No. 2017-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims
in case no. 1:16-cv-00651, Judge Lydia Kay Griggsby

BRIEF FOR APPELLEE

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STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. The issues presented in this appeal are also presented in the following appeals now pending before this Court:

Land of Lincoln Mutual Health Insurance Co. v. United States, No. 16-1224;

Moda Health Plan, Inc. v. United States, No. 17–1994;

Maine Community Health Options v. United States, No. 17-2395.

The following cases pending before the Court of Federal Claims are related cases within the meaning of Federal Circuit Rule 47.5(b):

Atkins v. United States, No. 17-906C (Kaplan, J.);

Alliant Health Plans, Inc. v. United States, No. 16-1491C (Braden, J.);

BCBSM, Inc. v. United States, No. 16-1253C (Coster Williams, J.);

Blue Cross and Blue Shield of Alabama v. United States, No. 17-95C (Campbell-Smith, J.);

Blue Cross and Blue Shield of Kanas City v. United States, No. 17-95C (Braden, J.);

Blue Cross and Blue Shield of South Carolina v. United States, No. 16-1501C (Griggsby, J.)

BlueCross BlueShield of Tennessee v. United States, No. 16-651C (Horn, J.);

Blue Cross of Idaho Health Service, Inc. v. United States, No. 16-1384C (Lettow, J.);

Common Ground Healthcare Cooperative v. United States, No. 17-877C (Sweeney, J.);

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First Priority Life Ins. Co. v. United States, No. 16-587C (Wolski, J.);

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Premera Blue Cross v. United States, No. 17-1155C (Griggsby, J.);

QCC Insurance Co. v. United States, No. 17-1312C (Coster Williams, J.);

Sanford Health Plan v. United States, Nos. 17-357C & 17-1432C (Bruggink, J.);

Vullo v. United States, No. 17-1185C (Wolski, J.);

Wisconsin Physicians Service Ins. Corp. v. United States, No. 17-1070C (Braden, J.).

INTRODUCTION

The Patient Protection and Affordable Care Act ("ACA") established Health Benefit Exchanges ("Exchanges"), in which insurance companies could compete for customers and take individually calculated business risks. The Act does not require the taxpayers to indemnify unprofitable insurers for their losses. Instead, the ACA established three premium-stabilization programs, informally known as the "3Rs," under which payment adjustments are made among insurers.

There is no dispute that two of the 3R programs (reinsurance and risk adjustment) are funded solely by the amounts that insurers or plans pay into each program. But here and in dozens of other pending cases, insurers contend the third program, the risk-corridors program created by section 1342 of the ACA, exposed the government to uncapped liability for insurance-industry losses, based on criteria—the ratio of a plan's allowable costs to its premiums—that are largely dependent upon insurers' business judgment. On this theory, insurers are seeking billions of dollars from the Treasury.

Contrary to the insurers' premise, Congress did not expose the federal fisc to this massive liability. The risk-corridors program is a self-funded program under which the Department of Health and Human Services ("HHS") collects "payments in" from insurers that were profitable and uses those funds to make "payments out" to insurers that were unprofitable.

Section 1342 of the ACA, which established the risk-corridors program, did not appropriate any funds for risk-corridors payments. Instead of enacting an appropriation as part of the ACA (as Congress did for many other ACA programs), Congress deferred the issue of appropriations for risk-corridors payments until the time to make such payments drew near. Then, in the relevant appropriations legislation, Congress appropriated the amounts that insurers would pay into the program but explicitly barred HHS from using other funds for risk-corridors payments. The appropriations legislation thus ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec.11, 2014).

It is a bedrock principle of constitutional law that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM v. Richmond*, 496 U.S. 414, 424 (1990). Congress "made clear its intention that no public funds be spent to reimburse risk corridor participants beyond their user fee contributions." *Maine Community Health Options v. United States*, 133 Fed. Cl. 1, 13 (2017) (Bruggink, J.), *appeal pending*, No. 17-2395 (Fed. Cir.). Insurers cannot circumvent Congress's power of the purse by demanding billions of additional dollars from the Treasury.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1). The court entered final judgment for plaintiff on April 18, 2017. Plaintiff filed a notice of appeal on June 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether plaintiff's statutory claim fails as a matter of law because Congress capped risk-corridors payments at the amount collected from insurers.

2. Whether plaintiff's remaining claims fail because there are no contracts for risk-corridors payments, and plaintiff has no property interest in such payments.

3. Whether the agency's timing of risk-corridors payments is reasonable and consistent with the statute.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Statutory Background

A. The ACA's Central Provisions

The Patient Protection and Affordable Care Act adopted a series of measures designed to expand coverage in the individual health-insurance market. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the Act provides billions of dollars of subsidies each year to help individuals buy insurance. *Id.* at 2489. Second, the Act generally requires each individual to maintain coverage or pay a penalty. *Id.* at 2486. Third, the

Act bars insurers from denying coverage or charging higher premiums based on an individual's health status. *Id.*

The ACA created the Exchanges, virtual marketplaces in each state where individuals and small groups can purchase health coverage. 42 U.S.C. §§ 18031-18041. For consumers, Exchanges are the only forum in which they can purchase coverage with the assistance of federal subsidies. For insurers, Exchanges provide marketplaces to compete for business in a centralized location, and they are the only commercial channel in which insurers can market their plans to the millions of individuals who receive federal subsidies. All plans offered through an Exchange must be Qualified Health Plans ("QHPs"), meaning that they provide "essential health benefits" and comply with other regulatory requirements such as provider-network requirements, benefit-design rules, and cost-sharing limitations. 42 U.S.C. § 18021; 45 C.F.R. pts. 155 and 156.

B. The ACA's Premium-Stabilization Programs (the "3Rs")

The ACA's Exchanges created business opportunities for insurers electing to participate. Like most business opportunities, risk was involved—here, in the form of pricing uncertainty arising from the unknown health status of an expanded risk pool and the fact that insurers could no longer charge higher premiums or deny coverage based on an enrollee's health (*i.e.*, expected cost). In an effort to mitigate the pricing risk and incentives for adverse selection arising from this system, the ACA established three premium-stabilization programs modeled on preexisting programs established

under the Medicare program. Informally known as the "3Rs," these ACA programs began with the 2014 calendar year and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-18063.

The 3R programs distribute risks among insurers and mitigate risk attendant to the new opportunities created by the ACA. Each of the 3R programs is funded by amounts that insurers or plans pay into the program.

The reinsurance program was created by section 1341 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from insurers and self-insured group health plans are used to fund payments to issuers of eligible plans that cover high-cost individuals in the individual market. 42 U.S.C. § 18061.

The risk-adjustment program was created by section 1343 of the ACA. It is a permanent program under which amounts collected from insurers whose plans have healthier-than-average enrollees are used to fund payments to insurers whose plans have sicker-than-average enrollees. 42 U.S.C. § 18063.

The risk-corridors program was created by section 1342 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from profitable insurance plans are used to fund payments to unprofitable plans. 42 U.S.C. § 18062.

The risk-corridors program is at issue here. The operative provision is subsection (a) of section 1342, which directed HHS to "establish and administer a

program of risk corridors" under which insurers offering individual and small-group QHPs between 2014 and 2016 "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). The "payment methodology" is set out in subsection (b) of section 1342. That provision states that if an insurer's "allowable costs" (essentially, claims costs) are less than a "target amount" (premiums minus allowable administrative costs) by more than three percent, the plan shall pay a specified percentage of the difference to HHS. *Id.* § 18062(b)(2).[1] The statute refers to these payments as "payments in." *Id.* Conversely, if an insurer's allowable costs exceed the target amount by more than three percent, the payment-methodology provision states that HHS shall pay a specified percentage of the difference. *Id.* § 18062(b)(1). The statute refers to these payments as "payments out." *Id.* HHS regulations incorporated this payment methodology in substantially similar terms. 45 C.F.R. § 153.510(b)-(c).

Nowhere does the ACA connect "payments out" to an independent source of taxpayer funds. "Payments in" from insurers are the only source of funds referenced in section 1342. By contrast, in dozens of other ACA provisions, Congress appropriated or authorized the appropriation of funds for various programs. *See infra*

[1] "Allowable administrative costs" include administrative costs and profit of the QHP, the sum of which is limited to 20% of total premiums collected. 45 C.F.R. § 153.500.

p.18 n.4 (citing examples). Section 1342 neither appropriated funds nor authorized appropriations for risk-corridors payments.

The budget authority for section 1342 contrasts starkly with the preexisting risk-corridors program for Medicare Part D, on which the ACA program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA risk-corridors program "shall be based on" the risk-corridors program under Medicare Part D). The statute that established the Medicare Part D program provides: "This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section." 42 U.S.C. § 1395w-115(a)(2). Congress omitted that language (and any similar language) from section 1342 and thus ensured that this provision would not by itself make risk-corridors payments an obligation of the government.

Consistent with the text and structure of section 1342, the Congressional Budget Office ("CBO") did not attribute any costs to the risk-corridors program when, shortly before the ACA's passage, it estimated the ACA's impact on the federal budget. *See* Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, tbl. 2 (Mar. 20, 2010) ("CBO Cost Estimate") (omitting risk corridors from the budgetary scoring).[2] Congress specifically referenced that CBO cost estimate in the ACA, in a provision that emphasized the Act's fiscal

[2] http://www.cbo.gov/ftpdocs/113xx/doc11379/amendreconProp.pdf

responsibility. *See* ACA § 1563(a) ("Sense of the Senate Promoting Fiscal Responsibility").

C. Congress's Appropriations for Risk-Corridors Payments

As discussed above, when Congress enacted the ACA in 2010, it did not appropriate funds or authorize appropriations for risk-corridors payments. Instead, Congress deferred the issue of appropriations for risk-corridors payments until the time to make such payments drew near.

The risk-corridors program began in the 2014 calendar year, and the first set of payments could not be made before the 2015 calendar year, which corresponded to the 2015 and 2016 fiscal years. Anticipating the upcoming appropriations process, in early 2014, Members of Congress asked the Government Accountability Office ("GAO") to address potential sources of funds that might be used for risk-corridors payments when such payments came due in 2015. *See Dep't of Health and Human Servs.-Risk Corridors Program*, B-325630, 2014 WL 4825237, at *1 (Comp. Gen. Sept. 30, 2014) ("GAO Op.") (noting requests). The GAO, in turn, solicited the views of HHS, which identified risk-corridors collections, which would not begin until 2015, as the only source of funding for risk-corridors payments. *See* Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014) (Appx223-225).

In an opinion released in September 2014, the GAO recognized that "Section 1342, by its terms, did not enact an appropriation to make the payments specified in

section 1342(b)(1)." GAO Op., 2014 WL 4825237, at *2. The GAO examined HHS's appropriations act for fiscal year 2014 to determine whether its language—if reenacted in subsequent appropriations acts—would allow funds to be used for risk-corridors payments. *See id.* at *2-5.

The GAO identified within the Program Management appropriation for HHS's Centers for Medicare & Medicaid Services ("CMS") two potential sources of funding that it believed would be available for risk-corridors payments, if the same language were reenacted for subsequent fiscal years. *Id.* at *3, *5. First, the GAO agreed with HHS that the appropriation for "user fees" would, if reenacted for subsequent fiscal years, allow HHS to use "payments in" from insurers to make "payments out" to insurers. *Id.* at *3-4; *see also* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (appropriating "such sums as may be collected from authorized user fees").

Second, the GAO noted that the fiscal year 2014 act appropriated a $3.67 billion lump sum for the management of enumerated programs such as Medicaid and Medicare, as well as for "other responsibilities of" CMS. 2014 WL 4825237, at *3. The GAO opined that this language could encompass risk-corridors payments, if it were reenacted by Congress in subsequent appropriations acts. *Id.* at *3, *5.

In December 2014—before any payments could have been claimed or made under the risk-corridors program—Congress enacted the appropriations act for fiscal

year 2015, which specifically addressed funding for the risk-corridors program. That legislation reenacted the user-fee language that allowed funds from "payments in" to be used to make risk-corridors payments. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477. The act also provided a lump sum amount for CMS's Program Management account for fiscal year 2015 to be derived from CMS trust funds. *Id.* To make clear that risk-corridors payments could only be paid out of the user-fee appropriation, Congress included a rider that expressly limited the availability of Program Management funds for the risk-corridors program. The legislation specified:

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Id. § 227, 128 Stat. at 2491.

In other words, the first time that Congress needed to decide whether to appropriate funds for risk-corridors payments, it enacted legislation that capped those payments at amounts collected from insurers. Congress explained that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014).

The following year, in December 2015, Congress enacted an identical funding limitation in the appropriations act for fiscal year 2016. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, § 225, 129 Stat. 2242, 2624. Congress

subsequently enacted continuing resolutions that retained the same funding limitation. *See, e.g.,* Continuing Appropriations Act, 2017, Pub. L. No. 114-223, div. C, 130 Stat. 857, 909; Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005-06. Congress reenacted the funding limitation in the appropriations act for fiscal year 2017, *see* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title II, § 223, 131 Stat. 135, whose provisions carry over into fiscal year 2018 under a continuing resolution, *see* Continuing Appropriations Act, 2018, Pub. L. No. 115-56, div. D., §§ 101, 103, 104 (Sept. 8, 2017).

II. HHS's Implementation of the Risk-Corridors Program

HHS regulations require insurers to compile and submit their risk-corridors data for a particular calendar year by July 31 of the following year. 45 C.F.R. § 153.530(d). HHS then applies the statutory formula to calculate collection and payment amounts for the preceding calendar year. *Id.* § 153.530(a)-(c).

In March 2014, HHS informed insurers that it would "implement th[e] program in a budget neutral manner." 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014). In April 2014, HHS released guidance explaining that, if the total amount that insurers paid into the risk-corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula, payments to insurers would be reduced pro rata to the extent of any shortfall. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014) (Appx250-251). The guidance

further explained that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the current year. *Id.*

HHS implemented that payment methodology when collections in fact proved insufficient to pay in full amounts calculated under the statutory formula. In November 2015, HHS announced that for 2014 (the program's first year), the total amount that insurers would pay in ($362 million) was $2.5 billion less than the total amount that insurers requested ($2.87 billion). CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015) (Appx261). As a result, HHS indicated that it would at that time make pro-rated payments of approximately 12.6% of the amount requested for 2014. *Id.*

The following year, in November 2016, HHS announced that it would apply the total amount that insurers were expected to pay in for 2015 to outstanding payment requests for 2014. Appx1016. To date, the total amount of "payments in" for 2014 and 2015 is approximately $8.3 billion less than the total amount calculated as "payments out" for those years. Insurers submitted their data for 2016 in July 2017. HHS has not yet announced payments and charges for the 2016 benefit year.

III. Factual Background and Proceedings Below

Plaintiff and many other insurers filed Tucker Act suits in the Court of Federal Claims, alleging that the government is obligated to pay insurers the full amount calculated under the formula in section 1342(b)(1), regardless of how much insurers

paid into the program under section 1342(b)(2). Collectively, the insurers are seeking billions of dollars.

The principal claim is statutory. Although Congress appropriated only the amounts that insurers pay into the risk-corridors program and expressly barred HHS from using other funds for risk-corridors payments, plaintiff alleged that there is no cap on the amounts that the government must pay under the risk-corridors program. Appx71-72. Plaintiff also alleged contract and takings claims, but the claims are largely derivative of its statutory claim. Appx72-82.

After concluding that it had jurisdiction, the trial court upheld HHS's three-year payment methodology, under which HHS has been making annual risk-corridors payments to the extent of its budget authority while leaving open the possibility of additional payments if permitted by appropriations. Appx23-28. Because the court concluded that this methodology is reasonable, the court dismissed the statutory claim on the ground that funds allegedly owed to plaintiff are not presently due. Appx28.

The trial court rejected plaintiff's express contract claim because the QHP Agreement on which plaintiff relied does not relate to risk-corridors payments, Appx28-29—a ruling that plaintiff does not challenge on appeal. *See* Pl. Br. 17 n.10. The court rejected plaintiff's implied-in-fact contract claim because the language of section 1342 does not make risk-corridors payments a contractual obligation of the government. Appx29-31. The court rejected plaintiff's implied-covenant-of-good-

faith-and-fair-dealing claim because the claim is dependent on plaintiff's unsuccessful contract claims. Appx32. And the court rejected plaintiff's takings claim because plaintiff does not have a cognizable property interest in additional risk-corridors payments. Appx32-33.[3]

SUMMARY OF ARGUMENT

Under the risk-corridors program created by section 1342 of the ACA, HHS collects "payments in" from profitable insurance plans and uses those funds to make "payments out" to unprofitable plans. Plaintiff and other insurers contend that section 1342 obligates the government to make up shortfalls in collections. On that theory, they seek billions of dollars from the Treasury. The claims have no merit.

I. Contrary to the insurers' premise, the ACA did not obligate the taxpayers to cover insurance-industry losses. The Act's three premium-stabilization programs, including the risk-corridors program, distribute risks among insurers. Each program is self-funded by amounts collected from insurers or plans.

Section 1342 of the ACA neither appropriated funds nor authorized appropriations for risk-corridors payments. And unlike the preexisting Medicare Part D statute on which section 1342 was generally modeled, section 1342 does not include any language that would make risk-corridors payments an obligation of the government without regard to appropriations. When the time came to appropriate

[3] The trial court also rejected plaintiff's request for declaratory relief. Appx34. Plaintiff does not challenge that ruling on appeal. *See* Pl. Br. 17 n.10.

funds for risk-corridors payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make risk-corridors payments. That legislation ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). Congress has plenary power over appropriations, and insurers cannot circumvent Congress's power of the purse by demanding billions of dollars that Congress did not appropriate.

II. Plaintiff's implied-in-fact contract claim and takings claim rest on the same incorrect premise as the meritless statutory claim and also fail on independent grounds. It is well settled that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). Nothing in the language of section 1342 "'create[s] or speak[s] of a contract' between the United States and" insurers. *Id.* at 631 (quoting *Atchison*, 470 U.S. at 467). Section 1342 did not vest HHS with any contracting authority, much less with authority to enter into contracts that would obligate the government to make uncapped risk-corridors payments without regard to appropriations. The takings claim fails because plaintiff does not have a property interest in the payments it seeks.

III. The trial court correctly upheld the agency's three-year payment methodology, under which HHS has been making annual risk-corridors payments to the extent of its budget authority, while leaving open the possibility of additional payments if permitted by appropriations. That methodology is eminently reasonable. We recognize, however, that the practical significance of this timing issue is likely to be overtaken by the passage of time while the litigation is pending. Accordingly, we focus in this brief on the legal issues that will control the disposition of the insurers' claims after this timing issue becomes moot.

STANDARD OF REVIEW

The decision below presents issues of law that are subject to de novo review.

ARGUMENT

I. There Is No Statutory Obligation To Use Taxpayer Funds For Risk-Corridors Payments.

A. Section 1342 of the ACA Did Not Appropriate Funds for Risk-Corridors Payments or Make Such Payments an Obligation of the Government.

The risk-corridors program is one of three premium-stabilization programs created by the ACA (together known as the "3Rs"). There is no dispute that the other 3R programs—the reinsurance and risk-adjustment programs created by sections 1341 and 1343 of the ACA, respectively—are funded solely by amounts collected from insurers or plans. *See* Pl. Br. 34. Plaintiff and other insurers contend that the risk-corridors program created by section 1342 of the ACA uniquely obligates

the government to use taxpayer dollars to make up shortfalls in amounts collected from insurers. But the text, structure, history, and purpose of the risk-corridors program demonstrate that the program was to be self-funded.

Section 1342 directed HHS to "establish and administer" a system of payment adjustments among insurers for the 2014, 2015, and 2016 calendar years, 42 U.S.C. § 18062(a), based on a retrospective analysis of insurers' data for a prior full year, *id.* § 18062(b). Insurers that overestimated their premiums relative to costs make "payments in" at specified percentages; insurers that underestimated their premiums relative to costs receive "payments out" at corresponding percentages. *Id.* The "payment methodology" provision, which states that HHS "shall pay" amounts calculated under the statutory formula, *id.* § 18062(b)(1), does not refer to any potential funding source other than "payments in," *id.* § 18062(b)(2).

Like the other 3R programs, the risk-corridors program mitigated insurers' risk in the early years of the ACA's implementation. Those potential risks resulted not only from market uncertainties, but also from the insurers' business judgment in pricing and designing the plans that they offered on the Exchanges.

Nothing in the text of section 1342 obligated the government to use taxpayer dollars to make potentially massive, uncapped payments to insurance companies. In dozens of other ACA provisions, Congress immediately appropriated funds or

enacted statutory language authorizing the future appropriation of funds.[4] In contrast, the only funds referenced in the risk-corridors statute are "payments in" by insurers and "payments out" to insurers. *See* GAO Op., 2014 WL 4825237, at *2 ("Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)."). The risk-corridors statute makes no reference to appropriations whatsoever.

Congress conspicuously omitted from section 1342 any language making risk-corridors payments an obligation of the government, in notable contrast to the preexisting risk-corridors program under Medicare Part D on which the ACA risk-corridors program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA's risk-corridors program "shall be based on" the risk-corridors program under Medicare Part D). The Medicare Part D statute, unlike the ACA risk-corridors provision, expressly made risk-corridors payments an obligation of the government:

> This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section.

[4] For examples of ACA provisions appropriating funds, *see* ACA §§ 1101(g)(1), 1311(a)(1), 1322(g), 1323(c). For examples of ACA provisions authorizing the appropriation of funds, *see* ACA §§ 1002, 2705(f), 2706(e), 3013(c), 3015, 3504(b), 3505(a)(5), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

42 U.S.C. § 1395w-115(a)(2). Thus, in Medicare Part D, Congress made risk-corridors payments an "obligation" of the government regardless of amounts contributed by insurers. *Id.*

Congress enacted no equivalent language in section 1342 of the ACA. This contrast is especially notable because Congress *did* enact equivalent language elsewhere in the ACA. *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, Congress provided: "BUDGET AUTHORITY.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts appropriated under that subparagraph.").

By omitting from section 1342 the budget language that it used in the preexisting Medicare Part D statute and elsewhere in the ACA, Congress ensured that section 1342 would not by itself make risk-corridors payments an obligation of the government. No payment obligation could arise by statute without further action by Congress.

Consistent with the plain text of section 1342, the budget estimate that the CBO prepared for Congress when the ACA was under consideration indicated that the risk-corridors program would not increase the federal deficit. *See* CBO Cost Estimate, tbl. 2 (omitting the risk-corridors program from the budgetary scoring). When the CBO—which is the legislative branch agency responsible for providing Congress with nonpartisan budget analyses—estimated the budgetary impact of the

ACA and identified "budgetary cash flows for direct spending" from the ACA, *id.* at 3, it did not mention risk-corridors payments, reflecting the understanding that the program would be self-funded.

By contrast, the CBO did score the other 3R programs. The CBO explained that under the risk adjustment program, payments lag receipts by one quarter, which may affect the budget. CBO Cost Estimate, tbl. 2 note a. And the CBO noted that under the reinsurance program, payments were expected to total $20 billion, *id.*, whereas collections were expected to total $25 billion, 42 U.S.C. § 18061(b)(3)(B). The CBO likewise scored ACA § 2707 which, as indicated above, made payments under a psychiatric demonstration project an obligation of the government. *See* CBO Cost Estimate, tbl. 5 (indicating that section 2707 would increase the federal deficit).

Congress explicitly relied on the CBO Cost Estimate when it enacted the ACA. In an ACA provision entitled "Sense of the Senate Promoting Fiscal Responsibility," Congress indicated, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the federal deficit between 2010 and 2019." ACA § 1563(a)(1). That projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010. And it was predicated on Congress's understanding that risk-corridors payments would not increase the deficit.

B. Congress Appropriated Amounts Collected From Insurers but Barred HHS From Using Other Funds, and Thus Capped the Government's Liability at Amounts Collected.

1. As explained above, the ACA did not appropriate any funds for risk-corridors payments or make such payments an obligation of the government. When the time arrived to appropriate funds for risk-corridors payments, Congress appropriated amounts collected from insurers under the risk-corridors program but explicitly barred HHS from using other funds. Once those appropriated funds "were exhausted, the government's liability was capped." *Maine Community Health Options v. United States*, 133 Fed. Cl. 1, 13 (2017) (Bruggink, J.). Thus, the statutory claim fails as a matter of law.

The relevant appropriations provision was first enacted in the appropriations legislation for fiscal year ("FY") 2015. In anticipation of the appropriations process, Congress asked the GAO to identify the sources of funding that would potentially be available for risk-corridors payments. The GAO opinion identified only two possible sources: (1) the user fees that insurers would pay into the risk-corridors program, and (2) a lump sum appropriation for CMS program management. "The GAO report did not mention any other sources of funding as available to the program." *Maine*, 133 Fed. Cl. at 6. Congress then enacted legislation that appropriated user fees but explicitly barred the HHS from using other funds. Congress thus "made clear its intention that no public funds be spent to reimburse risk corridor participants beyond their user fee contributions." *Id.* at 13.

Indeed, the bar could not have been more explicit: "None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act . . . may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors)." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, § 227, 128 Stat. 2130, 2491. As the trial court in *Maine* noted, the plain terms of the enactment are echoed in the statement of the Chairman of the House Appropriations Committee recounting the relevant background. The Chairman explained that "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." *Maine*, 133 Fed. Cl. at 6 (quoting 160 Cong. Rec. H9838 (daily ed. Dec.11, 2014)). The appropriations legislation thus locked HHS into keeping the program budget neutral.

Even where (unlike here) permanent legislation makes payments an "obligation" of the government, there is no doubt that subsequent appropriations legislation can amend the preexisting statutory obligation, as long as Congress's intent to do so is clear. In *United States v. Dickerson*, 310 U.S. 554, 554-55 (1940), for example, the Supreme Court held that an appropriations act precluding the use of funds to pay military reenlistment allowances superseded permanent legislation providing that an enlistment allowance shall be paid "to every honorably discharged enlisted man . . . who reenlists within a period of three months from the date of his

discharge." Similarly, in *United States v. Will*, 449 U.S. 200, 224 (1980), the Supreme Court held that an appropriations act providing that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 . . . may be used to pay" salary increases mandated by earlier legislation "indicate[d] clearly that Congress intended to rescind these raises entirely." And in *United States v. Mitchell*, 109 U.S. 146, 148 (1883), the Supreme Court held that "by the appropriation acts which cover the period for which the appellee claims compensation, congress expressed its purpose to suspend the operation of [a prior statute fixing salaries] and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum."

2. Plaintiff asserts that "[t]he *mere fact* that Congress has not specifically appropriated funds to pay for a legally enforceable obligation under a money-mandating statute does not alter the existence of the obligation or prevent the Court of Federal Claims from enforcing it." Pl. Br. 36 (citing *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (en banc)) (emphasis added). This assertion rests on multiple legal errors. First, as plaintiff acknowledges, *Slattery* addressed "the jurisdictional foundation of the Tucker Act," Pl. Br. 36, rather than the merits of a claim. This Court has emphasized that the jurisdictional and merits questions are distinct, and has explicitly rejected the contention that "whether a statute is money-mandating for purposes of Tucker Act jurisdiction depends on whether the plaintiff

on the merits can make out a claim under the statute." *Greenlee County v. United States*, 487 F.3d 871, 875 (Fed. Cir. 2007).

Second, Congress did not make risk-corridors payments a "legally enforceable obligation." Pl. Br. 36. To the contrary, although Congress generally modeled the ACA's risk-corridors program on the preexisting program under Medicare Part D, Congress declined to make the ACA payments an "obligation of the Secretary," as Congress had done in the Medicare Part D statute, 42 U.S.C. § 1395w-115(a)(2).

Third, "Congress did not *merely fail* to address the source of funding" for risk-corridors payments. *Maine*, 133 Fed. Cl. at 13 (emphasis added). Congress appropriated "payments in" but explicitly barred HHS from using other funds. In enacting that legislation, Congress explained that it ensured that the federal government will not pay out more than it collects from insurers over the three-year period the risk-corridors program is in effect. Thus, in contrast to the cases on which plaintiff relies, Congress's intent to limit the government's liability at the amounts appropriated is abundantly clear.

Plaintiff's reliance on a presumption against retroactivity, Pl. Br. 49-50, is wholly misplaced. The legislation that appropriated funds for risk-corridors payments did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). As discussed above, section 1342 did not appropriate any funds for risk-corridors payments, much less obligate the

taxpayer to indemnify unprofitable insurers for their business losses. The very first time that Congress appropriated funds for risk-corridors payments, Congress appropriated "payments in" and barred HHS from using other funds. That is not retroactive legislation. In any event, the presumption against retroactivity is overcome when Congress's intent is clear, *id.*, and Congress clearly intended to limit payments to the amounts collected.[5]

3. Plaintiff's reliance on HHS regulations stating that "HHS will pay" risk-corridors amounts to insurers, Pl. Br. 33, turns the Appropriations Clause on its head. Under the "straightforward and explicit command of the Appropriations Clause," "no money can be paid out of the Treasury unless it has been appropriated by *an act of Congress*." *Richmond*, 496 U.S. at 424 (emphasis added). The Appropriations Clause is "particularly important as a restraint on Executive Branch officers," *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012), and it is implicit in any agency's payment regulation that implementation depends on appropriations.

Plaintiff's reliance on other HHS statements, *see* Pl. Br. 9-10, 34-35, fails for the same reason. It is well settled that an agency's statements cannot create a payment obligation that Congress did not authorize. The Supreme Court has emphasized that a contrary holding could "render the Appropriations Clause a nullity." *Richmond*,

[5] Indeed, Congress is free to "upset[] otherwise settled expectations" in a statutory program. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

496 U.S. at 428. "If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Id.* That would contravene "the straightforward and explicit command of the Appropriations Clause." *Id.* at 424. Accordingly, "[a] regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." GAO, *Principles of Federal Appropriations Law* 2–2 (4th ed. 2016 rev.) ("GAO Redbook").[6] Likewise, "[i]f a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." GAO, *Principles of Federal Appropriations Law* (Vol. II) at 7-8 (3d ed. 2004).[7]

C. The *Molina* Opinion, on Which Plaintiff Relies, Reflects a Basic Misunderstanding of Congress's Appropriations Power.

1. Plaintiff relies heavily on Judge Wheeler's recent liability opinion in *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14 (2017).[8] There, Judge

[6] The GAO Redbook is being updated on a chapter-by-chapter basis. Citations are to the 2016 edition unless otherwise indicated.

[7] Moreover, as discussed below, HHS repeatedly recognized that its ability to make risk-corridors payments was subject to appropriations, and HHS made clear that it would pay out only the amounts that were paid into the risk-corridors program by insurers. *See infra* p.45.

[8] Judge Wheeler stayed further proceedings in *Molina* pending this Court's disposition of *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Fed. Cir.), and *Moda Health Plan, Inc. v. United States*, No. 17–1994 (Fed. Cir.).

Wheeler concluded that Congress's explicit limitation on appropriations for risk-corridors payments achieved nothing because those payments could, instead, be made from the Judgment Fund, which he regarded as a "third option" for funding risk-corridors payments. *Id.* at 35.

But as Judge Bruggink correctly recognized in the *Maine* risk-corridors case, the existence of the Judgment Fund is "immaterial" because "[r]etreat to the Judgment Fund assumes a liability in the first instance." *Maine*, 133 Fed. Cl. at 13 (citing *OPM v. Richmond*, 496 U.S. 414, 432 (1990)). There is no substantive basis for liability here. "Congress was presented with two potential pools of money for [risk-corridors] payments and clearly eliminated one of them, thus expressly limiting payments to the other pool—user fees." *Id.* "Once those funds were exhausted, the government's liability was capped." *Id.*

Judge Wheeler's contrary ruling is especially misguided because he recognized that it was "highly unlikely that Congress actively contemplated the availability of the Judgment Fund, let alone intended its use to make risk corridor payments." *Molina*, 133 Fed. Cl. at 35. Thus, Judge Wheeler's own understanding of the legislation made clear that there was no conceivable basis for resort to the Judgment Fund, which appropriates funds only to "pay final judgments." 31 U.S.C. § 1304(a)(1).

2. Judge Wheeler's liability ruling reflects a basic misunderstanding of the Appropriations Clause and the federal statutes that implement it. The Appropriations Clause is not self-defining, and Congress has plenary power to implement it. *See U.S.*

Dep't of the Navy, 665 F.3d at 1347 (citing *Harrington v. Bush*, 553 F.2d 190, 194–95 (D.C. Cir. 1977)). Congress has implemented the Appropriations Clause through longstanding statutes. *Id.*

First, "[a]ppropriations shall be applied only to the objects for which the appropriations were made," 31 U.S.C. § 1301(a), and a "law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made," *id.* § 1301(d). Once made, appropriations in the annual appropriations act are only available for obligation until the end of the fiscal year, unless the appropriation "expressly provides that it is available after the fiscal year." *Id.* § 1301(c)(2).

Second, the Anti-Deficiency Act prohibits any officer or employee of the United States from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Moreover, federal law bars federal officers from withdrawing "from one appropriation account and credit[ing] to another [except] when authorized by law." *Id.* § 1532.

Third, except as otherwise specifically provided by law, the Miscellaneous Receipts Act requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). This

statutory requirement ensures that all money received for the government is deposited into the Treasury, unless the law specifically provides otherwise. Once deposited into the Treasury, the Appropriations Clause requires an appropriation from Congress to pay the money out. Thus, absent the legislation appropriating the amounts collected from insurers, HHS could not have retained and used risk-corridors collections to make risk-corridor payments because such amounts would have been deposited into the Treasury pursuant to the Miscellaneous Receipts Act.

Congress permits agencies to incur financial obligations and spend federal funds by providing the agency with "budget authority," such as through "provisions of law that make funds available for obligation and expenditure." 2 U.S.C. § 622(2)(A)(i). "Congress' power to spend, or not, is unimpeded by its earlier actions." *Maine*, 133 Fed. Cl. at 8; accord *Manigault v. Springs*, 199 U.S. 473, 487 (1905) ("[A] general law . . . may be repealed, amended, or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature."). Thus, where Congress indicates in its appropriations acts "a broader purpose" beyond "something more than the mere omission to appropriate a sufficient sum," *United States v. Vulte*, 233 U.S. 509, 515 (1914), the Supreme Court and this Court have given effect to Congress's intent and held that the United States is not liable for payments in excess of those limitations.

Judge Wheeler nevertheless declared that statutory language stating that an agency "shall pay" specified amounts imposes "discretionless obligations." *Molina*,

133 Fed. Cl. at 36 (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). But the cases on which he relied did not involve the payment of money. In *Lopez*, for example, the statute provided that the Bureau of Prisons "shall designate the place of the prisoner's imprisonment" without "favoritism given to prisoners of high social or economic status." *Lopez*, 531 U.S. at 241.

Judge Wheeler was simply wrong to declare that "[t]he test for determining whether a statute obligates the Government does not change simply because" the directive is for "the payment of money." *Molina*, 133 Fed. Cl. at 36. No further action by Congress is necessary when a statute directs an agency to house prisoners without special favoritism. By contrast, the statutes that implement the Appropriations Clause make it unlawful for an agency to implement a payment directive unless and until Congress appropriates the necessary funds. It is "not enough for a statute to simply require an agency to make a payment," because "[a]gencies may incur obligations and make expenditures only as permitted by an appropriation." GAO Op., 2014 WL 4825237, at *2. Accordingly, until Congress provided an appropriation for risk-corridors payments, HHS was not permitted (much less required) to make such payments.

3. This Court's decision in *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), recognized that payment directives must be understood in light of the applicable appropriation and the constraints of the Anti-Deficiency Act. In *Highland Falls*, this Court held that earmarked amounts in annual

appropriations acts limited the government's liability for payments to which school districts were otherwise entitled under section 237 of the Impact Aid Act. This Court explained that, by making pro rata reductions in the amounts to which school districts were entitled, the Secretary of Education "harmonized the requirements of [the Impact Aid Act] and the appropriations statutes with the requirements of" the Anti-Deficiency Act, which prevents an agency from making expenditures that exceed appropriations. *Id.* at 1171. This Court likewise noted that the agency's approach harmonized the Impact Aid Act with the requirements of 31 U.S.C. § 1532, which states that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law." *Id.*

Judge Wheeler's attempts to distinguish *Highland Falls* do not bear even cursory scrutiny. First, he declared that "[u]nlike the appropriation laws in *Highland Falls*," the appropriations laws at issue here did "not specifically and affirmatively appropriate any funds whatsoever to satisfy Section 1342(b)(1)," *Molina*, 133 Fed. Cl. at 39, and that "Congress merely pointed to funds which *could not* be used to make risk corridor payments." *Id.* Even if that description of the appropriations laws were correct, Congress can limit the government's liability through an explicit bar on the use of funds.

In any event, Judge Wheeler's description of the risk-corridors appropriations was incorrect. The FY 2015 legislation *did* appropriate funds for risk-corridors payments: it appropriated user fees. Absent that appropriation, HHS could not have

retained and used risk-corridors collections to make risk-corridor payments because such amounts would have been deposited into the Treasury pursuant to the Miscellaneous Receipts Act. The GAO thus advised Congress that reenactment of the user-fee appropriation would allow HHS to use "payments in" as a funding source for "payments out." Congress then appropriated funds collected from user fees. *See, e.g.,* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477 (appropriating "such sums as may be collected from authorized user fees"). Congress thus allowed HHS to use risk-corridors collections to fund risk-corridors payments, but in the same appropriations law, explicitly prohibited the use of other funds.

As in *Highland Falls*, there is "great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." 48 F.3d at 1170. Indeed, insurers are on even weaker footing than were the school districts in *Highland Falls*, because the Impact Aid Act provided that school districts were "entitled" to receive the section 237 payments and specified that in the event of a shortfall of appropriations, the section 237 entitlements shall be paid at 100 percent. *Id.* at 1168. By contrast, nothing in section 1342 provides for an "entitlement" to risk-corridors payments or specifies 100 percent payment.

Judge Wheeler was on no firmer ground in attempting to distinguish *Highland Falls* by observing that the Impact Aid Act required the Secretary of Education to determine, based on statutory criteria, "whether a school district should receive

payment and how much payment they should receive." *Molina*, 133 Fed. Cl. at 40. Judge Wheeler declared those threshold determinations "important" to this Court's reasoning. *Id.* In reality, they were irrelevant to the legal issue before this Court, because the Secretary had found the school district entitled to a specific and undisputed amount. The Tucker Act suit was filed because "the money Highland Falls received under the Act was less than its § 237 entitlement, as determined by the Secretary of DOE." *Highland Falls*, 48 F.3d at 1169. This Court did not suggest that the Impact Aid Act gave the Secretary discretion to withhold the amounts to which the Secretary had determined a school district to be entitled. The point of this Court's decision was that the subsequent appropriations legislation limited the government's liability to the amounts that Congress appropriated, notwithstanding the mandatory language of the Impact Aid Act.

For good reason, plaintiff does not press the argument that the statute at issue in *Highland Falls* was not "money mandating." *Cf. Molina*, 133 Fed. Cl. at 23 n.17 (noting this argument). Nothing in this Court's *Highland Falls* decision questioned the existence of Tucker Act jurisdiction. The government moved to dismiss the complaint in *Highland Falls* for failure to state a claim on which relief could be granted, *see* 48 F.3d at 1167, 1169, and this Court affirmed the trial court's dismissal on the merits, *id.* at 1172. The Impact Aid Act provided that a school district "shall be entitled to receive" 100% of the amounts calculated by the Secretary of Education. *Id.* at 1168; *see also* 20 U.S.C. § 240(b)(1) (1988) (repealed 1994) (providing that the

Secretary of Education "shall pay" those amounts once determined). This Court has "repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating" for purposes of jurisdiction. *Greenlee County*, 487 F.3d at 877. Accordingly, this Court's *Highland Falls* decision did not question the existence of Tucker Act jurisdiction. The existence of jurisdiction is distinct from the merits, however, and plaintiff improperly conflates these distinct issues.

D. Plaintiff Incorrectly Conflates the Question of Jurisdiction with the Merits.

Plaintiff asserts that "[s]tatutes, like § 1342, providing that the Government 'shall' make payment are money-mandating and impose on the Government a legal obligation to pay." Pl. Br. 36 (citing *Greenlee County*, 487 F.3d at 877, and *Molina*, 133 Fed. Cl. at 27). Plaintiff further declares that "[b]ecause § 1342 contains no express limitation regarding appropriations, Congress intended to 'impose[] a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations[.]'" *Id.* (emphasis omitted) (quoting *Prairie County v. United States*, 782 F.3d 685, 690 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015)).

These assertions have no support in the case law and confuse the question of jurisdiction with the merits of a claim. In *Greenlee County*, this Court held that statutory language stating that an agency "shall pay" (or words to that effect) typically suffices to make a statute "money-mandating" for purposes of jurisdiction under the Tucker Act. 487 F.3d at 875. At the same time, this Court admonished that the

jurisdictional and merits inquiries are distinct, and explicitly rejected the contention that "whether a statute is money-mandating for purposes of Tucker Act jurisdiction depends on whether the plaintiff on the merits can make out a claim under the statute." *Id.* On the contrary, in both *Greenlee County* and *Prairie County*, this Court found jurisdiction under a money-mandating statute but went on to reject the claims on the merits.

On the merits, plaintiff's reliance on section 1342 as a "money-mandating" statute fails for two independent reasons. First, although plaintiff asserts that section 1342 created a "statutory *obligation* to pay the full amounts according to the statutory formulas regardless of appropriations," Pl. Br. 36 (emphasis added), Congress did *not* make risk-corridors payments an "obligation" of the government—in contrast to provisions in the Medicare Part D statute and elsewhere in the ACA which expressly create "obligations" of the government. *See supra* pp.18-19; *see also Prairie County*, 782 F.3d at 691 (explaining that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language" stating that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter").

Second, even if section 1342 had made risk-corridors payments an "obligation" of the government, Congress has plenary power to limit a preexisting statutory obligation to amounts appropriated. As discussed above, the acts appropriating funds

for risk-corridors payments clearly limited any such obligation to the user fees that Congress appropriated. *See Maine*, 133 Fed. Cl. at 13.

Plaintiff's own argument shows that Congress capped the government's liability at the amounts collected from insurers. By plaintiff's account, "Congress intended" HHS "to pay annually, *not* after the program's three years had elapsed," Pl. Br. 22, and "delaying Government payment until December 2017 or later, is inconsistent with Congress's intent," Pl. Br. 22-23. Likewise, Judge Wheeler opined that "the function of the risk corridor program requires that risk corridor payments be made on an annual basis," and that, "[i]f HHS were allowed to delay payments until the end of the program, the purpose of protecting financial loss annually would be thwarted." *Molina*, 133 Fed. Cl. at 30. But there is no dispute that Congress, in its annual appropriations acts, explicitly barred HHS from paying out more than HHS collected from insurers each year. Thus, under the insurers' own reasoning, their attempt to collect billions of additional dollars after the program has ended is contrary to Congress's intent.[9]

[9] Although plaintiff relies in its statutory argument on *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), this Court expressly held that *Ramah*'s contract-based reasoning does not extend to statutory claims. *See Prairie County*, 782 F.3d at 689-90. Plaintiff's contract claims fail for the reasons discussed below.

II. The Contract And Takings Claims Fail On Multiple, Independent Grounds.

A. Section 1342 of the ACA Did Not Create Contracts for Risk-Corridors Payments.

1. The precedents of this Court and the Supreme Court foreclose plaintiff's effort to derive an implied-in-fact contract from the text of section 1342 of the ACA. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Brooks*, 702 F.3d at 630 (quoting *Atchison*, 470 U.S. at 466). Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Brooks*, 702 F.3d at 630-31 (quoting *Atchison*, 470 U.S. at 466).

In *Brooks*, for example, this Court rejected the contention that a *qui tam* relator entered into a contract with the United States by filing suit against a third party for false patent marketing. The *qui tam* statute at issue in *Brooks* provided that "[a]ny

person may sue for the penalty, in which one-half shall go to the person suing and the other to the use of the United States." 702 F.3d at 631. Rejecting the implied-in-fact contract claim, this Court explained that "[n]othing in this language 'create[s] or speak[s] of a contract' between the United States and a *qui tam* relator." *Id.* (quoting *Atchison*, 470 U.S. at 467).

Similarly, this Court has recognized that federal employees' "entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles." *Schism v. United States*, 316 F.3d 1259, 1274 (Fed. Cir. 2002) (en banc). "[A]pplying th[is] doctrine ... courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel." *Id.*; *see also Hanlin v. United States*, 316 F.3d 1325, 1329 (Fed. Cir. 2003) (finding no contract where the "statute is a directive from the Congress to the [agency], not a promise from the [agency] to" a third party).

These precedents foreclose plaintiff's implied-in-fact contract claim. Nothing in the language of section 1342 "'create[s] or speak[s] of a contract' between the United States and" insurers. *Brooks*, 702 F.3d at 631 (quoting *Atchison*, 470 U.S. at 467). Section 1342 "is a directive from the Congress to the [agency], not a promise from the [agency] to" third parties. *Hanlin*, 316 F.3d at 1329. Accordingly, the trial court here correctly rejected plaintiff's implied-in-fact contract claim. *See* Appx30.

2. Although Judge Wheeler ruled that section 1342 creates an implied-in-fact contract between the government and insurers, his reasoning is irreconcilable with the governing precedents discussed above. In his first opinion addressing the issue, Judge Wheeler declared that a statute binds the government in contract if it "create[s] a program that offers specified incentives in return for the voluntary performance of private parties." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 463 (2017), *appeal pending*, No. 17–1994 (Fed. Cir.). That novel test would transform myriad statutory programs into contractual undertakings. Indeed, under Judge Wheeler's reasoning, the claimants in *Brooks* and *Hanlin* should have prevailed on their contract claims. The *qui tam* statute in *Brooks* offered a specified incentive (a share of the penalty) in return for a voluntary performance by a private party (bringing a successful suit for false patent marketing). Likewise, in *Hanlin*, the statute and regulations offered a specified incentive (direct payment of attorney's fees) to a private attorney who performed a voluntary undertaking (successfully represented a veteran seeking back-due benefits). Despite the incentives for private conduct that these statutory schemes created, this Court easily found that they did not create contracts.

Judge Wheeler's *Moda* opinion did not discuss this Court's modern precedents, and the older cases on which he relied were inapposite. The regulation at issue in *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957), expressly stated that "[u]pon receipt of an offer," the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his

acceptance." And in *New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966), the court emphasized that "Congress recognized the contract nature of the subsidy payments" by titling its enactment "Payments to Air Carriers (Liquidation of Contract Authorization)."

Section 1342 has no language comparable to the contractual language on which *Radium Mines* and *New York Airways* relied. None of the statutory provisions on which plaintiff relies evinces any intent to bind the government *in contract*. There is nothing unusual about a statutory scheme that includes both requirements and incentives. As Judge Griggsby correctly recognized, that structure does not transform statutory provisions into contractual offers. *See* Appx30-31; *see also Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 110-13 (2016) (Lettow, J.), *appeal pending*, No. 17-1224 (Fed. Cir.).

In his more recent *Molina* opinion, Judge Wheeler retreated from his suggestion that an implied-in-fact contract can be derived from the text of the ACA. Instead, he opined that the "circumstances surround[ing] the passage of the ACA . . . clearl[ly] indicat[e] . . . an intent to contract." *Molina*, 133 Fed. Cl. at 45 (internal quotation marks and citations omitted). To derive a contract from legislative history of a regulatory program would be a perilous venture even if Judge Wheeler were, in fact, relying on the legislative history of the statute. Instead, however, he relied entirely on post-enactment statements by HHS. *Id.* (citing HHS statements in Federal Register documents issued in 2012, 2013, and 2014). Post-enactment statements by an agency

cannot manifest an "intent *by Congress* to bind itself contractually." *Id.* at 42 (emphasis added) (quoting *Brooks*, 702 F.3d at 631). Accordingly, Judge Griggsby correctly rejected plaintiff's attempt to derive the intent of Congress from post-enactment statements by HHS. *See* Appx31.

B. The ACA Did Not Authorize HHS to Make Contracts for Risk-Corridors Payments in Excess of Appropriations.

It is equally clear that HHS's post-enactment statements cannot themselves be the basis for an implied-in-fact contract.

As a threshold matter, for the reasons already discussed, HHS had no authority to bind the government in contract for risk-corridors payments in excess of appropriations. Federal law provides that "[a] law may be construed to make an appropriation out of the Treasury *or to authorize making a contract for the payment of money in excess of an appropriation* only if the law specifically states that an appropriation is made or that such a contract may be made." 31 U.S.C. § 1301(d) (emphasis added). Nothing in section 1342 authorized HHS to make contracts for risk-corridors payments in excess of appropriations. Indeed, nothing in section 1342 gave HHS any contracting authority with respect to risk-corridors payments at all.

Plaintiff's implied-in-fact contract claim thus fails as a matter of law. An implied-in-fact contract cannot arise without "actual authority" on the part of the government's representative to bind the government. *Schism*, 316 F.3d at 1278. "As to 'actual authority,' the Supreme Court has recognized that any private party entering

into a contract with the government assumes the risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority." *Id.* (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)). "The oft-quoted observation . . . that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook." *Merrill*, 332 U.S. at 385. "It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.*

Plaintiff relies on *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), but the Supreme Court's reasoning undermines plaintiff's assertion that HHS agreed to indemnify insurers for their business losses without regard to appropriations. In *Hercules*, the plaintiff argued that "the context in which the Government compelled it to manufacture Agent Orange constitutes an implied-in-fact agreement by the Government to indemnify for losses to third parties." *Id.* at 426. Rejecting the argument, the Supreme Court emphasized that "[t]he Anti–Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation." *Id.* at 427 (quoting 31 U.S.C. § 1341). The Supreme Court "view[ed] the Anti–Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact, the contractual indemnification Thompson claims." *Id.* at 428.

The reasoning of *Hercules* applies equally here. Congress did not grant HHS authority to enter into contracts for risk-corridors payments in advance of, or in excess of, an existing appropriation. Thus, the implied-in-fact contract that plaintiff posits would have been a clear violation of the Anti-Deficiency Act. Given HHS's presumed knowledge of the Anti-Deficiency Act, no such contract may be implied.

Other cases on which plaintiff relies underscore the absence of contracting authority here. The statute at issue in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012), for example, expressly directed the Secretary of the Interior to enter into contracts with willing tribes, and specifically mandated that the Secretary pay in full the "contract support costs" incurred by tribes in performing their contracts. Similarly, in *United States v. Winstar Corp.*, 518 U.S. 839, 890 (1996), the statute creating the FSLIC expressly empowered the agency "[t]o make contracts," and, in light of a statutory delegation of specific powers in the context of supervisory mergers, the Supreme Court found that the agency "had ample statutory authority" to "promise to permit respondents to count supervisory goodwill and capital credits toward regulatory capital and to pay respondents' damages if that performance became impossible." This Court's decision in *H. Landau & Co. v. United States*, 886 F.2d 322 (Fed. Cir. 1989), concerned a procurement contract for sleeping bags, and the agency's contracting authority was not in dispute. The disputed issue was whether particular agency officials had authority to bind the government, and this Court declined to decide that question. *See id.* at 324.

In contrast to the cases on which plaintiff relies, section 1342 of the ACA did not authorize or require HHS to enter into *any* contracts for risk-corridors payments. The ACA certainly did not vest HHS with authority to enter into contracts for risk-corridors payments in excess of appropriations.

C. HHS Did Not Purport to Enter Into Risk-Corridors Contracts, nor Was There a Meeting of the Minds With Respect to the Terms of the Risk-Corridors Program.

Insofar as HHS lacked authority to bind the government contractually for risk-corridors payments in excess of appropriations, it is unsurprising that HHS did not enter into such contracts. Indeed, there are no contracts that relate to risk-corridors payments. The only agreements that insurers have identified have nothing to do with the risk-corridors program, as Judge Wheeler recognized in *Molina*. *See* 133 Fed. Cl. at 45-46 (dismissing the express contract claim because the QHP agreements concern the rules of conduct for maintaining access to the CMS Data Services Hub Web Services) (following *Land of Lincoln*, 129 Fed. Cl. at 109). Although plaintiff here alleged an express contract claim based on its QHP Agreement, plaintiff explicitly abandoned that express contract claim in its opening brief. *See* Pl. Br. 17 n.10.

Plaintiff instead relies on various HHS statements, but none of those statements described risk-corridors payments as contractual undertakings. For example, plaintiff relies on "HHS's implementing regulations," Pl. Br. 53, but those regulations simply restate the terms of the statute, which has no contractual language.

See 45 C.F.R. § 153.510. Plaintiff does not identify any statement by HHS that treated the implementation of section 1342 as a contractual undertaking.

Moreover, HHS's statements show that there was no meeting of the minds with respect to the key terms of the agency's risk-corridors payments. The premise of the insurers' contract claims is that HHS committed itself contractually to paying amounts calculated under the statutory formula—in full and on an annual basis—regardless of appropriations. But as Judge Wheeler recognized, "HHS stated repeatedly that it 'intend[ed] to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually.'" *Moda*, 130 Fed. Cl. at 454 (quoting 79 Fed. Reg. 30,240, 30,260 (May 27, 2014)). HHS thus made clear that "it intended to pay out only what it took in from profitable QHPs over the program's three years." *Id.* "In other words, HHS announced that it would *not* make full annual payments." *Id.* (emphasis added; other emphasis omitted). And HHS repeatedly recognized that its ability to make risk-corridors payments was subject to appropriations.[10]

Despite these statements, plaintiff and other insurers chose to offer QHPs on the Exchanges for the 2015 and 2016 calendar years. Moreover, they did so even

[10] *See* 79 Fed. Reg. at 30,260 (stating that if collections are insufficient to fund payments, "HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*") (emphasis added); 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (same); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx509) (similar).

after Congress enacted legislation in December 2014 that prohibited HHS from using funds other than "payments in" to make risk-corridors payments. Insurers cannot now claim to have formed implied-in-fact contracts whose terms contradict HHS's statements and the express funding restrictions enacted by Congress.

D. HHS Did Not Have Authority to Obligate the FY 2014 Lump Sum for Risk-Corridors Payments and, in Any Event, HHS Did Not Purport to Do So.

1. Although plaintiff generally relies on the reasoning of the *Moda* and *Molina* opinions, plaintiff does not defend Judge Wheeler's conclusion that HHS could have chosen to obligate all or part of the $3.67 billion lump-sum appropriation in the *FY 2014* appropriation for risk-corridors payments, before Congress enacted the express restriction on risk-corridors funding in December 2014. That conclusion was legally incorrect, and Judge Wheeler himself disclaimed reliance on this proposition in his subsequent *Molina* opinion. *See Molina*, 133 Fed. Cl. at 35 ("While the ruling in *Moda Health Plan* identified some funds available to make 2014 risk corridor payments, this finding was not necessary for the holding").

The lump sum in the FY 2014 appropriation was available "[f]or carrying out" enumerated programs such as Medicare, Medicaid, and the Public Health Service Act, and for "other responsibilities of [CMS]." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (Jan. 17, 2014). That catch-all language did not include risk-corridors payments, because such payments were not among the "other responsibilities" of CMS in FY 2014. The plain text of section

1342 made risk-corridors collection and payment amounts dependent on insurers' cost-to-premium ratios for an entire calendar year. Therefore, those amounts were unknowable until FY 2015 at the earliest. Indeed, plaintiff acknowledges that risk-corridors charges and payments for calendar year 2014 "would not be made until FY 2015." Pl. Br. 12. The lump sum in the FY 2014 appropriation expired at the end of that fiscal year, and the appropriations legislation for FY 2015 (and subsequent years) expressly barred HHS from using funds other than collections for risk-corridors payments.

In stating that HHS could have chosen to use the FY 2014 lump sum for risk-corridors payments, Judge Wheeler misread the reasoning of the GAO opinion. The GAO understood that HHS would not actually begin making collections or payments until FY 2015 at the earliest. GAO Op., 2014 WL 4825237, at *2. To assist Congress in considering future appropriations legislation, the GAO addressed a counter-factual scenario under which collections and payments occurred in FY 2014. In parallel language, the GAO stated that the FY 2014 appropriation "*would have* appropriated to CMS user fees collected pursuant to section 1342(b)(2) in FY 2014," and that the "CMS PM appropriation for FY 2014 *would have* been available to CMS to make the payments specified in section 1342(b)(1)." *Id.* at *5 (emphases added). The GAO did not suggest that the language actually made the appropriation available. Nor could it: the plain text of section 1342 made it impossible for there to be any "user fees collected pursuant to section 1342(b)(2) in FY 2014." *Id.* Thus, the GAO

emphasized that "for funds to be available for this purpose in FY 2015, the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014." *Id.*

In any event, Judge Wheeler's conclusion that HHS would have had discretion to obligate the FY 2014 lump sum for risk-corridors payments is academic, because HHS did not in fact obligate the lump sum for such payments. Indeed, when the GAO asked HHS to identify potential funding sources, HHS identified user fees as the sole source of funding for risk-corridors payments. *See* Letter from HHS to GAO (May 20, 2014) (Appx223-225); GAO Op., 2014 WL 4825237, at *5 (noting HHS's position).

2. Rather than defend Judge Wheeler's reasoning, plaintiff makes the novel assertion that HHS could have used an entirely different appropriation—the $1 billion appropriation for "Federal administrative expenses to carry out" the ACA, 42 U.S.C. § 18121(b)—for risk-corridors payments.

This argument is baseless, and no court has accepted it. As the GAO explained, the appropriation on which plaintiff relies was used for the *administrative expenses* that the federal government incurred in implementing the ACA, such as infrastructure for various health reform initiatives. *See Dep't of Health and Human Servs.-Administrative Expenses*, B- 321823, 2011 WL 6076287, at *2 (Comp. Gen. Dec. 6, 2011). The ACA implementation fund was used for such administrative expenses of not just HHS, but also the Internal Revenue Service, the Office of Personnel

Management, and the Department of Labor, all of which were assigned administrative responsibilities under the ACA. *See id.* at *2-3.

Risk-corridors payments authorized by section 1342 of the ACA are not "Federal administrative expenses." 42 U.S.C. § 18121(b). Accordingly, when GAO was asked by Congress to identify funds that would potentially be available for risk-corridors payments, the GAO did not suggest that the implementation fund could be used for that purpose. It is blackletter law that appropriations "shall be applied only to the objects for which the appropriations were made." 31 U.S.C. § 1301(a).

3. Plaintiff's brief emphasizes that Congress did not repeal the risk-corridors program, and that Congress in fact appropriated the amounts collected from insurers under the risk-corridors program (*i.e.*, the user fees referenced in the GAO opinion). *See* Pl. Br. 13, 43. The point is true but irrelevant. There is no dispute that HHS used the amounts collected from insurers to make risk-corridors payments to insurers. Plaintiff and other insurers are collectively seeking billions of dollars in risk-corridors payments *beyond* the amounts collected from insurers. For the reasons already discussed, their claims fail as a matter of law.

E. Plaintiff Has No Property Interest in Risk-Corridors Payments.

In the Fifth Amendment takings claim, plaintiff alleges that it had a property interest in risk-corridors payments that was taken by Congress's enactments limiting appropriations for those payments. The claim fails because plaintiff had no such

property interest. *See* Appx33; *see also Land of Lincoln*, 129 Fed. Cl. at 114 (rejecting an identical takings claim).

As shown above, plaintiff has no contractual right to risk-corridors payments. Nor does plaintiff have a statutory right to risk-corridors payments in excess of appropriations. In any event, a "statutory obligation to pay money, even where unchallenged," does not "create a property interest within the meaning of the Takings Clause." *Adams v. United States*, 391 F.3d 1212, 1225 (Fed. Cir. 2004) (holding that government employees did not have a property interest in "underpaid overtime compensation under the FLSA"); *see also National Educ. Ass'n—Rhode Island v. Retirement Bd. of the Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 30 (1st Cir. 1999) (where an expectation of payment is insufficient to constitute an enforceable contract, it does not constitute property under the Takings Clause); *Kizas v. Webster*, 707 F.2d 524, 539-40 (D.C. Cir. 1983) ("A 'legitimate claim of entitlement' to a government benefit does not transform the benefit *itself* into a vested right."). Because plaintiff cannot "demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

III. The Timing Of HHS's Risk-Corridors Payments Is Reasonable And Consistent With The ACA.

The only remaining issue concerns the timing of risk-corridors payments, although the parties agree that the practical significance of this issue is likely to be overtaken while the litigation is pending. *See* Pl. Br. 28 n.12.[11]

In April 2014, HHS released guidance explaining how it would proceed if the total amount that insurers paid into the risk-corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014) (Appx250-251). The guidance explained that payments to insurers would be reduced pro rata to the extent of any shortfall, and that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the program year for which they were collected. *Id.* This methodology is known as the "three-year payment framework." Appx1016.

HHS implemented that three-year payment framework when "payments in" proved insufficient to fund in full the "payments out" calculated under the statutory

[11] Plaintiff states that the "the program concludes on December 31, 2017," Pl. Br. 28 n.12, but HHS has not announced a specific end date for the three-year payment framework. As in prior years, HHS expects to announce risk corridors charges and payments in November 2017, and insurers must remit those charges in 30 days, *see* 45 C.F.R. § 153.510(d). Because risk-corridors payments are funded solely from collections, HHS cannot begin making final payments until after those charges are collected, which may not occur until after December 31, 2017.

formula. For the 2014 year, HHS made risk-corridors payments to the extent of its budget authority, that is, it used the funds that insurers paid in for 2014 to make a proportion of the payments calculated for that year. For the 2015 year, HHS used the funds collected from insurers to reduce outstanding payment amounts from 2014. Risk-corridors payments have not yet been made for the 2016 year, but HHS has indicated that it will use the funds collected for 2016 to reduce outstanding payment amounts from 2014 and 2015, in that order, and to make payments for 2016, to the extent funds are available.

The trial court correctly held that the agency's three-year payment framework is reasonable and consistent with the ACA. Appx23-28; *see also Land of Lincoln*, 129 Fed. Cl. at 106-08. Neither section 1342 nor the regulations specify a deadline by which risk-corridors payments must be made. Moreover, Congress ratified the agency's three-year payment framework when it enacted legislation appropriating funds for risk-corridors payments. Aware of the three-year framework that HHS had announced, Congress appropriated "payments in" but barred HHS from using other funds for risk-corridors payments. The agency's implementation of the three-year framework thus enabled it to make annual payments to the full extent of its budget authority, while leaving open the opportunity for additional payments as the three-year program progressed.

Contrary to plaintiff's suggestion, Judge Wheeler's reasoning provides no basis to invalidate the agency's three-year payment framework. In declaring that framework

unreasonable, Judge Wheeler emphasized that HHS could not refuse to make annual payment of funds that Congress had in fact appropriated for risk-corridors payments. *Moda*, 130 Fed. Cl. at 454. But that was not the question presented. Indeed, as Judge Wheeler recognized, HHS never claimed that it could withhold appropriated funds, and HHS has made annual risk-corridors payments to the extent of its budget authority. *Id.*

The narrow timing question presented was whether HHS, while making annual payments to the extent of its budget authority, reasonably left open the possibility of additional payments in future years. It was eminently reasonable for HHS to leave that possibility open. HHS indicated that it intended to "work[] with Congress on the necessary funding for outstanding risk corridors payments," CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx509), and Congress retains its usual prerogative to appropriate additional funds for risk-corridors payments if it so chooses.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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NOVEMBER 2017

STATUTORY ADDENDUM

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Section 1342 of the ACA, 42 U.S.C. § 18062

(a) In general

The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act [42 U.S.C. 1395w-101 et seq.].

(b) Payment methodology

(1) Payments out

The Secretary shall provide under the program established under subsection (a) that if--

(A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and

(B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

(2) Payments in

The Secretary shall provide under the program established under subsection (a) that if--

(A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and

(B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

(c) Definitions

In this section:

(1) Allowable costs

(A) In general

The amount of allowable costs of a plan for any year is an amount equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan.

(B) Reduction for risk adjustment and reinsurance payments

Allowable costs shall reduced by any risk adjustment and reinsurance payments received under section 18061 and 18063 of this title.

(2) Target amount

The target amount of a plan for any year is an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan.

Public Law 113–76
113th Congress

An Act

Making consolidated appropriations for the fiscal year ending September 30, 2014, and for other purposes.

Jan. 17, 2014
[H.R. 3547]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2014.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2014".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

SEC. 3. REFERENCES.

1 USC 1 note.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about January 15, 2014 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2014.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2014, new budget authority provided in appropriation Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2014 shall be made by the Director of the Office of Management and Budget in the amount of the excess but not to exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. LAUNCH LIABILITY EXTENSION.

Section 50915(f) of title 51, United States Code, is amended by striking "December 31, 2013" and inserting "December 31, 2016".

DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2014

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014.

TITLE I

AGRICULTURAL PROGRAMS

PRODUCTION, PROCESSING AND MARKETING

OFFICE OF THE SECRETARY

(INCLUDING TRANSFERS OF FUNDS)

For necessary expenses of the Office of the Secretary, $43,778,000, of which not to exceed $5,051,000 shall be available

CENTERS FOR MEDICARE AND MEDICAID SERVICES

GRANTS TO STATES FOR MEDICAID

For carrying out, except as otherwise provided, titles XI and XIX of the Social Security Act, $177,872,985,000, to remain available until expended.

For making, after May 31, 2014, payments to States under title XIX or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the last quarter of fiscal year 2014 for unanticipated costs incurred for the current fiscal year, such sums as may be necessary.

For making payments to States or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the first quarter of fiscal year 2015, $103,472,323,000, to remain available until expended.

Payment under such title XIX may be made for any quarter with respect to a State plan or plan amendment in effect during such quarter, if submitted in or prior to such quarter and approved in that or any subsequent quarter.

PAYMENTS TO HEALTH CARE TRUST FUNDS

For payment to the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as provided under sections 217(g), 1844, and 1860D–16 of the Social Security Act, sections 103(c) and 111(d) of the Social Security Amendments of 1965, section 278(d)(3) of Public Law 97–248, and for administrative expenses incurred pursuant to section 201(g) of the Social Security Act, $255,185,000,000.

In addition, for making matching payments under section 1844 and benefit payments under section 1860D–16 of the Social Security Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2019: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2014 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts

under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act: *Provided further*, That $22,004,000 shall be available for the State high-risk health insurance pool program as authorized by the State High Risk Pool Funding Extension Act of 2006.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $293,588,000, to remain available through September 30, 2015, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $207,636,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $28,122,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $29,708,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $28,122,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided,* That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2014 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation.

ADMINISTRATION FOR CHILDREN AND FAMILIES

PAYMENTS TO STATES FOR CHILD SUPPORT ENFORCEMENT AND FAMILY SUPPORT PROGRAMS

For carrying out, except as otherwise provided under titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, $2,965,245,000, to remain available until expended; and for such purposes for the first quarter of fiscal year 2015, $1,250,000,000, to remain available until expended.

For making, after May 31 of the current fiscal year, payments to States or other non-Federal entities under titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, for the last 3 months of the current fiscal year for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.

LOW INCOME HOME ENERGY ASSISTANCE

For making payments under subsections (b) and (d) of section 2602 of the Low Income Home Energy Assistance Act of 1981, $3,424,549,000: *Provided*, That all but $491,000,000 of this amount shall be allocated as though the total appropriation for such payments for fiscal year 2014 was less than $1,975,000,000: *Provided further*, That notwithstanding section 2609A(a), of the amounts appropriated under section 2602(b), not more than $2,988,000 of

TITLE V

GENERAL PROVISIONS

(TRANSFER OF FUNDS)

SEC. 501. The Secretaries of Labor, Health and Human Services, and Education are authorized to transfer unexpended balances of prior appropriations to accounts corresponding to current appropriations provided in this Act. Such transferred balances shall be used for the same purpose, and for the same periods of time, for which they were originally appropriated.

SEC. 502. No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.

SEC. 503. (a) No part of any appropriation contained in this Act or transferred pursuant to section 4002 of Public Law 111–148 shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, electronic communication, radio, television, or video presentation designed to support or defeat the enactment of legislation before the Congress or any State or local legislature or legislative body, except in presentation to the Congress or any State or local legislature itself, or designed to support or defeat any proposed or pending regulation, administrative action, or order issued by the executive branch of any State or local government, except in presentation to the executive branch of any State or local government itself.

(b) No part of any appropriation contained in this Act or transferred pursuant to section 4002 of Public Law 111–148 shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before the Congress or any State government, State legislature or local legislature or legislative body, other than for normal and recognized executive-legislative relationships or participation by an agency or officer of a State, local or tribal government in policymaking and administrative processes within the executive branch of that government.

(c) The prohibitions in subsections (a) and (b) shall include any activity to advocate or promote any proposed, pending or future Federal, State or local tax increase, or any proposed, pending, or future requirement or restriction on any legal consumer product, including its sale or marketing, including but not limited to the advocacy or promotion of gun control.

SEC. 504. The Secretaries of Labor and Education are authorized to make available not to exceed $28,000 and $20,000, respectively, from funds available for salaries and expenses under titles I and III, respectively, for official reception and representation expenses; the Director of the Federal Mediation and Conciliation Service is authorized to make available for official reception and representation expenses not to exceed $5,000 from the funds available for "Federal Mediation and Conciliation Service, Salaries and Expenses"; and the Chairman of the National Mediation Board

Public Law 113–164
113th Congress

Joint Resolution

Making continuing appropriations for fiscal year 2015, and for other purposes.

Sept. 19, 2014
[H.J. Res. 124]

Continuing Appropriations Resolution, 2015.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2015, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2014 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2014, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014 (division A of Public Law 113–76).

(2) The Commerce, Justice, Science, and Related Agencies Appropriations Act, 2014 (division B of Public Law 113–76).

(3) The Department of Defense Appropriations Act, 2014 (division C of Public Law 113–76).

(4) The Energy and Water Development and Related Agencies Appropriations Act, 2014 (division D of Public Law 113–76).

(5) The Financial Services and General Government Appropriations Act, 2014 (division E of Public Law 113–76).

(6) The Department of Homeland Security Appropriations Act, 2014 (division F of Public Law 113–76).

(7) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014 (division G of Public Law 113–76).

(8) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2014 (division H of Public Law 113–76).

(9) The Legislative Branch Appropriations Act, 2014 (division I of Public Law 113–76).

(10) The Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2014 (division J of Public Law 113–76).

(11) The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2014 (division K of Public Law 113–76).

(12) The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2014 (division L of Public Law 113–76).

Rate reduction.

(b) The rate for operations provided by subsection (a) is hereby reduced by 0.0554 percent.

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2014 or prior years; (2) the increase in production rates above those sustained with fiscal year 2014 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P–1 line item in a budget activity within an appropriation account and an R–1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during fiscal year 2014.

Contracts.

(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 104. Except as otherwise provided in section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2014.

SEC. 105. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Expiration date.

SEC. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act for fiscal year 2015, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution; (2) the enactment into law of the applicable appropriations Act for fiscal year 2015 without any provision for such project or activity; or (3) December 11, 2014.

SEC. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

SEC. 108. Appropriations made and funds made available by or authority granted pursuant to this joint resolution may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United

States Code, but nothing in this joint resolution may be construed to waive any other provision of law governing the apportionment of funds.

SEC. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year 2015 because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and no grants shall be awarded for such programs funded by this joint resolution that would impinge on final funding prerogatives.

SEC. 110. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.

SEC. 111. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2014, and for activities under the Food and Nutrition Act of 2008, activities shall be continued at the rate to maintain program levels under current law, under the authority and conditions provided in the applicable appropriations Act for fiscal year 2014, to be continued through the date specified in section 106(3). Extension.

(b) Notwithstanding section 106, obligations for mandatory payments due on or about the first day of any month that begins after October 2014 but not later than 30 days after the date specified in section 106(3) may continue to be made, and funds shall be available for such payments. Deadline.

SEC. 112. Amounts made available under section 101 for civilian personnel compensation and benefits in each department and agency may be apportioned up to the rate for operations necessary to avoid furloughs within such department or agency, consistent with the applicable appropriations Act for fiscal year 2014, except that such authority provided under this section shall not be used until after the department or agency has taken all necessary actions to reduce or defer non-personnel-related administrative expenses. Furloughs.

SEC. 113. Funds appropriated by this joint resolution may be obligated and expended notwithstanding section 10 of Public Law 91–672 (22 U.S.C. 2412), section 15 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2680), section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (22 U.S.C. 6212), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 3094(a)(1)).

SEC. 114. (a) Each amount incorporated by reference in this joint resolution that was previously designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 or as being for disaster relief pursuant to section 251(b)(2)(D) of such Act is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of such Act or as being for disaster relief pursuant to section 251(b)(2)(D) of such Act, respectively.

(b) The reduction in section 101(b) of this joint resolution shall not apply to—

(1) amounts designated under subsection (a) of this section; or

(2) amounts made available by section 101(a) by reference to the second paragraph under the heading "Social Security Administration—Limitation on Administrative Expenses" in division H of Public Law 113–76.

Applicability.

(c) Section 6 of Public Law 113–76 shall apply to amounts designated in subsection (a) for Overseas Contingency Operations/Global War on Terrorism.

SEC. 115. During the period covered by this joint resolution, discretionary amounts appropriated for fiscal year 2015 that were provided in advance by appropriations Acts shall be available in the amounts provided in such Acts, reduced by the percentage in section 101(b).

SEC. 116. Notwithstanding section 101, amounts are provided for "Department of Agriculture—Domestic Food Programs—Food and Nutrition Service—Commodity Assistance Program" at a rate for operations of $275,701,000, of which $208,682,000 shall be for the Commodity Supplemental Food Program.

SEC. 117. For "Department of Health and Human Services—Food and Drug Administration—Salaries and Expenses", amounts shall be made available by this joint resolution as if "outsourcing facility fees authorized by 21 U.S.C. 379j–62," were included after "21 U.S.C. 381," in the second paragraph under such heading in division A of Public Law 113–76.

SEC. 118. Amounts made available by section 101 for "Department of Commerce—National Oceanic and Atmospheric Administration—Procurement, Acquisition and Construction" may be apportioned up to the rate for operations necessary to maintain the planned launch schedules for the Joint Polar Satellite System and the Geostationary Operational Environmental Satellite system.

SEC. 119. Notwithstanding any other provision of law, except sections 106 and 107 of this joint resolution, for "Department of Defense—Overseas Contingency Operations—Operation and Maintenance—Operation and Maintenance, Army", up to $50,000,000, to be derived by reducing the amount otherwise made available by section 101 for such account, may be used to conduct surface and subsurface clearance of unexploded ordnance at closed training ranges used by the Armed Forces of the United States in Afghanistan: *Provided*, That such funds may only be used if the training ranges are not transferred to the Islamic Republic of Afghanistan for use by its armed forces: *Provided further*, That the authority provided by this section shall continue in effect through the earlier of the date specified in section 106(3) of this joint resolution or the date of the enactment of an Act authorizing appropriations for fiscal year 2015 for military activities of the Department of Defense: *Provided further*, That such amount is designated as provided under section 114 for such account.

Afghanistan.

Extension.

Extension.

SEC. 120. The following authorities shall continue in effect through the earlier of the date specified in section 106(3) of this joint resolution or the date of the enactment of an Act authorizing appropriations for fiscal year 2015 for military activities of the Department of Defense:

(1) Section 1004 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 10 U.S.C. 374 note).

(2) Section 1215 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 10 U.S.C. 113 note).

(3) Section 127b of title 10, United States Code, notwithstanding subsection (c)(3)(C) of such section.

(4) Subsection (b) of section 572 of the National Defense Authorization Act for Fiscal Year 2006 (20 U.S.C. 7703b(b)), notwithstanding paragraph (4) of such subsection.

SEC. 121. (a) Funds made available by section 101 for "Department of Energy—Energy Programs—Uranium Enrichment Decontamination and Decommissioning Fund" may be apportioned up to the rate for operations necessary to avoid disruption of continuing projects or activities funded in this appropriation.

(b) The Secretary of Energy shall notify the Committees on Appropriations of the House of Representatives and the Senate not later than 3 days after each use of the authority provided in subsection (a). Notification. Deadline.

SEC. 122. (a) Funds made available by section 101 for "Department of Energy—Environmental and Other Defense Activities—Defense Environmental Cleanup" for the Waste Isolation Pilot Plant may be obligated at a rate for operations necessary to assure timely execution of activities necessary to restore and upgrade the repository.

(b) The Secretary of Energy shall notify the Committees on Appropriations of the House of Representatives and the Senate on each use of the spending rate authority provided in this section that exceeds customary apportionment allocations. Notification.

SEC. 123. Notwithstanding any other provision of this joint resolution, except section 106, the District of Columbia may expend local funds under the heading "District of Columbia Funds" for such programs and activities under title IV of H.R. 5016 (113th Congress), as passed by the House of Representatives on July 16, 2014, at the rate set forth under "District of Columbia Funds—Summary of Expenses" as included in the Fiscal Year 2015 Budget Request Act of 2014 (D.C. Act 20–370), as modified as of the date of the enactment of this joint resolution.

SEC. 124. Notwithstanding section 101, amounts are provided for "Office of Special Counsel—Salaries and Expenses" at a rate for operations of $22,939,000.

SEC. 125. The third proviso under the heading "Small Business Administration—Business Loans Program Account" in division E of Public Law 113–76 is amended by striking "$17,500,000,000" and inserting "$18,500,000,000": *Provided*, That amounts made available by section 101 for such proviso under such heading may be apportioned up to the rate for operations necessary to accommodate increased demand for commitments to general business loans under section 7(a) of the Small Business Act: *Provided further*, That this section shall become effective upon enactment of this joint resolution. *Ante*, p. 223. Effective date.

SEC. 126. Sections 1101(a) and 1104(a)(2)(A) of the Internet Tax Freedom Act (title XI of division C of Public Law 105–277; 47 U.S.C. 151 note) shall be applied by substituting the date specified in section 106(3) of this joint resolution for "November 1, 2014". Applicability.

SEC. 127. Section 550(b) of Public Law 109–295 (6 U.S.C. 121 note) shall be applied by substituting the date specified in section 106(3) of this joint resolution for "October 4, 2014". Applicability.

SEC. 128. The authority provided by section 831 of the Homeland Security Act of 2002 (6 U.S.C. 391) shall continue in effect through the date specified in section 106(3) of this joint resolution. Extension.

SEC. 129. (a) Amounts made available by section 101 for the Department of Homeland Security for "U.S. Customs and Border Protection—Salaries and Expenses", "U.S. Customs and Border Protection—Border Security Fencing, Infrastructure, and Technology", "U.S. Customs and Border Protection—Air and Marine Operations", "U.S. Customs and Border Protection—Construction and Facilities Management", and "U.S. Immigration and Customs Enforcement—Salaries and Expenses" shall be obligated at a rate for operations as necessary to respectively—

(1) sustain the staffing levels of U.S. Customs and Border Protection officers and Border Patrol agents in accordance with the provisos under the heading "U.S. Customs and Border Protection—Salaries and Expenses" in division F of Public Law 113–76;

(2) sustain border security and immigration enforcement operations;

(3) sustain necessary Air and Marine operations; and

Compliance.

(4) sustain the staffing levels of U.S. Immigration and Customs Enforcement agents, equivalent to the staffing levels achieved on September 30, 2014, and comply with the fifth proviso under the heading "U.S. Immigration and Customs Enforcement—Salaries and Expenses" in division F of Public Law 113–76.

Notification.

(b) The Secretary of Homeland Security shall notify the Committees on Appropriations of the House of Representatives and the Senate on each use of the authority provided in this section.

Applicability.

SEC. 130. Section 810 of the Federal Lands Recreation Enhancement Act (16 U.S.C. 6809) shall be applied by substituting "on the date that is 1 year after the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015" for "10 years after the date of the enactment of this Act".

Extension.

SEC. 131. (a) The authority provided by subsection (m)(3) of section 8162 of the Department of Defense Appropriations Act, 2000 (40 U.S.C. 8903 note; Public Law 106–79) shall continue in effect through the date specified in section 106(3) of this joint resolution.

(b) For the period covered by this joint resolution, the authority provided by the provisos under the heading "Dwight D. Eisenhower Memorial Commission—Capital Construction" in division E of Public Law 112–74 shall not be in effect.

Extension.

SEC. 132. Activities authorized under part A of title IV and section 1108(b) of the Social Security Act (other than under section 413(h) of such Act) shall continue through the date specified in section 106(3) of this joint resolution, in the manner authorized for fiscal year 2014 (except that the amount appropriated for section 403(b) of such Act shall be $598,000,000, and the requirement to reserve funds provided for in section 403(b)(2) of such Act shall not apply with respect to this section), and out of any money in the Treasury of the United States not otherwise appropriated, there are hereby appropriated such sums as may be necessary for such purpose. Grants and payments may be made pursuant to this authority through the applicable portion of the first quarter of fiscal year 2015 at the pro rata portion of the level provided for such activities through the first quarter of fiscal year 2014.

SEC. 133. Amounts allocated to Head Start grantees from amounts identified in the seventh proviso under the heading "Department of Health and Human Services—Administration for

Children and Families—Children and Families Services Programs" in Public Law 113–76 shall not be included in the calculation of the "base grant" in fiscal year 2015, as such term is used in section 640(a)(7)(A) of the Head Start Act (42 U.S.C. 9835(a)(7)(A)).

Applicability.

SEC. 134. The first proviso under the heading "Department of Health and Human Services—Administration for Children and Families—Low Income Home Energy Assistance" in division H of Public Law 113–76 shall be applied to amounts made available by this joint resolution by substituting "2015" for "2014".

SEC. 135. Amounts provided by this joint resolution for "Department of Health and Human Services—Administration for Children and Families—Refugee and Entrant Assistance" may be apportioned up to the rate for operations necessary to maintain program operations at the level provided in fiscal year 2014.

Ebola virus.

SEC. 136. In addition to the amount otherwise provided by this joint resolution for "Department of Health and Human Services—Office of the Secretary—Public Health and Social Services Emergency Fund", there is appropriated $58,000,000 for an additional amount for fiscal year 2015, to remain available until September 30, 2015, for expenses necessary to support acceleration of countermeasure and product advanced research and development pursuant to section 319L of the Public Health Service Act for addressing Ebola.

Ebola virus. Africa.

SEC. 137. In addition to the amount otherwise provided by this joint resolution for "Department of Health and Human Services—Centers for Disease Control and Prevention—Global Health", there is appropriated $30,000,000 for an additional amount for fiscal year 2015, to remain available until September 30, 2015, for expenses necessary to support the responses of the Centers for Disease Control and Prevention (referred to in this section as the "CDC") to the outbreak of Ebola virus in Africa: *Provided*, That such funds shall be available for transfer by the Director of the CDC to other accounts of the CDC for such support: *Provided further*, That the Director of the CDC shall notify the Committees on Appropriations of the House of Representatives and the Senate not later than 30 days after the date of any transfer under the preceding proviso.

Notification.

SEC. 138. Amounts made available by this joint resolution for "Department of Education—Rehabilitation Services and Disability Research", "Department of Education—Departmental Management—Program Administration", and "Department of Health and Human Services—Administration for Community Living—Aging and Disability Services Programs" may be obligated in the account and budget structure set forth in section 491 of the Workforce Innovation and Opportunity Act (42 U.S.C. 3515e).

Rescission.

SEC. 139. Of the unobligated balance of amounts provided by section 108 of Public Law 111–3, $4,549,000,000 is rescinded.

Applicability.

SEC. 140. Section 113 of division H of Public Law 113–76 shall be applied by substituting the date specified in section 106(3) for "September 30, 2014".

SEC. 141. (a) Notwithstanding section 101, amounts are made available for accounts in title I of division J of Public Law 113–76 at an aggregate rate for operations of $6,558,223,500.

Deadline. Reports.

(b) Not later than 30 days after the date of enactment of this joint resolution, the Secretary of Defense shall submit to the Committees on Appropriations of the House of Representatives and

the Senate a report delineating the allocation of budget authority in subsection (a) by account and project.

SEC. 142. Notwithstanding section 101, amounts are provided for "Department of Veterans Affairs—Departmental Administration—General Operating Expenses, Veterans Benefits Administration" at a rate for operations of $2,524,254,000.

SEC. 143. Notwithstanding section 101, amounts are provided for "Department of Veterans Affairs—Departmental Administration—Office of Inspector General" at a rate for operations of $126,411,000.

Applicability.

SEC. 144. Section 209 of the International Religious Freedom Act of 1998 (22 U.S.C. 6436) shall be applied by substituting the date specified in section 106(3) of this joint resolution for "September 30, 2014".

SEC. 145. Amounts made available by section 101 for "Broadcasting Board of Governors—International Broadcasting Operations", "Bilateral Economic Assistance—Funds Appropriated to the President—Economic Support Fund", "International Security Assistance—Department of State—International Narcotics Control and Law Enforcement", "International Security Assistance—Department of State—Nonproliferation, Anti-terrorism, Demining and Related Programs", and "International Security Assistance—Funds Appropriated to the President—Foreign Military Financing Program" shall be obligated at a rate for operations as necessary to sustain assistance for Ukraine and independent states of the Former Soviet Union and Central and Eastern Europe to counter external, regional aggression and influence.

Applicability.

SEC. 146. Section 7081(4) of division K of Public Law 113–76 shall be applied to amounts made available by this joint resolution by substituting the date specified in section 106(3) of this joint resolution for "September 30, 2014".

Applicability.

SEC. 147. The Export-Import Bank Act of 1945 (12 U.S.C. 635 et seq.) shall be applied through June 30, 2015, by substituting such date for "September 30, 2014" in section 7 of such Act.

SEC. 148. (a) Section 44302(f) of title 49, United States Code, is amended by striking "September 30, 2014" and inserting "the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015".

(b) Section 44303(b) of title 49, United States Code, is amended by striking "September 30, 2014" and inserting "the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015".

(c) Section 44310(a) of title 49, United States Code, is amended by striking "September 30, 2014" and inserting "the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015".

Syria.

SEC. 149. (a) The Secretary of Defense is authorized, in coordination with the Secretary of State, to provide assistance, including training, equipment, supplies, and sustainment, to appropriately vetted elements of the Syrian opposition and other appropriately vetted Syrian groups and individuals for the following purposes:

(1) Defending the Syrian people from attacks by the Islamic State of Iraq and the Levant (ISIL), and securing territory controlled by the Syrian opposition.

(2) Protecting the United States, its friends and allies, and the Syrian people from the threats posed by terrorists in Syria.

(3) Promoting the conditions for a negotiated settlement to end the conflict in Syria.

(b) Not later than 15 days prior to providing assistance authorized under subsection (a) to vetted recipients for the first time— Deadline. Reports.

(1) the Secretary of Defense, in coordination with the Secretary of State, shall submit to the appropriate congressional committees and leadership of the House of Representatives and Senate a report, in unclassified form with a classified annex as appropriate, that contains a description of—

(A) the plan for providing such assistance; Plan.

(B) the requirements and process used to determine appropriately vetted recipients; and

(C) the mechanisms and procedures that will be used to monitor and report to the appropriate congressional committees and leadership of the House of Representatives and Senate on unauthorized end-use of provided training and equipment and other violations of relevant law by recipients; and

(2) the President shall submit to the appropriate congressional committees and leadership of the House of Representatives and Senate a report, in unclassified form with a classified annex as appropriate, that contains a description of how such assistance fits within a larger regional strategy.

(c) The plan required in subsection (b)(1) shall include a description of—

(1) the goals and objectives of assistance authorized under subsection (a);

(2) the concept of operations, timelines, and types of training, equipment, and supplies to be provided;

(3) the roles and contributions of partner nations;

(4) the number of United States Armed Forces personnel involved;

(5) any additional military support and sustainment activities; and

(6) any other relevant details.

(d) Not later than 90 days after the Secretary of Defense submits the report required in subsection (b)(1), and every 90 days thereafter, the Secretary of Defense, in coordination with the Secretary of State, shall provide the appropriate congressional committees and leadership of the House of Representatives and the Senate with a progress report. Such progress report shall include a description of— Deadlines. Reports.

(1) any updates to or changes in the plan, strategy, vetting requirements and process, and end-use monitoring mechanisms and procedures, as required in subsection (b)(1);

(2) statistics on green-on-blue attacks and how such attacks are being mitigated;

(3) the groups receiving assistance authorized under subsection (a);

(4) the recruitment, throughput, and retention rates of recipients and equipment;

(5) any misuse or loss of provided training and equipment and how such misuse or loss is being mitigated; and

(6) an assessment of the effectiveness of the assistance authorized under subsection (a) as measured against subsections (b) and (c).

Definitions. Applicability.

(e) For purposes of this section, the following definitions shall apply:

(1) The term "appropriately vetted" means, with respect to elements of the Syrian opposition and other Syrian groups and individuals, at a minimum, assessments of such elements, groups, and individuals for associations with terrorist groups, Shia militias aligned with or supporting the Government of Syria, and groups associated with the Government of Iran. Such groups include, but are not limited to, the Islamic State of Iraq and the Levant (ISIL), Jabhat al Nusrah, Ahrar al Sham, other al-Qaeda related groups, and Hezbollah.

(2) The term "appropriate congressional committees" means—

(A) the Committee on Armed Services, the Committee on Foreign Affairs, the Committee on Appropriations, and the Permanent Select Committee on Intelligence of the House of Representatives; and

(B) the Committee on Armed Services, the Committee on Foreign Relations, the Committee on Appropriations, and the Select Committee on Intelligence of the Senate.

(f) The Department of Defense may submit a reprogramming or transfer request to the congressional defense committees for funds made available by section 101(a)(3) of this joint resolution and designated in section 114 of this joint resolution to carry out activities authorized under this section notwithstanding sections 102 and 104 of this joint resolution.

(g) The Secretary of Defense may accept and retain contributions, including assistance in-kind, from foreign governments to carry out activities as authorized by this section which shall be credited to appropriations made available by this joint resolution for the appropriate operation and maintenance accounts, except that any funds so accepted by the Secretary shall not be available for obligation until a reprogramming action is submitted to the congressional defense committees: *Provided*, That amounts made available by this subsection are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985: *Provided further*, That such amounts shall be available only if the President so designates such amounts and transmits such designations to the Congress.

President.

Extension.

(h) The authority provided in this section shall continue in effect through the earlier of the date specified in section 106(3) of this joint resolution or the date of the enactment of an Act authorizing appropriations for fiscal year 2015 for military activities of the Department of Defense.

(i) Nothing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.

(j) Nothing in this section supersedes or alters the continuing obligations of the President to report to Congress pursuant to section 4 of the War Powers Resolution (50 U.S.C. 1543) regarding the use of United States Armed Forces abroad.

This joint resolution may be cited as the "Continuing Appropriations Resolution, 2015".

Approved September 19, 2014.

LEGISLATIVE HISTORY—H.J. Res. 124:

CONGRESSIONAL RECORD, Vol. 160 (2014):
Sept. 16, 17, considered and passed House.
Sept. 18, considered and passed Senate.

○

Public Law 113–202
113th Congress

Joint Resolution

Making further continuing appropriations for fiscal year 2015, and for other purposes.

Dec. 12, 2014
[H.J. Res. 130]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Continuing Appropriations Resolution, 2015 (Public Law 113–164) is amended by striking the date specified in section 106(3) and inserting "December 13, 2014".

Ante, p. 1868.

Approved December 12, 2014.

LEGISLATIVE HISTORY—H.J. Res. 130:

CONGRESSIONAL RECORD, Vol. 160 (2014):
Dec. 11, considered and passed House and Senate.

○

Public Law 113–203
113th Congress

Joint Resolution

Dec. 13, 2014
[H.J. Res. 131]

Making further continuing appropriations for fiscal year 2015, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Continuing Appropriations Resolution, 2015 (Public Law 113–164) is further amended by striking the date specified in section 106(3) and inserting "December 17, 2014".

Ante, p. 2069.

Approved December 13, 2014.

LEGISLATIVE HISTORY—H.J. Res. 131:

CONGRESSIONAL RECORD, Vol. 160 (2014):
Dec. 12, considered and passed House.
Dec. 13, considered and passed Senate.

○

CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT, 2015

Public Law 113–235
113th Congress

An Act

Dec. 16, 2014
[H.R. 83]

Making consolidated appropriations for the fiscal year ending September 30, 2015, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated and Further Continuing Appropriations Act, 2015.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated and Further Continuing Appropriations Act, 2015".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 11, 2014 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through K of this Act as if it were a joint explanatory statement of a committee of conference.

fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2016.

CENTERS FOR MEDICARE AND MEDICAID SERVICES

GRANTS TO STATES FOR MEDICAID

For carrying out, except as otherwise provided, titles XI and XIX of the Social Security Act, $234,608,916,000, to remain available until expended.

For making, after May 31, 2015, payments to States under title XIX or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the last quarter of fiscal year 2015 for unanticipated costs incurred for the current fiscal year, such sums as may be necessary.

For making payments to States or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the first quarter of fiscal year 2016, $113,272,140,000, to remain available until expended.

Payment under such title XIX may be made for any quarter with respect to a State plan or plan amendment in effect during such quarter, if submitted in or prior to such quarter and approved in that or any subsequent quarter.

PAYMENTS TO HEALTH CARE TRUST FUNDS

For payment to the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as provided under sections 217(g), 1844, and 1860D–16 of the Social Security Act, sections 103(c) and 111(d) of the Social Security Amendments of 1965, section 278(d)(3) of Public Law 97–248, and for administrative expenses incurred pursuant to section 201(g) of the Social Security Act, $259,212,000,000.

In addition, for making matching payments under section 1844 and benefit payments under section 1860D–16 of the Social Security Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2020: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes

of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2015 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $672,000,000, to remain available through September 30, 2016, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $477,120,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $67,200,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $67,200,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $60,480,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided,* That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2015 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation: *Provided further*, That of the amount provided under this heading, $311,000,000 is provided to meet the terms of section 251(b)(2)(C)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, and $361,000,000 is additional new budget authority specified for purposes of section 251(b)(2)(C) of such Act.

ADMINISTRATION FOR CHILDREN AND FAMILIES

PAYMENTS TO STATES FOR CHILD SUPPORT ENFORCEMENT AND FAMILY SUPPORT PROGRAMS

For carrying out, except as otherwise provided, titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, $2,438,523,000, to remain available until expended; and for such purposes for the first quarter of fiscal year 2016, $1,160,000,000, to remain available until expended.

For carrying out, after May 31 of the current fiscal year, except as otherwise provided, titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, for the last 3 months of the current fiscal year for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.

LOW INCOME HOME ENERGY ASSISTANCE

For making payments under subsections (b) and (d) of section 2602 of the Low Income Home Energy Assistance Act of 1981,

of all funds used by the Centers for Medicare and Medicaid Services specifically for Health Insurance Marketplaces for each fiscal year since the enactment of the Patient Protection and Affordable Care Act (Public Law 111–148) and the proposed uses for such funds for fiscal year 2016. Such information shall include, for each such fiscal year—

(1) the amount of funds used for each activity specified under the heading "Health Insurance Marketplace Transparency" in the explanatory statement described in section 4 (in the matter preceding division A of this Consolidated Act) accompanying this Act; and

(2) the milestones completed for data hub functionality and implementation readiness.

SEC. 227. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

SEC. 228. (a) Subject to the succeeding provisions of this section, activities authorized under part A of title IV and section 1108(b) of the Social Security Act shall continue through September 30, 2015, in the manner authorized for fiscal year 2014, and out of any money in the Treasury of the United States not otherwise appropriated, there are hereby appropriated such sums as may be necessary for such purpose. Grants and payments may be made pursuant to this authority through September 30, 2015, at the level provided for such activities for fiscal year 2014, except as provided in subsections (b) and (c).

(b) In the case of the Contingency Fund for State Welfare Programs established under section 403(b) of the Social Security Act—

(1) the amount appropriated for section 403(b) of such Act shall be $608,000,000 for each of fiscal years 2015 and 2016;

(2) the requirement to reserve funds provided for in section 403(b)(2) of such Act shall not apply during fiscal years 2015 and 2016; and

(3) grants and payments may only be made from such Fund for fiscal year 2015 after the application of subsection (d).

(c) In the case of research, evaluations, and national studies funded under section 413(h)(1) of the Social Security Act, no funds shall be appropriated under that section for fiscal year 2015 or any fiscal year thereafter. 42 USC 613 note.

(d) Of the amount made available under subsection (b)(1) for section 403(b) of the Social Security Act for fiscal year 2015—

(1) $15,000,000 is hereby transferred and made available to carry out section 413(h) of the Social Security Act; and

(2) $10,000,000 is hereby transferred and made available to the Bureau of the Census to conduct activities using the Survey of Income and Program Participation to obtain information to enable interested parties to evaluate the impact of the amendments made by title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

CONSOLIDATED APPROPRIATIONS ACT, 2016

Public Law 114–113
114th Congress

An Act

Dec. 18, 2015
[H.R. 2029]

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2016, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2016.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2016".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 17, 2015 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2016.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2016, new budget authority provided in appropriations Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2016 shall be made by the Director of the Office of Management and Budget in the amount of the excess but the total of all such adjustments shall not exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. CORRECTIONS.

The Continuing Appropriations Act, 2016 (Public Law 114–53) is amended—

(1) by changing the long title so as to read: "Making continuing appropriations for the fiscal year ending September 30, 2016, and for other purposes.";

(2) by inserting after the enacting clause (before section 1) the following: "**DIVISION A—TSA OFFICE OF INSPECTION ACCOUNTABILITY ACT OF 2015**";

In addition, for making matching payments under section 1844 and benefit payments under section 1860D–16 of the Social Security Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2021: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2016 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $681,000,000, to remain available through September 30, 2017, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $486,120,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $67,200,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $67,200,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $60,480,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided*, That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2016 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation: *Provided further*, That of the amount provided under this heading, $311,000,000 is provided to meet the terms of section 251(b)(2)(C)(ii) of the

ACA, and the amendments made by that Act, in the proposed fiscal year and each fiscal year since the enactment of the ACA.

(b) With respect to employees or contractors supported by all funds appropriated for purposes of carrying out the ACA (and the amendments made by that Act), the Secretary shall include, at a minimum, the following information:

(1) For each such fiscal year, the section of such Act under which such funds were appropriated, a statement indicating the program, project, or activity receiving such funds, the Federal operating division or office that administers such program, and the amount of funding received in discretionary or mandatory appropriations.

(2) For each such fiscal year, the number of full-time equivalent employees or contracted employees assigned to each authorized and funded provision detailed in accordance with paragraph (1).

(c) In carrying out this section, the Secretary may exclude from the report employees or contractors who—

(1) are supported through appropriations enacted in laws other than the ACA and work on programs that existed prior to the passage of the ACA;

(2) spend less than 50 percent of their time on activities funded by or newly authorized in the ACA; or

(3) work on contracts for which FTE reporting is not a requirement of their contract, such as fixed-price contracts.

SEC. 223. The Secretary shall publish, as part of the fiscal year 2017 budget of the President submitted under section 1105(a) of title 31, United States Code, information that details the uses of all funds used by the Centers for Medicare and Medicaid Services specifically for Health Insurance Exchanges for each fiscal year since the enactment of the ACA and the proposed uses for such funds for fiscal year 2017. Such information shall include, for each such fiscal year, the amount of funds used for each activity specified under the heading "Health Insurance Exchange Transparency" in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act).

SEC. 224. (a) The Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate:

(1) Detailed monthly enrollment figures from the Exchanges established under the Patient Protection and Affordable Care Act of 2010 pertaining to enrollments during the open enrollment period; and

(2) Notification of any new or competitive grant awards, including supplements, authorized under section 330 of the Public Health Service Act.

(b) The Committees on Appropriations of the House and Senate must be notified at least 2 business days in advance of any public release of enrollment information or the award of such grants.

SEC. 225. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Public Law 114–223
114th Congress

An Act

Making continuing appropriations for fiscal year 2017, and for other purposes.

Sept. 29, 2016
[H.R. 5325]

Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act".

SEC. 2. TABLE OF CONTENTS.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2017.

SEC. 5. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall

PERSONAL SERVICE CONTRACTORS

Consultation. Notification.

SEC. 302. Funds made available by this division may be used to enter into contracts with individuals for the provision of personal services (as described in section 104 of part 37 of title 48, Code of Federal Regulations (48 CFR 37.104)) to support the purposes of titles I and II of this division, within the United States and abroad, subject to prior consultation with, and the notification procedures of, the Committees on Appropriations: *Provided*, That such individuals may not be deemed employees of the United States for the purpose of any law administered by the Office of Personnel Management: *Provided further*, That the authority made available pursuant to this section shall expire on September 30, 2017.

Expiration date.

DESIGNATION RETENTION

SEC. 303. Any amount appropriated by this division, designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 and subsequently so designated by the President, and transferred pursuant to transfer authorities provided by this division shall retain such designation.

EFFECTIVE DATE

SEC. 304. This division shall become effective immediately upon enactment of this Act.

This division may be cited as the "Zika Response and Preparedness Appropriations Act, 2016".

Continuing Appropriations Act, 2017.

DIVISION C—CONTINUING APPROPRIATIONS ACT, 2017

The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2017, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2016 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2016, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2016 (division A of Public Law 114–113), except section 728.

(2) The Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 (division B of Public Law 114–113).

(3) The Department of Defense Appropriations Act, 2016 (division C of Public Law 114–113).

(4) The Energy and Water Development and Related Agencies Appropriations Act, 2016 (division D of Public Law 114–113).

(5) The Financial Services and General Government Appropriations Act, 2016 (division E of Public Law 114–113), which

for purposes of this Act shall be treated as including section 707 of division O of Public Law 114–113.

(6) The Department of Homeland Security Appropriations Act, 2016 (division F of Public Law 114–113).

(7) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 (division G of Public Law 114–113).

(8) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016 (division H of Public Law 114–113).

(9) The Legislative Branch Appropriations Act, 2016 (division I of Public Law 114–113).

(10) The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (division K of Public Law 114–113), except title IX.

(11) The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2016 (division L of Public Law 114–113), except section 420.

Rate reduction.

(b) The rate for operations provided by subsection (a) is hereby reduced by 0.496 percent.

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2016 or prior years; (2) the increase in production rates above those sustained with fiscal year 2016 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P–1 line item in a budget activity within an appropriation account and an R–1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during fiscal year 2016.

Contracts.

(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 104. Except as otherwise provided in section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2016.

SEC. 105. Appropriations made and authority granted pursuant to this Act shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this Act.

Expiration date.

SEC. 106. Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2017, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this Act; (2) the enactment into law

Public Law 114–254
114th Congress

An Act

Making appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2016, and for other purposes.

Dec. 10, 2016
[H.R. 2028]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Further Continuing and Security Assistance Appropriations Act, 2017.

SECTION 1. SHORT TITLE.

This Act may be cited the "Further Continuing and Security Assistance Appropriations Act, 2017".

SEC. 2. TABLE OF CONTENTS.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in division B of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. AVAILABILITY OF FUNDS.

(a) Each amount designated in this Act, or in an amendment made by this Act, by the Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

(b) Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

DIVISION A—FURTHER CONTINUING APPROPRIATIONS ACT, 2017

Further Continuing Appropriations Act, 2017.

SEC. 101. The Continuing Appropriations Act, 2017 (division C of Public Law 114–223) is amended by—

Ante, p. 910.

(1) striking the date specified in section 106(3) and inserting "April 28, 2017";

(2) striking "0.496 percent" in section 101(b) and inserting "0.1901 percent"; and

(3) inserting after section 145 the following new sections:

"SEC. 146. Amounts made available by section 101 for 'Department of Agriculture—Farm Service Agency—Agricultural Credit Insurance Fund Program Account' may be apportioned up to the rate for operations necessary to fund loans for which applications are approved.

"SEC. 147. Amounts made available by section 101 for 'Department of Agriculture—Food and Nutrition Service—Child Nutrition Programs' to carry out section 749(g) of the Agriculture Appropriations Act of 2010 (Public Law 111–80) may be apportioned up to the rate for operations necessary to ensure that the program can be fully operational by May, 2017.

"SEC. 148. Section 26(d) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1769g(d)) is amended in the first sentence by striking '2010 through 2016' and inserting '2010 through 2017'.

"SEC. 149. Amounts made available by section 101 for 'Department of Agriculture—Rural Utilities Service' may be transferred between appropriations under such heading as necessary for the cost of direct telecommunications loans authorized by section 305 of the Rural Electrification Act of 1936 (7 U.S.C. 935).

"SEC. 150. Amounts made available by Section 101 for 'Department of Agriculture—Rural Housing Service—Rural Housing Insurance Fund Program Account' for the section 538 Guaranteed Multi-Family Housing Loan Program may be apportioned up to the rate necessary to fund loans for which applications are approved.

"SEC. 151. Amounts made available by section 101 for 'Department of Commerce—National Oceanic and Atmospheric Administration—Procurement, Acquisition and Construction' may be apportioned up to the rate for operations necessary to maintain the planned launch schedules for the Joint Polar Satellite System.

"SEC. 152. Amounts made available by section 101 for 'Department of Commerce—Bureau of the Census—Periodic Censuses and Programs' may be apportioned up to the rate for operations necessary to maintain the schedule and deliver the required data according to statutory deadlines in the 2020 Decennial Census Program.

"SEC. 153. Amounts made available by section 101 for 'National Aeronautics and Space Administration—Exploration' may be apportioned up to the rate for operations necessary to maintain the planned launch capability schedules for the Space Launch System launch vehicle, Exploration Ground Systems, and Orion Multi-Purpose Crew Vehicle programs.

"SEC. 154. In addition to the amount otherwise provided by section 101, and notwithstanding section 104 and section 109, for 'Department of Justice—State and Local Law Enforcement Activities—Office of Justice Programs—State and Local Law Enforcement Assistance', there is appropriated $7,000,000, for an additional amount for the Edward Byrne Memorial Justice Assistance Grant program for the purpose of providing reimbursement of extraordinary law enforcement overtime costs directly and solely associated with protection of the President-elect incurred from November 9, 2016 until the inauguration of the President-elect as President:

One Hundred Fifteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and seventeen

An Act

Making appropriations for the fiscal year ending September 30, 2017, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2017".

SEC. 2. TABLE OF CONTENTS.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House section of the Congressional Record on or about May 2, 2017, and submitted by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2017.

SEC. 6. AVAILABILITY OF FUNDS.

(a) Each amount designated in this Act by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

(b) Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2017, new budget authority provided in appropriations Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2017 shall be made by the Director of the Office of Management and Budget in the amount of the excess but the total of all such adjustments shall not exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. CORRECTION.

The Further Continuing and Security Assistance Appropriations Act, 2017 (Public Law 114–254) is amended by changing the long title so as to read: "Making further continuing appropriations for the fiscal year ending September 30, 2017, and for other purposes.".

Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2022: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2017 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $725,000,000, to remain available through September 30, 2018, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $486,936,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $82,132,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $82,132,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $73,800,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided*, That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2017 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation: *Provided further*, That of the amount provided under this heading, $311,000,000 is provided to meet the terms of section 251(b)(2)(C)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, and $414,000,000 is additional new budget authority

such fiscal year, the amount of funds used for each activity specified under the heading "Health Insurance Exchange Transparency" in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act).

SEC. 222. (a) The Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate:

(1) Detailed monthly enrollment figures from the Exchanges established under the Patient Protection and Affordable Care Act of 2010 pertaining to enrollments during the open enrollment period; and

(2) Notification of any new or competitive grant awards, including supplements, authorized under section 330 of the Public Health Service Act.

(b) The Committees on Appropriations of the House and Senate must be notified at least 2 business days in advance of any public release of enrollment information or the award of such grants.

SEC. 223. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

SEC. 224. In addition to the amounts otherwise available for "Centers for Medicare and Medicaid Services, Program Management", the Secretary of Health and Human Services may transfer up to $305,000,000 to such account from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund to support program management activity related to the Medicare Program: *Provided*, That except for the foregoing purpose, such funds may not be used to support any provision of Public Law 111–148 or Public Law 111–152 (or any amendment made by either such Public Law) or to supplant any other amounts within such account.

SEC. 225. The Secretary shall include in the fiscal year 2018 budget justification an analysis of how section 2713 of the PHS Act will impact eligibility for discretionary HHS programs.

SEC. 226. Effective during the period beginning on November 1, 2015 and ending January 1, 2019, any provision of law that refers (including through cross-reference to another provision of law) to the current recommendations of the United States Preventive Services Task Force with respect to breast cancer screening, mammography, and prevention shall be administered by the Secretary involved as if—

(1) such reference to such current recommendations were a reference to the recommendations of such Task Force with respect to breast cancer screening, mammography, and prevention last issued before 2009; and

(2) such recommendations last issued before 2009 applied to any screening mammography modality under section 1861(jj) of the Social Security Act (42 U.S.C. 1395x(jj)).

This title may be cited as the "Department of Health and Human Services Appropriations Act, 2017".

H. R. 601

One Hundred Fifteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and seventeen

An Act

Making continuing appropriations for the fiscal year ending September 30, 2018, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

DIVISION A—REINFORCING EDUCATION ACCOUNTABILITY IN DEVELOPMENT ACT

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Reinforcing Education Accountability in Development Act" or the "READ Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

This division may be cited as the "Supplemental Appropriations for Disaster Relief Requirements, 2017".

DIVISION C—TEMPORARY EXTENSION OF PUBLIC DEBT LIMIT

SEC. 101. (a) IN GENERAL.—Section 3101(b) of title 31, United States Code, shall not apply for the period beginning on the date of enactment of this Act and ending on December 8, 2017.

(b) SPECIAL RULE RELATING TO OBLIGATIONS ISSUED DURING EXTENSION PERIOD.—Effective on December 9, 2017, the limitation in effect under section 3101(b) of title 31, United States Code, shall be increased to the extent that—

(1) the face amount of obligations issued under chapter 31 of such title and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) outstanding on December 9, 2017, exceeds

(2) the face amount of such obligations outstanding on the date of the enactment of this Act.

(c) RESTORING CONGRESSIONAL AUTHORITY OVER THE NATIONAL DEBT.—

(1) EXTENSION LIMITED TO NECESSARY OBLIGATIONS.—An obligation shall not be taken into account under section 101(b)(1) unless the issuance of such obligation was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before December 9, 2017.

(2) PROHIBITION ON CREATION OF CASH RESERVE DURING EXTENSION PERIOD.—The Secretary of the Treasury shall not issue obligations during the period specified in section 101(a) for the purpose of increasing the cash balance above normal operating balances in anticipation of the expiration of such period.

DIVISION D—CONTINUING APPROPRIATIONS ACT, 2018

The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2018, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2017 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2017, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2017 (division A of Public Law 115–31) and section 193 of Public Law 114–223, as amended by division A of Public Law 114–254.

(2) The Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017 (division B of Public Law 115–31), except section 540.

(3) The Department of Defense Appropriations Act, 2017 (division C of Public Law 115–31).

(4) The Energy and Water Development and Related Agencies Appropriations Act, 2017 (division D of Public Law 115–31).

(5) The Financial Services and General Government Appropriations Act, 2017 (division E of Public Law 115–31).

(6) The Department of Homeland Security Appropriations Act, 2017 (division F of Public Law 115–31), except section 310.

(7) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2017 (division G of Public Law 115–31), except that the language under the heading "FLAME Wildfire Suppression Reserve Fund" in the Departments of Agriculture and the Interior shall be applied by adding at the end the following: "*Provided further*, That notwithstanding the first proviso under the heading and notwithstanding the FLAME Act of 2009, 43 U.S.C. 1748a(e), such funds shall be available to be transferred to and merged with other appropriations accounts to fully repay amounts previously transferred for wildfire suppression".

(8) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017 (division H of Public Law 115–31) and sections 171, 194, and 195 of Public Law 114–223, as amended by division A of Public Law 114–254.

(9) The Legislative Branch Appropriations Act, 2017 (division I of Public Law 115–31) and section 175 of Public Law 114–223, as amended by division A of Public Law 114–254.

(10) The Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017 (division A of Public Law 114–223), except for appropriations for fiscal year 2017 in the matter preceding the first proviso under the heading "Medical Community Care", and division L of Public Law 115–31.

(11) The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017 (division J of Public Law 115–31).

(12) The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2017 (division K of Public Law 115–31), except sections 420 and 421.

(13) The Security Assistance Appropriations Act, 2017 (division B of Public Law 114–254).

(b) The rate for operations provided by subsection (a) is hereby reduced by 0.6791 percent.

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2017 or prior years; (2) the increase in production rates above those sustained with fiscal year 2017 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P–1 line item in a budget activity within an appropriation account and an R–1 line item that includes a program element and subprogram element within an appropriation account)

for which appropriations, funds, or other authority were not available during fiscal year 2017.

(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 104. Except as otherwise provided in section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2017.

SEC. 105. Appropriations made and authority granted pursuant to this Act shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this Act.

SEC. 106. Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2018, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs:

(1) the enactment into law of an appropriation for any project or activity provided for in this Act;

(2) the enactment into law of the applicable appropriations Act for fiscal year 2018 without any provision for such project or activity; or

(3) December 8, 2017.

SEC. 107. Expenditures made pursuant to this Act shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

SEC. 108. Appropriations made and funds made available by or authority granted pursuant to this Act may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United States Code, but nothing in this Act may be construed to waive any other provision of law governing the apportionment of funds.

SEC. 109. Notwithstanding any other provision of this Act, except section 106, for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year 2018 because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and no grants shall be awarded for such programs funded by this Act that would impinge on final funding prerogatives.

SEC. 110. This Act shall be implemented so that only the most limited funding action of that permitted in the Act shall be taken in order to provide for continuation of projects and activities.

SEC. 111. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2017, and for activities under the Food and Nutrition Act of 2008, activities shall be continued at the rate to maintain

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Alisa B. Klein
ALISA B. KLEIN
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,825 words, excluding parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b), according to the count of Microsoft Word 2013.

s/Alisa B. Klein
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