

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

FRANCISCAN ALLIANCE, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary
of Health and Human Services, *et al.*,

Defendants.

No. 7:16-cv-00108

STATUS REPORT

Pursuant to this Court’s August 16, 2017 Order, ECF No. 108, Defendants hereby provide the following update on “rulemaking proceedings initiated with respect to the challenged Rule.” ECF No. 108. *See also* 45 C.F.R. § 92 (the “Rule”).¹ As previously described, Defendants are reevaluating the reasonableness, necessity, and efficacy of the Rule that is challenged in this case and, as part of that process, are assessing the issues identified by the Court in granting Plaintiffs a preliminary injunction.

As stated in Defendants’ last status report, the Department of Health and Human Services has submitted a draft of a proposed rule to the Office of Management and Budget (OMB) for inter-agency clearance as required under Executive Order 12,866. As reflected on the website of OMB’s Office of Information and Regulatory Affairs (OIRA), the proposed rule was submitted under this clearance process on April 13, 2018. *See* <https://www.reginfo.gov/public/do/eoDetails?rrid=127999> (last visited December 14, 2018). The

¹ Pursuant to Fed. R. Civ.P. 25(d), Alex M. Azar II is substituted as a defendant in his official capacity as Secretary of Health and Human Services.

text of the proposed rule will not be publicly available until after the E.O. 12,866 process is complete, at which time it will be published in the Federal Register.

Defendants continue to work on the draft proposed rule through the E.O. 12866 process. However, Defendants are aware that three cases currently pending before the Supreme Court, which is considering petitions for a writ of certiorari in each case, may well have an impact on the resolution of the rulemaking and this case. Specifically, Defendants wish to draw this Court's attention to *Bostock v. Clayton County, Georgia*, 17-1618 (S. Ct.), and *Altitude Express, Inc. v. Zarda*, 17-1623 (S. Ct.), which both present the question whether Title VII of the Civil Rights Act of 1964, which prohibits discrimination "because of ... sex," encompasses discrimination based on an individual's sexual orientation, and along with *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, 18-107 (S. Ct), which presents similar questions with respect to transgender status. The Solicitor General submitted a brief (in opposition to the petition for certiorari) in the *Harris Funeral Homes* case, in which the Solicitor General indicated the views of the United States on the issue. Defendants are evaluating their draft proposed rule in light of these developments.

Defendants will provide the Court, and the Plaintiffs, with the text of the proposed rule as soon as it has been published in the Federal Register and is available to the public. Defendants anticipate that the proposed rule will, upon publication, provide for a public comment period. The time required to complete the notice-and-comment phase and to publish a final rule will depend, in part, on the scope of the public comments received concerning the proposed rule. Defendants request an opportunity to continue reconsidering the Rule and do not request that the Court close this case. Defendants will continue to abide by this Court's preliminary injunction and will therefore not enforce the Rule's prohibition against discrimination on the basis of

gender identity or termination of pregnancy. Defendants therefore request that the Court maintain the stay in this case.

DATED: December 14, 2018

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/s/ Rhett P. Martin

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, a copy of the foregoing Status Report was filed electronically via the Court's ECF System, which effects service upon counsel of record.

/s/ Rhett P. Martin
Rhett P. Martin