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

STATE OF TEXAS, STATE OF KANSAS, STATE OF LOUISIANA, STATE OF INDIANA, STATE OF WISCONSIN, and STATE OF NEBRASKA Plaintiffs, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ERIC D. HARGAN, in his official capacity as ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and DAVID KAUTTER, in his official capacity as ACTING COMMISSIONER OF INTERNAL REVENUE[1] Defendants.	Civ. No. 7:15-cv-00151-O

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF SUMMARY JUDGMENT JUDMENT

[1] Eric D. Hargan, Acting Secretary of Health and Human Services, and David Kautter, Acting Commissioner of Internal Revenue, have been substituted for Donald Wright, M.D., M.P.H., and John Koskinen, respectively, as defendants in this case pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

INTRODUCTION

As this Court recognized in its November 1, 2017 Order (ECF No. 82) ("Order"), the timeliness of Plaintiffs' challenges to the actuarial soundness regulation is governed by 28 U.S.C. § 2401, which was authoritatively construed by the Fifth Circuit in *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283 (5th Cir. 1997). That case holds that the six-year limitations period for a facial challenge to the validity of a regulation runs from the date that the regulation was published. *Id.* at 1287. Because Plaintiffs can only bring a facial challenge to the actuarial soundness regulation, and they brought their suit outside the six-year limitations period, their challenge to that rule must be dismissed.

Plaintiffs attempt to avoid this result by describing their suit instead as an "as applied" challenge to the regulation. But, contrary to Plaintiffs' assertion, the "controlling question" on this statute of limitations issue is not whether, during the six years preceding Plaintiffs' lawsuit, there occurred any "agency action (and inaction) that produced 'legal consequences.'" Pls. Supp'l Br. 1. Rather, as this Court noted in its Order, the dispositive question is whether Plaintiffs can identify a "'direct, final agency action involving [them] within six years of filing suit'" or show "that they had unsuccessfully petitioned the agency for relief from [the challenged rule]." Order at 2; *see also Dunn-McCampbell*, 112 F.3d at 1287-88 ("If Dunn-McCampbell were able to point to such an application of the regulations here, or if they had petitioned the National Park Service to change the 9B regulations and been denied, this court might have jurisdiction to hear that case.") (cited in Order at 2).

Plaintiffs' Supplemental Brief in Support of Summary Judgment wholly ignores the actual question posed by the Court in its Order. Despite being provided with yet another opportunity to do so, Plaintiffs have again failed to identify a "direct, final agency action involving [them] within

six years of filing suit," and, accordingly, cannot establish that "their substantive APA claims are timely under the reasoning of *Dunn-McCampbell*." Order at 2.

For these reasons, and for the reasons further explained below, as to Plaintiffs' APA claims, Defendants' motion for summary judgment should be granted, Plaintiffs' motion should be denied, and the Court should dismiss these claims.

ARGUMENT

I. PLAINTIFFS HAVE NOT IDENTIFIED A DIRECT, FINAL AGENCY ACTION INVOLVING THEM WITHIN SIX YEARS OF FILING SUIT.

The Fifth Circuit has "made . . . clear" the limited circumstances in which a party may challenge the validity of a regulation more than six years after the regulation's promulgation. *P&V Enters. v. U.S. Army Corp. of Eng'rs*, 466 F. Supp. 2d 134, 143 (D.D.C. 2006) (citing *Dunn-McCampbell*, 112 F.3d at 1287), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008). On a "facial challenge to a regulation," the "general rule" is "that the limitations period begins to run from the date of publication in the Federal Register," but when "the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority[,] . . . the claimant must show some *direct, final agency action involving the particular plaintiff* within six years of filing suit." *Dunn-McCampbell*, 112 F.3d at 1287 (emphasis added).

To elucidate this exception to the "general rule," the Fifth Circuit cited the examples provided in three cases decided by federal appellate courts. First, the *Dunn-McCampbell* court explained that in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), the Ninth Circuit "held that a challenger may contest an agency decision as exceeding constitutional or statutory authority after the limitations period, but only by petitioning the agency to review the application of the regulation to that particular challenger." *Dunn-McCampbell*, 112 F.3d at 1287. In the Fifth Circuit's view, the *Wind River* court "treated the agency's denial of that petition as a

'final agency action' sufficient to create a new cause of action under the APA." *Id.* Next, the *Dunn-McCampbell* court cited *Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147 (D.C. Cir. 1990), in which the D.C. Circuit "[s]imilarly . . . held that it had jurisdiction to hear a substantive challenge after the limitations period had run" because "the claimant filed a petition with the agency to rescind regulations, then challenged the agency's denial of the petition in federal court." *Dunn-McCampbell*, 112 F.3d at 1287. Finally, the *Dunn-McCampbell* court cited *Texas v. United States*, 749 F.2d 1144 (5th Cir. 1985), in which the Fifth Circuit held "that when an agency *applies* a rule, the limitations period running from the rule's publication will not bar a claimant from challenging the agency's statutory authority." *Dunn-McCampbell*, 112 F.3d at 1287. Importantly, the agency act applying the rule was an order, on a petition filed with the agency by a third party, directly requiring Texas to approve a tariff for intrastate contract carriage of wheat by rail. *Texas v. United States*, 730 F.2d 409, 411-12 (5th Cir. 1984), *withdrawn in other part*, 749 F.2d at 1146. In challenging that order, Texas argued that the Interstate Commerce Commission lacked statutory authority to adopt the contract rate rules undergirding the agency's order on the petition. *Id*.

From these three cases the Fifth Circuit derived the rule announced in *Dunn-McCampbell*:

> These cases do not create an exception from the general rule that the limitations period begins to run from the date of publication in the Federal Register. They merely stand for the proposition that an agency's application of a rule to a party creates a new, six-year cause of action to challenge to the agency's constitutional or statutory authority.
>
> If Dunn–McCampbell were able to point to such an application of the regulations here, or if they had petitioned the National Park Service to change the 9B regulations and been denied, this court might have jurisdiction to hear that case.

112 F.3d at 1287-88. This language, which directly follows the court's explication of the decisions by the Ninth, D.C., and Fifth Circuits, makes clear that by "an agency's application of a rule to a party," 112 F.3d at 1287, the Fifth Circuit means deciding a petition that affects the party's rights.

At oral argument, this Court asked what the Fifth Circuit could have meant by "such an application of the regulations," in the sentence, "If Dunn–McCampbell were able to point to such an application of the regulations here, or if they had petitioned the National Park Service to change the 9B regulations and been denied, this court might have jurisdiction to hear that case." *See* 112 F.3d at 1287-88. A careful review of the *Dunn-McCampbell* decision, as described *supra*, makes clear that by this sentence, the Fifth Circuit was referring back to the circumstances described in the three cited appellate court cases. *Id.* The use of the words "such" and "here" demonstrates that this must be especially true for the phrase "such an application of the regulations here." *Id.* As for the two possible scenarios joined by the word "or," they are best understood as describing the circumstances in *Wind River* and *Public Citizen*, on the one hand, and in *Texas v. United States*, on the other. The Ninth and D.C. Circuit cases involved the party "ha[ving] petition[ed] the [agency] . . . and been denied." *Id.*; *see also id.* at 1287. By contrast, in *Texas v. United States*, the agency entered an order, on a petition filed by a third party, requiring Texas to undertake a particular action. *Id.*; *see also Texas v. United States*, 730 F.2d at 411-12. In that case, the party itself (Texas) had not "petitioned the [agency] . . . and been denied," *Dunn-McCampbell*, 112 F.3d at 1287-88, but an agency action—the order on the third-party petition—had "direct[y] . . . involv[ed]" the party. *Id.* at 1287 ("To sustain [a challenge to a regulation brought after the limitations period has expired], . . . the claimant must show some *direct*, final agency action involving the particular plaintiff within six years of filing suit.") (emphasis added). Thus, by these examples—*Wind River*, *Public Citizen*, and *Texas v. United States*—the *Dunn-McCampbell* decision makes plain the meaning of "some direct, final agency action involving the particular plaintiff within six years of filing suit." *Id.*[2]

[2] Plaintiffs correctly note that the *Dunn-McCampbell* court never explicitly defined "direct." They wrongly

Plaintiffs have identified no "direct, final agency action" involving them in particular, as they must do to fall within the limitations period. Plaintiffs have not filed a petition with HHS or CMS to rescind or amend the actuarial soundness regulation. And although HHS did amend the actuarial soundness regulation through notice and comment rulemaking in 2015-2016,[3] during that rulemaking, Plaintiffs did not ask the agency to amend the regulation's definition of actuary or its requirement that rates be developed in accordance with Actuarial Standards Board (ASB) principles or standards, despite the fact that most of the plaintiff States submitted comments on a number of issues. *See* Golden Decl. ¶ 17 & Exs. B-F, Defs.' App. at DA8, DA15-DA145. Nor have Plaintiffs identified an order "direct[ly] . . . involving" any of the plaintiff States or specifically requiring the plaintiff States to undertake a particular action.

Instead, Plaintiffs provide a list of what they assert are "myriad" examples of "Defendants newly appl[ying] their rules to Plaintiffs within six years of Plaintiffs' filing suit." Pls.' Supp'l Br. 2-6. Some of these alleged examples could not possibly satisfy the *Dunn-McCampbell* standard as they are not actions by HHS or CMS. *See id.* (listing items 1 (alleging action by ASB); 2 (alleging action by Congress); 3 (alleging action by IRS); 5 (alleging action by ASB); & 6

suggest, however, that "direct" in the Fifth Circuit's decision "is from *Abbott Labs v. Gardner*, 387 U.S. 136, 149-53 (1967)." Pls.' Supp'l Br. 2. Although the Fifth Circuit cites *Abbott Labs* in *Dunn-McCampbell*, it does not do so when discussing the statute of limitations applicable to the *Dunn-McCampbell* plaintiff's facial challenge to the regulations. *See* 112 F.3d at 1287-88. Rather, later in the decision, when discussing the separate "as applied" challenge brought by the plaintiff, the Fifth Circuit cites *Abbott Labs* when reciting the Supreme Court's "four factors for determining when agency action is final" under the APA provision allowing a cause of action only where "final agency action" exists. *Id.* at 1288 (citing 5 U.S.C. § 704). As elsewhere in their brief, Plaintiffs here erroneously attempt to shoehorn the statute of limitations analysis into the distinct body of caselaw defining "final agency action" for the purposes of whether the APA provides a cause of action. *See infra* section II.

[3] *See* Medicaid & Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, Medicaid and CHIP Comprehensive Quality Strategies, and Revisions Related to Third Party Liability, 80 Fed. Reg. 31,097 (June 1, 2015) (proposed rule); Medicaid & Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions Related to Third Party Liability, 81 Fed. Reg. 27,498 (May 6, 2016) (final rule).

(alleging in part action by Plaintiffs)). Others of these alleged examples post-date Plaintiffs' Amended Complaint in this action—*see id.* (listing items 8 (alleging action by CMS in November 2016); 9 (alleging in part action by HHS in March 2016, May 2016, and January 2017); & 10 (alleging action by HHS in May 2016))—and thus could not constitute actions giving rise to Plaintiffs' claims or triggering a new limitations period therefor. And none of the remaining examples represents an order "direct[ly] . . . involving" any of the plaintiff States or specifically requiring the plaintiff States to undertake a particular action as *Dunn-McCampbell* demands. Item 4 describes a general guidance document CMS published in October 2014. *See id.* 4, n.5. Item 9 describes seven rulemaking documents published by HHS. As to the three of these rulemaking documents that were published before Plaintiffs filed their Amended Complaint, one does not amend any portion of C.F.R. Title 42, Part 438, wherein the regulations for Medicaid managed care contracts, including the actuarial soundness requirement, are found. *See* Medicare and Medicaid Program; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction, 77 Fed. Reg. 29,002, 29,028 (May 16, 2012) (cited in Pls.' Supp'l Br. at 5, n.11). Two do amend portions of C.F.R. Title 42, Part 438, but do not "amend the delegation to AAA and ASB," as Plaintiffs suggest, or amend the actuarial soundness requirement at all; they simply reiterate that the requirement already in effect remains so unchanged.[4]

Finally, as to Item 6, Plaintiffs simply restate an example cited in their opening summary

[4] *See* Medicaid Program; Payment Adjustment for Provider-Preventable Conditions Including Health Care-Acquired Conditions, 76 Fed. Reg. 32,816, 32,837 (June 6, 2011); *id.* at 32,829 (in response to comment "recommend[ing] that CMS reinforce the importance of State compliance with the requirement that Medicaid managed care rate setting must be actuarially sound," simply noting that "[t]he requirements of this final rule do not in any way preempt regulatory provisions otherwise in effect"); Medicaid Program; Payments for Services Furnished by Certain Primary Care Physicians and Charges for Vaccine Administration Under the Vaccines for Children Program, 77 Fed. Reg. 66,670, 6,6699 (Nov. 6, 2012); *id.* at 66,687 (noting that new requirement that states submit "methodologies for determining the 2009 baseline rate and the payment differential for CMS review no later than the end of the first quarter of CY 2013 . . .

judgment brief: a letter from CMS to Texas approving the State's proposed amendment "to include payments for the Health Insurance Providers Fee into the capitation rates" for Texas's Medicaid managed care program. *See* Pls.' Br. in Supp. of Summ. J. 40 (citing Pls.' App. 513-14). But Plaintiffs' argument is that "the 2015 ASOP 49 functionally altered the definition of 'actuarial[] sound[ness]' announced in the original 2002 rule and therefore triggered a new statute of limitations period," *see* Order (citing Pls.' Reply 14, ECF No. 66), and, as Defendants previously explained, neither this letter nor the State's proposed amendment makes any mention of ASOP 49; both refer only to the actuarial soundness regulation itself. Defs.' Mem. in Supp. of Summ. J. 42 (citing Pls.' App. A514 ("This contract is subject to the managed care requirements in 42 Code of Federal Regulations 438 Subpart A through J."); *id.* at A577-78 (noting that "[i]n order to satisfy the requirement for actuarial soundness set forth in 42 C.F.R. § 438.6(c) . . . [the State] will make a retroactive adjustment to capitation to the MCO for the full amount of the HIP Fee")).

Moreover, the letter Plaintiffs point to—which approved Texas's proposed capitation rates—is not an order requiring Texas to undertake a particular action. Nor have Plaintiffs ever challenged CMS's approval of the proposed amendment Texas submitted and been denied. Accordingly, by this letter, Plaintiffs do not satisfy the requirement from *Dunn-McCampbell* that they "show some direct, final agency action involving the particular plaintiff within six years of filing suit." 112 F.3d at 1287. Because Plaintiffs have not identified a direct, final agency action involving them triggering a new cause of action, "the limitations period beg[an] to run when the

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does not negate the requirements of § 438.6(c)"). Moreover, Plaintiffs do not assert that they submitted comments—regarding the application of the actuarial soundness requirement following enactment of the HIPF, or otherwise—in any of these rulemakings and, accordingly, even if these rules were cited in Plaintiffs' Amended Complaint, Plaintiffs would not be permitted to challenge those rulemakings here. *See Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) ("It is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.") (quoting *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991)).

agency publishe[d] the regulation in the Federal Register." *Id.* at 1287.

II. *HAWKES* IS NOT DISPOSITIVE OF WHETHER PLAINTIFFS' APA CLAIMS ARE TIMELY UNDER THE REASONING OF *DUNN-McCAMPBELL*.

Plaintiffs cite recent Supreme Court authority discussing the definition of "final agency action" under the APA. The question of whether a particular action is final, authorizing suit under the APA, is a distinct question from that of whether in such a suit, a plaintiff may revive an otherwise time-barred challenge to a regulation issued more than six years earlier. Plaintiffs' citation is therefore immaterial to the question at issue here.

In *United States Army Corp. of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Supreme Court "held in the context of the Clean Water Act that a jurisdictional determination ('JD') is a final agency action that is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704," *Texas v. EEOC*, 838 F.3d 511 (5th Cir. 2016) (citing *Hawkes*, 136 S. Ct. at 1816), "because [the JD] creates legal consequences." *Texas v. EEOC*, 827 F.3d 372, 382 (5th Cir. 2016), *reh'g en banc granted, opinion withdrawn*, 838 F.3d 511. In *Hawkes*, the Supreme Court was expounding on the contours of the Court's earlier decision in *Bennett v. Spear*, 520 U.S. 154 (1997), in which the Court "distilled from [its] precedents two conditions that generally must be satisfied for agency action to be 'final' under the APA." *Hawkes*, 136 S. Ct. at 1813. As announced in *Bennett*, those conditions were: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. at 177–178 (internal quotation marks and citation omitted). *Hawkes* focused on the second *Bennett* condition and, particularly, the meaning of the phrase "legal consequences." *Hawkes*, 136 S. Ct. at 1814. There, the Supreme Court found that the challenged JD, which stated that the property at issue contained jurisdictional waters, was a

"final agency action" because "while no administrative or criminal proceeding can be brought for failure to conform to the approved JD itself," the JD "not only deprives respondents of a five-year safe harbor from liability under the Act, but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." *Id.*; *see also Texas v. EEOC*, 827 F.3d at 387 (describing *Hawkes* as holding that "an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties" because "'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability").

The APA provides judicial review only for "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court's discourse on the phrase "final agency action" in *Hawkes* concerns the scope of actions for which APA § 704 provides judicial review. *See* 136 S. Ct. at 1811. The rule announced in *Dunn-McCampbell* also uses the phrase "final agency action": "[o]n a facial challenge to a regulation," when "the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority[,] . . . the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit." *Dunn-McCampbell*, 112 F.3d at 1287. But because the *Dunn-McCampbell* rule for whether an APA claim is *timely* imposes additional conditions on the requisite agency action, whether Plaintiffs have identified an agency action that qualifies as a "final agency action" under *Hawkes* does not make their claims timely nor dispose of the question posed by the Court's Order.

To satisfy the *Dunn-McCampbell* rule, Plaintiffs would need to identify a "final agency

action" within six years of their suit. But identifying a "final agency action," whether under *Hawkes*, *Bennett*, *Abbott Labs*, or some other standard, only begins, but does not end, the limitations period inquiry under the *Dunn-McCampbell* rule. The *Dunn-McCampbell* rule concerns *not* the threshold question of whether a plaintiff has challenged an agency action for which the APA provides judicial review, but whether a plaintiff has challenged an agency action for which the APA provides judicial review *and* which occurred within the limitations period provided by 28 U.S.C. § 2401. To satisfy the *Dunn-McCampbell* rule, then, Plaintiffs must identify an agency action that not only qualifies as a "final agency action" under APA § 704 (and any applicable authority), but must identify an agency action that also is "direct," "involving the particular plaintiff," and occurred "within six years of [the plaintiff] filing suit." Regardless of whether Plaintiffs have identified an appropriate "final agency action" entitling them to review under APA § 704, Plaintiffs have wholly failed to identify such an action that meets these additional conditions.

CONCLUSION

For the foregoing reasons, and for the reasons provided in Defendants' summary judgment briefs and at the October 25, 2017 hearing, as to Plaintiffs' challenges to the actuarial soundness regulation, Defendants respectfully request that the Court grant summary judgment to Defendants, deny Plaintiffs' motion for summary judgment, and dismiss Plaintiffs' claims as time-barred.

Dated: November 22, 2017

Respectfully submitted,

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