IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

THRIVENT FINANCIAL FOR LUTHERANS, *Plaintiff,* v. R. ALEXANDER ACOSTA, Secretary of Labor, and UNITED STATES DEPARTMENT OF LABOR, *Defendants.*	Civil Action No. 16-cv-03289-SRN-DTS

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants, the United States Department of Labor and R. Alexander Acosta, Secretary of Labor (collectively, the "Department"), oppose Plaintiff's motion for a preliminary injunction. The Court need not rule on this motion, but instead should grant the Department's motion to stay the case. If the Court does not stay the case, there is no need for preliminary relief here, where summary judgment has been fully briefed and Plaintiff is concerned about an event that will occur in January 2018 at the earliest, if at all. Nor has Plaintiff carried its burden to justify an injunction under the four traditional factors: "the movant's likelihood of success on the merits, the threat of irreparable harm to the movant, the balance of the equities between the parties, and whether an injunction is in the public interest." *Gresham v. Swanson*, 866 F.3d 853 (8th Cir. 2017) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

"[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Roudachevski v. All-American Care Ctrs., Inc.*, 648 F.3d 701, 705 (8th Cir. 2011). "The burden of establishing the propriety of an injunction is on the movant." *Roudachevski*, 648 F.3d at 705. While Defendants do not contest Plaintiff's likelihood of success on the merits, *see* ECF No. 71, that alone is far from sufficient to justify the extraordinary remedy of an injunction. *See General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 318-19 (8th Cir. 2009) ("The likelihood that plaintiff ultimately will prevail is meaningless in isolation ... [and] must be examined in the context of the relative injuries to the parties and the public." (quoting *Dataphase*, 640 F.2d at 113)). Here, Plaintiff cannot establish irreparable injury that will occur before a decision on the merits is likely to be entered. For that reason, its alleged harms do not outweigh the unnecessary imposition of an injunction on the Defendants. Nor does the public interest conclusively weigh in favor of an injunction. Accordingly, Plaintiff's motion for a preliminary injunction should be denied.

I. PRELIMINARY RELIEF IS UNNECESSARY IN LIGHT OF THE FULLY BRIEFED MOTION FOR SUMMARY JUDGMENT

Preliminary relief is unnecessary and therefore inappropriate here. As a threshold matter, the Court should grant the Department's motion for a stay of proceedings because it would conserve judicial resources to await completion of the Department's pending administrative actions, which are likely to address the challenged provision before it becomes applicable to Plaintiff. *See* Defs.' Mem. in Supp. Mot. for Stay, ECF No. 78.

And if the Court does not grant a stay, it should issue a decision on the merits on the basis of Plaintiff's fully-briefed summary judgment motion. A preliminary injunction would serve no purpose here, where the Court will either forbear from ruling on the merits for the reasons presented in support of the pending stay motion (or because the Court independently determines that it lacks jurisdiction, *see* Order, ECF No. 94 (Aug. 24, 2017), or grant summary judgment in favor of one party or another.

"[The] primary purpose of a preliminary injunction is to preserve the status quo until the court reaches the merits and can grant full, effective relief if warranted." *Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1125 (D. Minn. 2000) (citing *Nat'l Basketball Ass'n v. Minn. Prof'l Basketball, Ltd. P'ship*, 56 F.3d 866, 872 (8th Cir. 1995)); *see also Bierman v. Dayton*, 817 F.3d 1070, 1072 (8th Cir. 2016) (noting that the purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until" the merits can be decided) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Because no change to the status quo will occur before January 1, 2018, at the earliest, the Court has ample opportunity to decide this matter—if the Court does not grant Defendants' stay motion or dismiss the case on mootness grounds—and there is no need to further "preserve the status quo until the court reaches the merits." *See Northland Ins. Cos.*, 115 F. Supp. 2d at 1125. *Cf. DeFranceschi v. Seterus, Inc.*, No. 4:15-870, 2016 WL 6496323, at *3 (N.D. Tex. Aug. 2, 2016) ("There is always a status quo. There should not be a preliminary injunction to protect it, however, unless the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy." (quoting *Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974))); *McElroy v.*

Gustafson, 2015 WL 135994, at *12 (E.D. Cal. Jan. 9, 2015) ("A preliminary injunction will not issue unless necessary to prevent threatened injury that would impair the courts ability to grant effective relief in a pending action."). Nor would it be efficient for the Court to address the preliminary injunction factors unnecessarily. *Cf. Gray v. City of Valley Park, Mo.*, No. 4:07-881, 2008 WL 294294, at *1 n.1 (E.D. Mo. Jan. 31, 2008) (denying preliminary injunction motion as moot because the Court "now has before it fully briefed summary judgment motions" and "[t]here is therefore no need to discuss the factors to be considered in ruling on a preliminary injunction").

II. PLAINTIFF HAS NOT ESTABLISHED IRREPARABLE HARM

Even if the Court were to somehow reach the conclusion that it should apply the preliminary injunction standard, the Court would have to conclude that the standard has not been met. Plaintiff has not carried its burden to show irreparable harm. To establish irreparable harm, Plaintiff must show that "the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *See Roudachevski v. All–Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (internal quotation marks omitted). "Speculative harm does not support a preliminary injunction." *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012). And, as discussed above, the showing of harm must be focused on the period before a decision on the merits can be reached. *See Sauk Prairie Conservation Alliance v. U.S. Dep't of the Interior*, No. 17-35, 2017 WL 2773718, at *1 (W.D. Wisc. June 26, 2017) ("[Plaintiff] must demonstrate that irreparable harm is sufficiently likely to occur before . . . the court will decide the case on the merits [of the fully-briefed summary judgment motions].").

A. The Alleged Harms That Would Occur Only If the January 1, 2018 Applicability Date is Unchanged Are Neither Certain Nor Imminent

The primary harms Plaintiff asserts could occur only "if, and when the anti-arbitration condition of the BIC Exemption becomes applicable." Pls.' Mem. at 11-12, ECF No. 104. But the Department has proposed to extend the January 1, 2018 applicability date by eighteen months. *See* 82 Fed. Reg. 41365 (Aug. 31, 2017) (link) (considering extension to provide time to consider public input and possible revisions to the rulemaking, and engage in rulemaking actions to finalize any revisions). And the Department has every intention of issuing a final rule on the basis of that proposal well in advance of the applicability date. *See, e.g.*, 82 Fed. Reg. at 41365 ("The Department is particularly concerned that, without a delay in the applicability dates, regulated parties may incur undue expense to comply with conditions or requirements that it ultimately determines to revise or repeal."); *id.* at 41371-41372 ("The Department's objective is to complete its review pursuant to the President's Memorandum, analyze comments received in response to the RFI, and propose and finalize any changes to the Rule or PTEs sufficiently before [the delayed applicability date,] July 1, 2019, to provide firms with sufficient time to design and implement an orderly transition process."). The Department explained that it "is not pursuing" the implementation of the January 1, 2018 applicability deadline as previously scheduled because:

> it would not provide sufficient time for the Department to complete its ongoing review of, or propose and finalize any changes to the Fiduciary Rule and PTEs. Moreover, absent the proposed extension of the transition period, Financial Institutions and Advisers would feel compelled to prepare for full compliance with PTE conditions that become applicable on January 1, 2018, the applicability date of the additional PTE conditions despite the possibility

> that the Department could adopt more efficient alternatives. This could lead to unnecessary compliance costs and market disruptions.

Id. at 41373; *see also id.* at 41370 (specifically noting comments which suggested that '[a]t the very least, an extension is needed to ensure that the regulation accurately reflects the Department's position in litigation' regarding the limitation on arbitration"); *id.* at 41373 ("[T]his proposal likely would yield the most desirable outcome including avoidance of costly market disruptions and investor losses. . . . The Department's objective was to avoid unnecessary confusion and uncertainty in the investment advice market, facilitate continued marketplace innovation, and minimize investor losses."). Accordingly, the alleged harms that are triggered only after the arrival of the applicability date are neither certain—because the Department is likely to adopt a significant extension of the applicability date—nor imminent—because the Court has the opportunity to resolve the merits before this date arrives.

Thus, this case is similar to *Tokarz v. Mortgage Electronic Registration Sys., Inc.*, No. 17-1022, 2017 WL 3425697 (D. Minn. Aug. 9, 2017). In *Tokarz*, another sitting of this Court rejected an injunction against a foreclosure sale because the plaintiffs would not be subject to eviction for six months and could redeem the property during that time. *Id.* at *1. Here, as in *Tokarz*, there is a sufficient window in which the alleged harms will not occur. The *Tokarz* court also rejected as "speculative and unsupported by the record" plaintiffs' attempt to inject additional uncertainty into the process by claiming they did "not believe that Defendants would honor a redemption of the property." *Id.*; *see also id.*, 2017 WL 3432100, at *4 (D. Minn. May 18, 2017) (M.J. Report & Rec.) ("[A]ny potential

eviction from the property is hypothetical at best; the possibility remains that the plaintiffs could redeem prior to the end of the redemption period. As a result, the plaintiffs have not clearly shown that any eviction is imminent and that they have a present need for equitable relief."). Here, likewise, there is no irreparable harm because "the possibility remains" that the Department will extend the applicability date or the Court will resolve the case before that date arrives. *See also Eyebobs, LLC v. Snap, Inc.*, No. 16-4276, 2017 WL 1843064, at *9 (D. Minn. May 8, 2017) ("Eyebobs has demonstrated that it would be harmed if reverse confusion were to occur—but, as discussed above, Eyebobs has not demonstrated that reverse confusion is likely to occur during the pendency of this lawsuit. The Court cannot find an imminent threat of irreparable harm.").

Plaintiff's three alleged harms suffer from other significant defects. First, Plaintiff repeats its unsupported claim that it could be subject to "punitive excise taxes administered by the Department of Treasury." Pl.'s Mem. at 13. But as the Department has explained, the Internal Revenue Service ("IRS") has specifically stated in Internal Revenue Bulletin 2017-16 that "the IRS will not apply [29 U.S.C.] § 4975 and related reporting obligations with respect to any transaction or agreement to which the DOL's temporary enforcement policy, or other subsequent related enforcement guidance, would apply." *See* IRS Announcement 2017-4, 2017-16 I.R.B. 1106 (Apr. 17, 2017) (link). Thus, the Department's specific guidance that "the Department of Labor will not . . . treat any fiduciary as being in violation of [the BIC Exemption], . . . [for] failure to comply with the Arbitration Limitation in Section II(f)(2) and/or Section II(g)(5) of the exemption[]" conclusively addresses Plaintiff's concern about the imposition of excise taxes. *See* DOL

Field Assistance Bulletin 2017-3 (Aug. 30, 2017), ECF No. 97-2 ("The Treasury Department and the IRS have confirmed that, for purposes of applying IRS Announcement 2017-4, this FAB 2017-03 constitutes 'other subsequent related enforcement guidance.'").

Second, Plaintiff's theory about "putative class action lawsuits against Thrivent in state court," Pl.'s Mem. Regarding Mootness at 13, ECF No. 99 (incorporated by Pl.'s Mem. at 13, ECF No. 104), is far too speculative to support a showing of irreparable harm. The BIC Exemption itself does not expose Plaintiff to state court liability. The undersigned is aware of no plausible theory under which the mere existence of a federal exemption "negates Thrivent's MDRP provision." Pl.'s Mem. Regarding Mootness at 13. As Plaintiff notes, the BIC Exemption is structured to permit "IRA owners . . . to enforce their contractual rights under state law." 82 Fed. Reg. at 41367. But Plaintiff's members would have no relevant "contractual rights" on which to base a state court suit unless Plaintiff changes its Bylaws (and thus its contracts). And Plaintiff identifies no evidence that it could actually be subject to liability on this ground.[1] Thus Plaintiff's speculative concern about apparently frivolous litigation cannot be considered evidence of irreparable harm. *Cf. Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015) (stating that

[1] Plaintiff's state law liability theory is entirely distinct from the limited possibility of private enforcement through federal lawsuits pursuant to 29 U.S.C. § 1132(a) discussed in the Department's Brief on the Issue of Mootness. *See* ECF No. 101 at 5-6. Because Plaintiff does not rely on this possibility here, it should not be treated as a basis for injunctive relief. Regardless, because no such suit could be filed now, because no such suit could be filed if the applicability date is delayed as proposed, and because it does not seem likely that the plaintiffs' bar would sue during the transition period over something the Department has concluded is unenforceable, this limited possibility is also too speculative to justify injunctive relief.

"[m]erely demonstrating the 'possibility of harm' is not enough" and rejecting an alleged injury as "too speculative"); *Sempris, LLC v. Watson*, No. 12-2454, 2012 WL 5199582, at *2 (D. Minn. Oct. 22, 2012) (finding no irreparable injury where plaintiff's "anticipation of future harm is speculative.").

Third, Plaintiff has not established that it "would no longer be able to accurately certify to state regulators that it complies with all federal and state laws." Pl.'s Mem. at 13. The annual statement certification to which Plaintiff points simply requires companies to certify "yes" or "no" to the following question:

> 14.1 Are the senior officers (principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions) of the reporting entity subject to a code of ethics, which includes the following standards? . . . (c) Compliance with applicable government laws, rules and regulations[.]

ECF No. 85-1 at 4. Plaintiff should be able to certify the existence of its code of ethics, regardless of what happens with the BIC Exemption. *See, e.g.*, NAIC Self-Assessment, Financial Sector Assessment Program at 20 (Aug. 26, 2009) (link) (explaining that this provision merely requires "insurers . . . to explain if the senior officers of the company are not subject to a code of ethics that includes" the specified provisions). Even if the annual statement were construed to also be a certification that each company's officers in fact comply with all applicable laws—and that is not what it says—it should be sufficient for a company to comply with the federal regulatory regime as applied by the relevant federal agencies—the Department of Labor and the IRS. And, because this certification is not due until March 1, 2018 when Plaintiff's next annual statement must be issued, *see, e.g.*, Minn.

Stat. § 60A.13, the relevant factual basis for the certification is likely to be a final rule extending the transition period.

B. The Alleged Harms Preceding January 1, 2018 Do Not Rise to the Level of Irreparable Harm

Plaintiff also claims it will suffer irreparable harm before January 1, 2018 due to "compliance costs" and "continued uncertainty." Pl.'s Mem. at 14-16. But Plaintiff cites no authority suggesting that the burdens it identifies rise to the level of irreparable injury. After all, harms are not cognizable under the injunction standard unless they are "certain and *great*." *Roudachevski*, 648 F.3d at 706 (emphasis added).

Here, Plaintiff has not established that it will face substantial compliance costs because it has made clear that it has not yet decided to modify its contracts as contemplated by the challenged provision of the BIC Exemption. *See, e.g.*, Pl.'s Mem. at 13 (suggesting that Plaintiff may "choose[] to maintain its MDRP once the anti-arbitration condition becomes applicable"); *id.* at 14 (indicating that Plaintiff has not yet "beg[u]n the extensive preparations necessary to comply with the rule on [January 1, 2018]"). Plaintiff has identified no specific cost involved in keeping its options open, and previously noted only that it might include a proposed modification of its Bylaws in its December newsletter. *See* Johnson Decl. ¶ 5, ECF No. 85. That action—which Plaintiff no longer suggests it intends to take—is not significant enough to constitute cognizable harm. *Cf. Alliance Ins. Co. v. Wilson*, No. 02-2929, 2003 WL 21954795, at *3 (D. Minn. Aug. 12, 2003) ("The Court finds that the expenditure of time, money, and energy by Alliance in complying with the Commissioner's investigation would not rise to the level of being considered irreparable.").

Plaintiff identifies no authority suggesting that uncertainty about an agency's future actions is itself irreparable harm. Instead, it cites three cases about a "lost opportunity to compete on a level playing field." *See* Pl.'s Mem. at 16. But those cases are inapplicable because the playing field is not distorted. Plaintiff is currently in the same position as all other retirement investment advisors selling indexed annuities—currently subject to the transitional requirements of Prohibited Transaction Exemption 84-24, and awaiting the Department's finalization of its proposed rule delaying implementation of the full conditions of the BIC Exemption. *See* ECF No. 78 at 3. Plaintiff appears to suggest that it suffers from a unique harm because some other entities may not currently have exclusive arbitration provisions in their contracts and therefore might not face the same choices about how to respond to the applicability date. Pl.'s Mem. at 15-16 (suggesting that the harm is somehow "distinct to Thrivent"). But Plaintiff offers no evidence that its competitors use something other than exclusive arbitration agreements and no evidence that any specific competitor is advantaged.

Regardless, Plaintiff's allegations of harm depend on speculation about the likelihood that the January 1, 2018 applicability date will not be extended. But the very fact that an extension is likely makes these alleged harms uncertain. It is Plaintiff's burden to "provide . . . proof indicating that the harm is certain to occur in the near future." *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam)); *see also id.* ("[Plaintiff must] substantiate the claim that irreparable injury is 'likely' to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in

fact occur."); *Superior Edge, Inc. v. Monsanto Co.*, 964 F. Supp. 2d 1017, 1046 (D. Minn. 2013) ("A mere possibility of irreparable harm is not enough for a preliminary injunction to issue."). And the Court need not adopt Plaintiff's version of what it may do in the future. *Cf. Alliance Ins. Co.*, 2003 WL 21954795, at *3 ("The Court also does not find merit in Alliance's argument that absent a stay, it will have to withdraw from the federal crop insurance program. In support of this argument, Alliance asserts that the Commissioner seeks 'to impose state law obligations different from those required by federal law.' As previously stated, the Court did not find the [federal statute] and Minnesota law to be inconsistent so long as the Commissioner limits the scope of his inquiry.").

Nor need the Court give credence to Plaintiff's speculative fears that it would be subject to IRS enforcement, frivolous state law class actions, or violation of its code of ethics certification in its annual statement, in light of the written assurance the Department has provided to Plaintiff and the industry that, in the event the applicability date is not extended as proposed, neither the Department nor the IRS will require compliance with the challenged provision in order to take advantage of the BIC Exemption. *See* Field Assistance Bulletin 2017-3, ECF No. 97-2. *Cf. U.S. Water Servs., Inc. v. Int'l Chemstar, Inc.*, No. 13-3092, 2013 WL 6147696, at *3 (D. Minn. Nov. 22, 2013) (finding "speculative at best" plaintiff's fear that its former sales manager would assist its competitor "in acquiring Waterchem's customers and will disclose Waterchem's confidential customer information" because "Chemstar has made clear its intention of honoring the non-solicitation provisions in [the sales manager's] contract with Waterchem and no evidence has been presented to the contrary"); *Superior Edge*, 964 F. Supp. 2d at 1046 (holding that

alleged harm from "the possibility of Monsanto compelling arbitration before the conclusion of the federal proceedings" was "unlikely and speculative" because Monsanto had written a letter and filed it with the court "explicitly confirming that 'Monsanto does not intend to initiate an arbitration proceeding,' and 'will not initiate any such proceeding'"). This assurance, combined with the likelihood that the applicability date will be extended, both explains why Plaintiff has not yet acted pursuant to its own dire predictions and makes the alleged injuries too speculative to be cognizable under the injunction standard.

For all of these reasons, Plaintiff has failed to establish irreparable harm that is "certain and great" and of "such imminence" that an injunction is required to preserve the status quo pending judicial resolution of the merits.

III. PLAINTIFF HAS NOT ESTABLISHED THAT THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH IN FAVOR OF AN INJUNCTION

Plaintiff is incorrect that the remaining injunction factors are irrelevant "where the validity of a law or regulation is at issue." Pl.'s Mem. at 7 (citing *Bank One, Utah Nat'l Ass'n v. Guttau*, 190 F.3d 844 (8th Cir. 1999)). This reading of *Guttau* cannot be squared with the Supreme Court's subsequent decision in *Winter*, which held that an injunction "does not follow from success on the merits as a matter of course," but instead is appropriate only if all of the injunction factors are satisfied. *See* 555 U.S. at 32 ("The factors examined above—the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent."). Moreover, *Guttau* does not appear to apply here by its own terms. Its logic

applies only to permanent, not preliminary injunctions, *see* 190 F.3d at 847-48 (addressing a "permanent injunction" if plaintiff "proves that the relevant [state law provisions] are preempted"); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 967 (8th Cir. 2005) (describing *Guttau* as "adapting generally the preliminary injunction factors . . . to review a permanent injunction"), and may be limited exclusively to the preemption context, *see Forest Park II v. Hadley*, 339 F.3d 724, 731 (8th Cir. 2003) (characterizing *Guttau* as "noting that other factors are irrelevant if the statutes at issue are preempted"). Thus, Plaintiff must make a sufficient showing on all four factors to justify a preliminary injunction.

Plaintiff has not established that the balance of harms weighs in its favor. Even if the Court were to find—notwithstanding the points made in the prior section—that Plaintiff has identified some cognizable harm, that harm is unlikely to justify issuance of an injunction when other relief would suffice. Plaintiff would be provided complete relief by vacatur of the provision as applied to Plaintiff's arbitration agreements. Because this "less drastic remedy [is] sufficient to redress [plaintiff's] injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted." *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). The burden of an injunction here, however slight, outweighs Plaintiff's failure to establish any cognizable irreparable harm.[2]

[2] Plaintiff's citation of *Empi, Inc. v. Iomed, Inc.*, 923. F. Supp. 1159, 1169 (D. Minn. 1996) is inapposite. In that case plaintiff sought to enjoin a competitor from "continuing to manufacture a confusingly similar product" and showed to the court's satisfaction that a "high likelihood of confusion" of the products from which irreparable harm could be "presume[d]." Plaintiff here identifies no similar injury. The time and money Plaintiff has

Accordingly, Plaintiff should receive no more relief than the vacatur that could be appropriate pursuant to a decision on the merits in its favor.[3]

Nor has Plaintiff established that a preliminary injunction would serve the public interest. It suggests that the public interest would be served by preserving the status quo. But, as discussed above, the status quo will not change before the Court has the opportunity to resolve the merits. And the Department has taken additional steps to preserve the status quo by proposing to extend the applicability date and issuing Field Assistance Bulletin 2017-3. Thus, any injunction would be of marginal utility to the public at best. Plaintiff also suggests that its motion would serve the public interest by "preserving judicial resources," Pl.'s Mem. at 20, but this entire motion is an unnecessary redundancy that is contrary to judicial efficiency. Having not sought a preliminary injunction when this case was filed, Plaintiff cites no authority for the proposition that a preliminary injunction motion filed long after summary judgment briefing is *sub judice* serves either judicial efficiency or the public interest. Finally, Plaintiff claims a public interest in having the Department "conduct[ing] its affairs in accordance with the APA," *id.*, which is precisely

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spent promoting its products are not at risk as a result of an action on the Department's part.

[3] In the parallel case to which Plaintiff cites, *Chamber of Commerce v. Acosta* (5th Cir.), the Department did not seek a stay of litigation regarding the Federal Arbitration Act challenge because that case challenged regulatory provisions that have already become applicable and because a stay would not have avoided the burden of additional briefing. Plaintiff is incorrect that the pendency of this case undermines the Department's opposition to an injunction. In that case, as in this one, the Department's position is that if the Court reaches the merits it should vacate the challenged provision, not that the Court should enjoin it. *Compare* Appellee Br. at 44-49 (5th Cir. July 27, 2017), ECF No. 72-1; *with* Withdrawal of Defs.' Cross-Mot. for Summ. J., ECF No. 71.

what the Department has done in issuing proposals and reviewing public comments before issuing final rules or revisions to the relevant exemptions. *See*, *e.g.*, 82 Fed. Reg. 41365 (Aug. 31, 2017); 82 Fed. Reg. 31278 (July 6, 2017); 82 Fed. Reg. 16902 (Apr. 7, 2017); 82 Fed. Reg. 12319 (Mar. 2, 2017). The Department does not need a judicial injunction to enable it to complete its work.

CONCLUSION

Accordingly, the Court should deny Plaintiff's motion for a preliminary injunction.

Dated: October 13, 2017

Respectfully submitted,

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