooses to incur) is not caused by defendants' actions.

III. BECAUSE PLAINTIFF LACKS BOTH STANDING AND RIPENESS TO ASSERT ITS CLAIMS, THE COURT SHOULD DISMISS THE CASE RATHER THAN ISSUE A STAY

Plaintiff's motion to stay, Jan. 28, 2013, ECF No. 20, is puzzling in the face of its assertion – passing and unpersuasive though it is, Resp. at 20 n.69 – that this case is ripe now. Indeed, plaintiff's desire for a stay – which plaintiff presumably would like to last until plaintiff feels its challenge has ripened – all but concedes the paucity of its ripeness arguments.

Because plaintiff lacks standing to challenge the regulations, the Court lacks jurisdiction. A stay is therefore inappropriate, and all that remains for the Court is to simply dismiss the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Even if plaintiff had standing, the fact that its claims are not ripe likewise means the Court lacks jurisdiction and should dismiss the case. Indeed, dismissal of an unripe case is "the customary practice," and plaintiff has offered no reason for this Court to deviate from that customary practice here. *CCU*, 2013 WL 93188, at *8 (citing 15 James WM. Moore et al., Moore's Federal Practice § 108.81 (3d ed. 2011) ("if a necessary component of jurisdiction, such as ripeness, is found to be lacking, the court has no choice but to dismiss the action")); *Persico*, 2013 WL 228200, at *14 n.10. Though the D.C. Circuit has held an appeal in a similar case in abeyance, *Wheaton*, 2012 WL 6652505, at *2, it too "offered no compelling reason for doing so." *CCU*, 2013 WL 93188, at *8. In fact, a district court within the D.C. Circuit recently dismissed a similar case in its

entirety, rather than issue a stay or hold it in abeyance, finding that the D.C. Circuit's disposition did not require it to do the same and noting that "courts in this circuit regularly dismiss cases for the absence of a ripe case or controversy." *Archbishop of Wash.*, 2013 WL 285599, at *4 (collecting cases). As that court explained, dismissal does not prevent a plaintiff from filing a "new and different" challenge in the future if it is unsatisfied with the new regulations or "in the unlikely event that the government does not keep its word" to issue those new regulations.[10] *Id.*

And any such challenge would truly be "new and different" because it would be a challenge to regulations that do not yet exist. At bottom, plaintiff asks this Court to stay *this* unripe challenge so that it can more easily mount a *different* challenge to *different* regulations that do not now exist when such a challenge may ripen in the future. It is therefore not the case that a stay would not prejudice defendants or that a stay would "simplify the issues in question and the trial of the case." Resp. at 22. A stay of this suit would have no impact on the issues plaintiff may raise in some future hypothetical challenge to some future regulations, and would only reward plaintiff for having brought an unripe lawsuit. The Court should not exercise its discretion to assist a plaintiff that tilts at windmills in its speculative quest to develop jurisdiction at some time in the future. Simply put, because plaintiff's suit is unripe now – and plaintiff barely argues to the contrary – the proper course is to dismiss this case in its entirety.

CONCLUSION

For these reasons and those contained in defendants' opening brief, the Court should grant defendants' motion to dismiss, and deny or dismiss as moot plaintiff's motion for a stay.

[10] Defendants respectfully submit that, due to defendants' repeated assurances, and the traditional presumption of good faith to which the government is entitled, *e.g.*, *Sossamon*, 560 F.3d at 325, this Court can be assured of defendants' commitments to never enforce the regulations in their current form against plaintiff and to amending the regulations, in an effort to accommodate the concerns of entities like plaintiff, before the rolling expiration of the enforcement safe harbor.

Respectfully submitted this 11th day of February, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michael C. Pollack
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