No. 2017-1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MODA HEALTH PLAN, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

On Appeal from the United States Court of Federal Claims
in case no. 1:16-cv-00649, Judge Thomas C. Wheeler

BRIEF FOR APPELLANT

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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. This Court designated the pending appeal in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 16-1224, as a companion to this appeal and ordered that the two appeals be assigned to the same merits panel. An appeal in a third risk-corridors case, *Blue Cross and Blue Shield of North Carolina v. United States*, No. 17-2154, was docketed on June 14, 2017.

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

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.);

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.);

EmblemHealth, Inc. v. United States, No. 17-703C (Wheeler, J.);

Farmer v. United States, No. 17-363C (Campbell-Smith, J.);

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

Health Alliance Medical Plans, Inc. v. United States, No. 17-653C (Campbell-Smith, J.)

Health Net, Inc. v. United States, No. 16-1722C (Wolski, J.);

Health Republic Ins. Co. v. United States, No. 16-259C (Sweeney, J.);

HPHC Insurance Co., Inc. v. United States, No. 17-87C (Griggsby, J.);

Maine Cmty. Health Options v. United States, No. 16-967C (Bruggink, J.);

Medica Health Plans v. United States, No. 17-94C (Horn, J.);

Minuteman Health Inc. v. United States, No. 16-1418C (Griggsby, J.);

Molina Healthcare v. United States, No. 17-97C (Wheeler, J.);

Montana Health CO-OP v. United States, No. 16-1427C (Wolski, J.);

Neighborhood Health Plan, Inc. v. United States, No. 16-1659C (Smith, J.);

New Mexico Health Connections v. United States, No. 16-1199C (Bruggink, J.);

Ommen v. United States, No. 17-712C (Lettow, J.);

Sanford Health Plan v. United States, No. 17-357C (Bruggink, 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 twenty-five 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 ACA created a self-funded risk-corridors program to distribute gains and losses between insurers that under- and over-estimated their cost-to-premium ratios. Under the program, 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. "Payments

in" are the only funding source referenced in the statutory provision, and nothing in the ACA appropriates or authorizes the use of other funds for "payments out."

Congress confirmed that the program is self-funded when it enacted appropriations necessary to authorize the distribution of risk-corridors collections to the industry. Fiscal year 2015 was the first year in which monies could be paid out under the risk-corridors program. (By law, HHS could not make payments before that time because the ACA requires HHS to use a full year's data to calculate payment and collection amounts, and the program did not begin until calendar year 2014.) In the appropriations legislation for fiscal year 2015, Congress allowed HHS to use "payments in"—amounts collected from insurers under the program—as a source of funding for "payments out." At the same time, Congress expressly prohibited HHS from using other funds for such "payments out." That legislation, which Congress subsequently reenacted, guarantees 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). 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 March 6, 2017. The government filed a timely notice of appeal on May 4, 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 the risk-corridors program is self-funded by "payments in" from insurers, and there is no statutory obligation to use taxpayer funds for risk-corridors payments.

2. Whether plaintiff's implied-in-fact contract claim is dependent on its meritless statutory claim and also fails on independent grounds.

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 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 paragraph (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 paragraph (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.3 (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

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

Act's fiscal 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. And as a practical matter, Congress did not need to address risk-corridors appropriations until fiscal year 2015, because the ACA did not allow payments to be made before that time. 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) (Appx231-233).

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 identified an additional potential source of funding that HHS had not identified. 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 catch-all language would be broad enough

to encompass risk-corridors payments, if it were reenacted by Congress in subsequent appropriations acts. *Id.* at *3, *5.

Congress did not reenact the same appropriations language. 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.* Congress included a rider, however, 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. And Congress reenacted the funding limitation in the current appropriations act. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title II, § 223, 131 Stat. 135.

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) (Appx229-230). 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) (Appx246). As a result, HHS indicated that it would at that time make pro-rated payments of 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. Appx41. 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 have not yet submitted their data for 2016, which are due July 31, 2017.

III. Factual Background and Proceedings Below

A. Plaintiff's Allegations

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 for the 2014 and 2015 years. Plaintiff alone seeks nearly $210 million for those years. Appx44.

The principal claim is statutory. Plaintiff alleges that the language of section 1342 created an obligation on the part of the government to pay out the full amounts calculated under the statutory formula, regardless of the amount that insurers paid in. Appx79-80. Plaintiff further alleges that Congress's limitations on appropriations for risk-corridors payments do not affect the obligation that section 1342 allegedly created. Appx80.

Plaintiff also alleges an implied-in-fact contract claim, but that claim is dependent on the statutory claim. Plaintiff alleges that the terms of the alleged implied-in-fact contract are specified in section 1342 and the implementing regulations. Appx81.

B. The Trial Court's Decision

After concluding that it had jurisdiction, the trial court held that that the risk-corridors program is not self-funded by amounts collected from insurers, and that

taxpayer funds must be used to make up shortfalls in "payments in." Appx1-40. The trial court recognized that section 1342 does not appropriate any funds for risk-corridors payments. Appx25. The court also recognized that section 1342 does not contain any budget authority comparable to that found in the Medicare Part D statute (on which section 1342 was generally modeled), which provides "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." Appx24 (quoting 42 U.S.C. § 1395w-115(a)(2)). And the court acknowledged that the cost estimate that the CBO provided to Congress when the ACA was under consideration did not project that the risk-corridors program would adversely affect the federal budget. *Id.*

Nonetheless, the trial court held that section 1342 obligates the Secretary to pay the full amounts calculated under the statutory formula, even in the absence of appropriations and despite Congress's express limitations on the funds available for risk-corridors payments. Appx23-34. In the alternative, the court held that section 1342 created an implied-in-fact contract with insurers, and that this contract was breached by the Secretary's payment of amounts that were pro-rated in light of collections of "payments in." Appx34-39. In ruling for the insurer, the trial court expressly rejected the contrary holdings of the trial court in *Land of Lincoln Mutual Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016), *appeal pending*, No. 17-1224 (Fed. Cir.).

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 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). 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 rests on the same incorrect premise as the meritless statutory claim and also fails 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.

III. The insurers' claims also may be premature. Under the agency's three-year payment methodology, 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. And because the time for making additional payments has not yet elapsed, it is impossible at this juncture to quantify an insurer's claims. We recognize, however, that this timing issue may be intertwined with the merits, and that the practical significance of the timing issue may be overtaken by the passage of time while the litigation is pending. Nonetheless, because the issue may be jurisdictional, we respectfully call the timing question to the attention of the Court.

STANDARD OF REVIEW

The decision below rests on conclusions of law that are subject to de novo review in this Court. *See, e.g.*, *Starr Int'l Co. v. United States*, 856 F.3d 953, 963 (Fed. Cir. 2017).

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 Create an Obligation to Use Taxpayer Funds for Such Payments.

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. Appx24. 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 appropriated funds or enacted statutory language authorizing the appropriation of funds in the future.[3] 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 (Sept. 30, 2014)

[3] 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).

("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.

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 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 Later Appropriated Funds Collected From Insurers But Barred HHS From Using Other Funds for Risk-Corridors Payments.

If there were any doubt as to whether Congress had established a self-funded program, it was removed by the legislation that provided appropriations for risk-corridors payments. In those statutes, Congress appropriated the funds that insurers would pay into the risk-corridors program, but expressly barred HHS from using other funds to make risk-corridors payments. Those appropriations acts confirm that section 1342 required "payments out" to be made solely from "payments in." And even if there were a question as to the meaning of section 1342, the appropriations acts definitively capped "payments out" at the total amount of "payments in."

As discussed above, the risk-corridors program began in calendar year 2014. Because section 1342 of the ACA required HHS to use a full year's data to calculate payment amounts, no payments could be made until calendar year 2015, which corresponded to the 2015 and 2016 fiscal years. Congress thus addressed the question of appropriations for the first time in December 2014, when it enacted appropriations legislation for fiscal year 2015.

In early 2014, Members of Congress requested from the GAO an analysis of what sources of appropriations might be available when risk-corridors payments came due. *See* GAO Op., 2014 WL 4825237, at *1 (noting requests). In September 2014, the GAO issued an opinion identifying two components of the CMS Program Management appropriation for fiscal year 2014 that, if reenacted in subsequent appropriations acts, could be used to make risk-corridors payments. First, the GAO explained that the appropriation for "user fees" would, if reenacted for fiscal year 2015, allow HHS to use "payments in" from insurers to make "payments out" to insurers. *Id.* at *3-4. Second, the GAO concluded that, if reenacted, a lump-sum appropriation to CMS for the management of enumerated programs such as Medicare and Medicaid, as well as for "other responsibilities" of CMS, could be used to make risk-corridors payments. *Id.* at *3. The GAO stressed, however, that these sources

would not be available for risk-corridors payments unless Congress enacted similar language in the appropriations acts for subsequent fiscal years. *Id.* at *5.[4]

Congress did not enact the same appropriations language for fiscal year 2015. Congress reenacted the user-fee appropriation and thus allowed HHS to use "payments in" to make "payments out." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477. But Congress added a new provision that expressly barred HHS from using other funds for risk-corridors payments:

> 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. 2491. The effect of this appropriations legislation was to reaffirm that "payments out" would not exceed the total amount of "payments in." The appropriations legislation thus reconfirmed that the statute would operate as originally designed: the risk-corridors program would be self-funded.

Moreover, even assuming arguendo that section 1342 had made risk-corridors payments an obligation of the government in advance of appropriations, this specific

[4] In addition to requesting an opinion from the GAO, Members of Congress asked HHS to identify potential sources of funding for risk-corridors payments. HHS identified collections from insurers (*i.e.*, the user fees), but, unlike the GAO, HHS did not identify the lump sum as a potential source of funding for risk-corridors payments. Appx231-233.

appropriations legislation definitively capped payments at amounts collected and thus superseded any such obligation. There is no doubt that appropriations legislation can amend a 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."

This Court's decision in *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), is particularly instructive. In contrast to section 1342, the permanent legislation at issue in *Highland Falls*—section 2 of the Impact Aid Act—gave funding recipients an "entitlement" to payment of amounts

calculated under a statutory formula. *See id.* at 1168 (statute provided that school districts "shall be entitled" to payment of such amounts). Moreover, the permanent legislation specified that, in the event of a shortfall in appropriations for various statutory programs, the Secretary "shall first allocate" to each school district 100% of the amount due under section 2 of the Impact Aid Act. *Id.* Subsequently, however, Congress earmarked certain amounts for entitlements under various sections of the Impact Aid Act, and the earmarked amount was insufficient to pay 100% of the amounts due under section 2. *Id.* at 1169. In light of that clear limit on appropriations, this Court held that the school districts were entitled to only a pro rata share of the amounts calculated under the statutory formula. *Id.* at 1170-71.

Here, as in *Highland Falls*, it is difficult "imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id.* at 1170. Indeed, the appropriations legislation for risk-corridors payments is materially indistinguishable from the appropriations legislation in *Highland Falls*. As in *Highland Falls*, the agency could not (in light of the shortfall in collections) have paid full amounts calculated under the statutory formula without violating the Anti-Deficiency Act, which states that "[a]n officer or employee of the United States Government ... may not ... make or authorize an expenditure ... exceeding an amount available in an appropriation ... for the expenditure." *Id.* at 1171 (quoting 31 U.S.C. § 1341(a)(1)(A)) (this Court's alterations). And in enacting the express restrictions on funding for risk-corridors payments, Congress left no doubt as to its intent, which

was to ensure 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 trial court made no attempt to distinguish *Highland Falls*, which its opinion did not discuss. Instead, the court relied on cases in which it was found that "the mere failure of Congress to appropriate funds . . . does not in and of itself defeat a Government obligation created by statute." *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966). *See* Appx28-30; *see also infra*, pp.39-42. But that principle is doubly inapplicable here. First, section 1342 did not create a "Government obligation" in advance of appropriations. Instead of creating such an obligation (as Congress did in the Medicare Part D statute and elsewhere in the ACA), section 1342 reserved Congress's full budget authority over risk-corridors payments.

Second, there was no "mere failure" by Congress to appropriate funds for risk-corridors payments. In the only acts that appropriated funds for such payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make "payments out." And as discussed above, the precedents of the Supreme Court and this Court recognize that even where (unlike here) permanent legislation creates a government obligation in advance of appropriations, that obligation can be modified by appropriations legislation of this kind.

C. Neither Plaintiff Nor the Trial Court Provided Any Basis to Order That Taxpayer Funds Be Used to Make Up Shortfalls in Collections From Insurers.

1. The ACA did not expose the government to uncapped liability for insurance-industry losses.

Plaintiff and other insurers contend that when Congress enacted the ACA's risk-corridors program, Congress exposed the government to uncapped liability for insurance-industry losses, based on criteria—the ratio of a plan's allowable costs to its aggregate premiums—that are largely dependent upon insurers' business judgment. The crux of their argument is that language in section 1342(b) stating that the Secretary "shall pay" amounts calculated under the formula is sufficient to create a binding payment obligation on the government, regardless of appropriations and despite Congress's express funding limitations. The trial court accepted this argument. Appx23-24, Appx27-34.

This argument rests on two independent errors. First, the language on which the insurers rely is embedded in the statute's "payment methodology" provision, section 1342(b). *See* 42 U.S.C. § 18062(b). The operative provision is section 1342(a), which directs the Secretary to establish and administer a program of payment adjustments among insurers. *See id.* § 18062(a) ("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."). Thus, the language on which the insurers rely simply describes the way the Secretary shall administer the program of payment adjustments among QHPs; it is not a freestanding directive to the agency to make payments.

Second, even a freestanding directive to an agency to pay amounts calculated under a statutory formula would not—standing alone—create an obligation on the part of the government to make payments without regard to appropriations. This Court's decision in *Prairie County v. United States*, 782 F.3d 685 (Fed. Cir. 2015), is illustrative. The statute at issue in that case directed an agency to make payments to local governments in accordance with a statutory formula, but this Court rejected the contention that the statute obligated the government to make full payments regardless of appropriations. This Court explained that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language." *Id.* at 691. Specifically, this Court noted that a subsequent amendment to the statute provided that each local government "shall be entitled to payment under this chapter" and that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter." *Id.* But that amendment did not apply to the fiscal years at issue in *Prairie County*, and the government thus had no obligation to make payments in excess of appropriations for those years. *Id.*

The language of "obligation" that this Court discussed in *Prairie County* is comparable to the language of "obligation" that Congress used in the Medicare Part D statute and elsewhere in the ACA. But Congress omitted that language (or its equivalent) from section 1342. Accordingly, section 1342 did not by itself create a government obligation to make risk-corridors payments. Indeed, the insurers' claim here is even weaker than the claim in *Prairie County*, because the permanent legislation in *Prairie County* authorized appropriations, while limiting the scope of that authorization.[5] By contrast, section 1342 does not authorize appropriations in the first place, nor does it provide any other budget authority for risk-corridors payments. *See generally* 2 U.S.C. § 622(2) (defining four types of budget authority, none of which was granted in section 1342).

The trial court interpreted section 1342 as if it tracked the language of the Medicare Part D statute, *see* Appx24, despite the crucial differences in the budget authority that Congress provided in the two statutes. In dismissing these key textual differences, the trial court stated that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay' specific amounts to insurers." *Id.* Based on that premise, the trial court opined that "[t]he stronger payment language in Section 1342 obligates the Secretary to make

[5] *See Prairie County*, 782 F.3d at 686 (explaining that the permanent legislation provided that "[n]ecessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter," but qualified that authorization by providing that "[a]mounts are available only as provided in appropriation laws").

payments and removes his discretion, so a further payment directive to the Secretary is unnecessary." *Id.*

As an initial matter, the trial court misunderstood the Medicare Part D statute. The statutory language quoted by the court, which directs the Secretary to "establish a risk corridor" under Medicare Part D, appears in 42 U.S.C. § 1395w-115(e)(3). The immediately preceding paragraph provides that, if risk-corridor costs for a plan are greater than a specified threshold, "the Secretary shall increase the total of the payments made to the sponsor or organization offering the plan" by a specified amount. 42 U.S.C. § 1395w-115(e)(2)(B)(i), (ii). Thus, contrary to the trial court's premise, the Medicare Part D statute directs the Secretary to pay specific amounts to insurers.

In any event, the trial court separately erred in concluding that the "payment language in Section 1342 obligates the Secretary to make payments" in the absence of appropriations. Appx24. 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." *OPM v. Richmond*, 496 U.S. 414, 424 (1990). A "direction to pay without a designation of the source of funds is not an appropriation." GAO, *Principles of Federal Appropriations Law* 2–24 (4th ed. 2016 rev.) (*GAO Redbook*).[6] And as discussed above, a direction to pay does not, standing alone,

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

create an obligation of the government. That is why the Medicare Part D statute not only directs the Secretary to make specified payments to insurers, but also provides budget authority to do so and makes such payments an obligation of the government. In section 1342, by contrast, Congress reserved its power of the purse by withholding both (1) an appropriation or authorization of appropriations, and (2) any language that makes risk-corridors payments an obligation of the government without regard to appropriations.

Given the absence of budget authority in section 1342, it is unsurprising that the CBO's March 2010 cost estimate indicated that the risk-corridors program would not increase the federal deficit. The trial court declared that "the CBO's failure to speak on Section 1342's budgetary impact was simply a failure to speak." Appx24. That pronouncement misunderstands the relevance of the CBO's 2010 cost estimate, which is important not for its own sake but because Congress relied on it in enacting the ACA. "Based on Congressional Budget Office (CBO) estimates," Congress determined that "this Act will reduce the federal deficit between 2010 and 2019." ACA § 1563(a)(1). Given that determination, a court cannot properly interpret the risk-corridors provision to require payment of billions of dollars from the federal fisc.

By contrast, the February 2014 CBO report on which the trial court relied (Appx24-25) is legally irrelevant, because that report was not before Congress when it enacted the ACA. Indeed, in *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009), this Court declined to rely on a CBO cost estimate because "Congress never

ratified the CBO's interpretation, which was completed more than two weeks after Congress took final action on the bill." In any event, the February 2014 report projected that risk-corridors collections would exceed payments, *see* Appx9, and thus confirmed that the risk-corridors program would be self-funded.

It is equally unsurprising that Congress, in enacting the ACA, did not create an uncapped government obligation to indemnify insurers against losses. The ACA's premium-stabilization programs were designed to create a structure that might mitigate insurers' risks, not to eliminate those risks by creating a government guarantee. There is no dispute that the other 3R programs—reinsurance and risk adjustment—are self-funded. Appx24. The same is true of the risk-corridors program. Recognizing the importance of fiscal responsibility, ACA § 1563(a)(1), Congress prudently refrained from committing taxpayer dollars to unprofitable insurers.

The indemnity that insurers now seek also would have exacerbated insurers' incentives to compete for market share on the Exchanges by selling policies below cost. *See* Milliman, *Ten Critical Considerations for Health Insurance Plans Evaluating Participation in Public Exchange Markets* (Dec. 2012) (explaining that "the opportunity to reach a new market by participating in the exchange land grab could be a very quick way to increase the size of an insurer's covered population"). A recent article noted "the prevalent strategy of deliberately selling policies below cost in the early years of the program in order to gain market share." Seth Chandler, *Judge's Ruling On 'Risk*

Corridors' Not Likely To Revitalize ACA, Forbes, Feb. 13, 2017. Contrary to the insurers' premise, Congress did not encourage that practice by obligating the government to cover insurers' losses.

2. Contrary to the trial court's understanding, the fiscal year 2014 appropriation could not have been used for risk-corridors payments.

In addition to erroneously interpreting section 1342 to obligate the government for risk-corridors payments without regard to appropriations, the trial court impermissibly disregarded Congress's express limitations on funding for risk-corridors payments. As the trial court acknowledged, section 1342 of the ACA did not appropriate any funds for risk-corridors payments. Appx25. When the time came to appropriate funds for risk-corridors payments, the only funds that Congress chose to appropriate were "payments in" from insurers. *See supra*, pp.8-11. At no point in time has Congress ever appropriated taxpayer funds for risk-corridors payments.

The trial court was manifestly incorrect in declaring that HHS lawfully could have made risk-corridors payments from appropriations other than "payments in." The court mistakenly believed that a $3.67 billion lump sum appropriation for the *2014 fiscal year* was available for risk-corridors payments but "HHS chose not to use" it. Appx25. Each year, including for fiscal year 2014, Congress generally makes a CMS Program Management appropriation "for carrying out" enumerated programs such as Medicare and Medicaid 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). The Program Management appropriation includes a lump sum amount transferred from specified trust funds, as well as such sums as may be collected from authorized user fees. *Id.* Although the user fees collected during that fiscal year remain available for the next five fiscal years, *id.*, the lump sum amount expires at the end of the fiscal year, *id.* § 502, 128 Stat. 408. Thus, the lump sum in the fiscal year 2014 appropriation expired on September 30, 2014.

Therefore, it is irrelevant whether the "other responsibilities" language could properly be read to cover risk-corridor payments, because, as a matter of timing, that lump sum appropriation expired at the end of the 2014 fiscal year (September 30, 2014). It thus was not available for the first set of risk-corridors payments, which, under the plain terms of section 1342, could not have been calculated or made until the 2015 calendar year. Section 1342 requires that "payments in" and "payments out" be calculated using insurers' data from an entire year. *See* 42 U.S.C. § 18062(b). Indeed, an insurer's allowable costs for the year must be reduced by any reinsurance and risk-adjustment payments it receives, and those payments are not made until after the end of the calendar year. *Id.* § 18062(c)(1)(B). The risk-corridors program began in calendar year 2014, and insurers' data for that calendar year were not even submitted to HHS until July 2015. 45 C.F.R. § 153.530(d). Accordingly, "payments out" for the 2014 calendar year were not due and owing in fiscal year 2014, and the lump sum appropriation for fiscal year 2014 was not available for risk-corridors payments.

For the same reasons, the trial court was incorrect in stating that approximately $750 million allocated to the Program Management account for the first two-and-a-half months of fiscal year 2015 (mid-September through December 2014) could have been used for risk-corridors payments. Appx27 n.13. First, the continuing resolutions cited by the trial court provided that "no appropriation or funds made available or authority granted [herein] 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." Continuing Appropriations Resolution, 2015, Pub. L. No. 113-164, § 104, 128 Stat. 1867, 1868.[7] Because the fiscal year 2014 Program Management appropriation did not appropriate funds for risk-corridors payments, the continuing resolutions did not provide an appropriation for those payments either. Second, the continuing resolutions made funds available only until December 2014, when Congress enacted the fiscal year 2015 appropriations act. *See*, *e.g., id.* § 101, 128 Stat. 1867. That appropriations act barred HHS from using funds other than "payments in" for risk-corridors payments. And as explained above, no risk-corridors payments could have been calculated or made before that express restriction was enacted in December 2014.

[7] The subsequent continuing resolutions, Pub. L. No. 113-202, 128 Stat. 2069 (Dec. 12, 2014), and Pub. L. No. 113-203, 128 Stat. 2070 (Dec. 13, 2014), merely amended the period of availability for the appropriations made available by Pub. L. No. 113-164 from December 11, 2014, until December 17, 2014.

The trial court compounded its errors by relying on the reasoning of *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012). In *Ramah*, the Supreme Court noted that "[w]hen a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, it has long been the rule that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends." *Id.* at 190. Citing that reasoning, the trial court declared it "immaterial" that $750 million would not have sufficed to cover the full amount of risk-corridors payments calculated under the statutory formula for all insurers, Appx27 n.13, and awarded Moda nearly $210 million in damages representing the full amount of its risk-corridors claims for the 2014 and 2015 years, Appx44.

For the reasons already discussed, the $750 million was not available for *any* risk-corridors payments. But even assuming arguendo that the $750 million could have been used to pay a fraction of the billions of dollars of risk-corridors payments that insurers have claimed, that would not be a basis to award Moda damages for the full amount of its statutory claims. In *Prairie County v. United States*, 782 F.3d 685 (Fed. Cir. 2015), this Court rejected the contention that *Ramah*'s reasoning extends to statutory claims, emphasizing that the *Ramah* decision explicitly rested on "well-

established principles of Government contracting law." *Id.* at 689-90 (quoting *Ramah*, 567 U.S. at 190).[8]

3. Contrary to the trial court's understanding, the Judgment Fund is not an appropriation for risk-corridors payments.

The trial court acknowledged that, beginning with the appropriations act for fiscal year 2015, Congress appropriated "payments in" but expressly barred HHS from using other funds in the Program Management account for risk-corridors payments. Appx27-28. Nonetheless, the trial court declared that Congress must have intended to allow insurers to collect full risk-corridors payments from the Judgment Fund, because the express restrictions that Congress included in those appropriations acts did not state that no funds in "this act *or any other act*" are available for risk-corridors payments. Appx33-34 (emphasis added).

This reasoning reflects a fundamental misunderstanding of the Judgment Fund. The "general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement," *Richmond*, 496 U.S. at 432, and it has no bearing on the question whether Congress obligated the government for risk-corridors payments beyond the amounts it appropriated to HHS for such payments. The Judgment Fund exists solely to pay "final judgments, awards, compromise

[8] Plaintiff's contract claim fails for reasons discussed in Part II below.

settlements, and interest and costs." 31 U.S.C. § 1304(a). Thus, until entry of judgment, the permanent appropriation of the Judgment Fund is irrelevant.

Accordingly, in *Highland Falls*, this Court rejected a Tucker Act claim for damages from the Judgment Fund, even though Congress had simply capped funds available under an agency's appropriations act without making reference to "any other act." On the trial court's logic, by contrast, the claimants in *Highland Falls* should have prevailed rather than lost.

The Supreme Court's decision in *United States v. Will*, 449 U.S. 200 (1980), likewise demonstrates the error in the trial court's reasoning. In *Will*, the Supreme Court examined restrictions in four annual appropriations acts to determine whether they had the effect of repealing salary increases mandated by earlier permanent legislation. Although the appropriations acts for certain fiscal years included the "or any other Act" language on which the trial court here relied (Appx32), the appropriations act for fiscal year 1980 (or "Year 4" in the Supreme Court's terminology) did not include that language.[9] The Supreme Court did not suggest that this difference in phrasing was material. To the contrary, the Supreme Court held that

[9] *Compare Will*, 449 U.S. at 207 (appropriations act for Year 3 provided that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 by this Act *or any other Act* may be used to pay" salary increases mandated by earlier legislation) (emphasis added), *with id.* at 208 (appropriations act for Year 4 provided that "funds available for payment to executive employees . . . who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay").

the "statutes in Years 1, 3, and 4, although phrased in terms of limiting funds, nevertheless were intended by Congress to block the increases the Adjustment Act otherwise would generate." *Will*, 449 U.S. at 223 (citation omitted).

The trial court missed the point when it emphasized that the appropriations acts at issue here restricted risk-corridors funding "from one specific account" and not "from other accounts." Appx33. There were no other accounts from which HHS could have made risk-corridors payments. The GAO identified only two potential funding sources—"payments in" and the lump-sum appropriation for program management—and did not suggest that risk-corridors payments could be made from any other account or from the Judgment Fund. Informed by the GAO's analysis, Congress appropriated "payments in" but barred HHS from using other funds in the program management account. Congress's intent was clear: it 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). Insurers cannot circumvent that "clear congressional mandate," *Highland Falls*, 48 F.3d at 1171, by demanding billions of dollars from the Judgment Fund.

4. The cases on which the trial court relied are inapposite.

This case bears no resemblance to the cases on which the trial court relied. *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), concerned

compensation that the government owed to helicopter companies for delivering the U.S. mail. The court held that "the particular wording of the [Federal Aviation] Act empowers the [Civil Aeronautics] Board to obligate the United States for the payment of an agreed subsidy in the absence or deficiency of a congressional appropriation." *Id.* at 804. And the court concluded that "in appropriating less than the amounts required to meet subsidy payments set by the Board," Congress "was well-aware that the Government would be legally obligated to pay the carriers whatever subsidies were set by the Board even if the appropriations were deficient," which was "evident in the floor debates during the period from 1961 through 1965." *Id.* at 808.

By contrast, section 1342 did not empower HHS to make or authorize obligations of the government in the absence or deficiency of appropriations. *See GAO Redbook* 2–55 ("Agencies may incur obligations only after Congress grants budget authority."). Moreover, unlike in *New York Airways*, nothing in the legislative history of the risk-corridors appropriations acts suggests that Congress regarded risk-corridors payments as a contractual obligation for which the government is legally obligated. *See also* Part II, *infra*.

Gibney v. United States, 114 Ct. Cl. 38 (1949), is equally far afield. The appropriations act in that case stated that "none of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services *other than as provided in* the Federal Employees Pay Act of 1945." *Id.* at 48-49 (emphasis added). Because "the 1945 act expressly state[d] . . . that it should

not prevent payments in accordance with the 1931 act," the court concluded that the italicized language allowed the plaintiffs to "be paid according to the 1931 act." *Id.* at 50. Although the trial court here declared that the provisions restricting funding for risk-corridors payments are "similar to the funding restriction in *Gibney*," Appx31, the risk-corridors provisions do not contain any language comparable to the language on which *Gibney* relied.

Nor does *United States v. Langston*, 118 U.S. 389 (1886), support plaintiff's claim. The substantive statute in *Langston* provided that the representative to Hayti "shall be entitled to a salary of $7,500 a year," and "the sum of $7,500" had in fact "been annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883." *Id.* at 390. For two subsequent years, Congress appropriated only $5,000 each for the salaries of various ministers including the minister to Hayti, but Congress omitted from these acts proposed language that would have repealed statutes allowing a larger salary. *Id.* at 391. While cautioning that the case was "not free from difficulty," the Supreme Court concluded that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years." *Id.* at 394.

Langston may have been a difficult case, but the risk-corridors cases are straightforward. In contrast to the substantive statute in *Langston*, section 1342 does

not make risk-corridors payments an "entitlement" of insurers. And in contrast to the appropriations act in *Langston*, Congress did not merely fail to appropriate sufficient funds for risk-corridors payments, but prohibited HHS from using funds other than collections for such payments.[10]

Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994), is wholly inapposite. In that case, this Court concluded that a specific limitation on the Secretary's use of Defense appropriations in administrative adjustments of shipbuilders' contract claims did not extend "to the payment of judgments to contractors after the courts have adjudicated their substantive rights." *Id.* at 1584. Based on the provision's legislative history, this Court determined that the limitation was enacted in response to "a specific event—the massive settlements of backlogged shipbuilding claims in 1977 by the U.S. Navy." *Id.* at 1582. This Court reasoned that "the purpose of the Act—essentially to minimize the quasi-conflict of the Navy Secretary—cannot apply to the CFC which plainly faces no such quasi-conflict" in adjudicating claims under the Contract Disputes Act. *Id.* at 1584.

Here, by contrast, the purpose of the appropriations restrictions was to ensure that the federal government would not pay out more than it collected from insurers

[10] Moreover, until the creation of the Judgment Fund in 1956, most money judgments against the United States required special appropriations from Congress for payment. *Richmond*, 496 U.S. at 424-25. Thus, cases such as *Langston* and *Gibney*, which predate the creation of the Judgment Fund, did not require payment without a congressional appropriation.

under the risk-corridors program. 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). That purpose would be directly undermined if trial courts remained free to award billions of dollars of additional risk-corridors payments from the federal Treasury.

D. The Parties Agree That HHS Is Not Owed Deference on the Appropriations-Law Questions Presented Here.

The trial court held that HHS is not entitled to deference on the question whether the government has a statutory obligation to make risk-corridors payments in the absence of appropriations. Appx25. The government agrees. As the trial court correctly noted, the government has not claimed that HHS is owed deference on that question. *Id.*

The government sought deference only with respect to a limited question regarding the *timing* of risk-corridors payments, discussed in Part III below. Appx25. The central issue on appeal, though, is not the timing but the *amount* of payments. And in section 1342, Congress reserved its full budget authority over the amount of risk-corridors payments and did not delegate any budget authority to HHS.

E. Plaintiff's Reliance-Based Arguments Fail as a Matter of Law.

For related reasons, plaintiff and other insurers cannot advance their position by claiming to have relied on HHS statements allegedly promising to make risk-corridors payments without regard to appropriations. Although HHS often explicitly

recognized that its ability to make such payments was subject to appropriations,[11] in at least one public statement HHS failed to do so.[12] HHS at various times also stated that the ACA "requires the Secretary to make full payments to issuers," Appx26 (quoting 79 Fed. Reg. 30,240, 30,260 (May 27, 2014)), and that HHS was recording unpaid amounts as "obligations of the United States Government for which full payment is required," *id.* (quoting Appx507).[13]

Although the trial court quoted these statements, the court correctly did not suggest that they could provide a basis for liability. It is well settled that an agency's statements cannot create a payment obligation that Congress did not authorize. In *Richmond*, the Supreme Court expressly rejected the contention that "erroneous oral and written advice given by a Government employee" may "entitle the claimant to a monetary payment not otherwise permitted by law." 496 U.S. at 415-16. The

[11] *See* 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) (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) (Appx546) (similar).

[12] *See* 78 Fed. Reg. 15,410, 15,493 (Mar. 11, 2013) (stating that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act").

[13] *See also* CMS, Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015) (Appx245) (stating that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligation of the United States Government for which full payment is required"); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx546) (similar).

Supreme Court held that "payments of money from the Federal Treasury are limited to those authorized by statute," and it "reverse[d] the contrary holding of" this Court. *Id.* at 416.

The Supreme Court emphasized that a contrary holding could "render the Appropriations Clause a nullity." *Richmond*, 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," which provides that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id.* at 424.

It is thus settled that "[a] regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." *GAO Redbook* 2–2. 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).

Thus, any reliance-based arguments that insurers advance are legally irrelevant. Moreover, given the agency's repeated recognition of the limits of its budget authority, any reliance would have been unreasonable and selective, at best. Indeed, in light of the Anti-Deficiency Act, any statement that HHS intended to remit payments necessarily presumed the availability of appropriations.

II. The Implied-In-Fact Contract Claim Is Dependent On The Meritless Statutory Claim And Also Fails On Independent Grounds.

The trial court ruled, in the alternative, that section 1342 created an implied-in-fact contract with insurers that was breached by HHS's failure to pay full amounts calculated under the statutory formula. Appx34-39. This ruling rests on the same incorrect legal premise as the court's statutory ruling, which is that section 1342 obligates the government to use taxpayer funds to make up shortfalls in collections. Because there is no such government obligation, the implied-in-fact contract claim fails on its own terms. Contrary to the trial court's premise, the government did not make "a promise in the risk corridors program that it has yet to fulfill." Appx39. In enacting section 1342, Congress directed HHS to establish and administer a risk-corridors program, but Congress reserved the full measure of its appropriations power by declining to grant any budget authority to HHS. Consistent with that limited delegation of authority, HHS established the risk-corridors program and has expended only those funds that Congress subsequently appropriated.

The implied-in-fact contract claim also fails on independent grounds. To allege a binding implied-in-fact contract, a plaintiff must allege facts demonstrating "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) 'actual authority' on the part of the government's representative to bind the government." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). Insurers cannot make the threshold showing that Congress intended

section 1342 to create contracts. Moreover, section 1342 does not vest HHS with any contracting authority, much less with authority to obligate the government for risk-corridors payments in excess of appropriations.

A. Section 1342 Did Not Create an Implied-In-Fact Contract.

The trial court's attempt to derive a contractual obligation from section 1342 runs afoul of settled legal principles. "'The Supreme Court 'has maintained 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, 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." *Id.* (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." *Id.* 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*, 316 F.3d at 1274. "[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.

Although the trial court ruled that section 1342 creates an implied-in-fact contract between the government and insurers, its reasoning is irreconcilable with the

governing precedents discussed above. The trial court 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." Appx35. That novel test would transform myriad statutory programs into contractual undertakings. Indeed, under the trial court'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.

The trial court did not discuss this Court's modern precedents, and the older cases on which it relied are 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.

B. HHS Did Not Purport to Commit the Government Contractually for Full Risk-Corridors Payments and, in Any Event, the Agency Had No Authority to Do So.

Nothing in HHS's regulations or statements purported to obligate the government contractually for risk-corridors payments. And in any event, the agency had no statutory authority to obligate the government for payments in excess of appropriations.

An implied-in-fact contract cannot arise without "actual authority" on the part of the government's representative to bind the government. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). "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 *Fed. 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.*; *accord Richmond*, 496 U.S. at 420 (quoting *Merrill*, 332 U.S. at 385).

"As far as government contracts are concerned," the 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, existing appropriation.'" *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996)). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005). Thus, in *Schism*, this Court held that promises of free lifetime medical care made by military recruiters did not bind the government because the "[t]he recruiters lacked actual authority, meaning the parties never formed a valid, binding contract." 316 F.3d at 1284. This Court emphasized that even the President, as Commander-in-Chief, "does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding." *Id.* at 1288.

The same principles foreclose plaintiff's claim. 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.

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, which implicated the trial court's jurisdiction. 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) (Appx229-230). 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."

HHS implemented that three-year payment framework when "payments in" proved insufficient to fund in full the "payments out" calculated under the statutory 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. Insurers have not yet submitted their data 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.

This three-year payment framework is reasonable and consistent with the ACA. 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.

In declaring the three-year payment framework unreasonable, the trial court emphasized that HHS could not refuse to make annual payment of funds that Congress had in fact appropriated for risk-corridors payments. Appx22. But that is not the question presented. Indeed, as the trial court 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 is 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. Congress retains its usual prerogative to appropriate additional funds for risk-corridors payments if it so chooses, and 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) (Appx546).

Because the agency's three-year framework is permissible and the time for making additional payments has not elapsed, it is impossible at this juncture to quantify an insurer's claims. Data from 2016 have not yet been submitted, and it is thus unknown whether and to what extent collections from 2016 will permit HHS to make additional risk-corridors payments for prior years or for 2016. And Congress of course remains free to appropriate additional amounts (beyond collections) for risk-corridors payments.

In light of the uncertain future events that could affect the existence and amount of insurers' claims, the government urged below that the risk-corridors claims are premature. The trial courts to address the issue concluded that this timing question presents a merits issue rather than an issue of jurisdiction. Because the insurers allege that section 1342 mandates full annual payments, we recognize that "the jurisdictional inquiry and merits inquiry may blend together under the Tucker Act." *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006). We also appreciate that the practical significance of this timing issue may be overtaken by the passage of time while the litigation is pending. Nonetheless, because the insurers' claims appear premature and the issue may be jurisdictional, we respectfully call the timing question to the attention of the Court.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,

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JULY 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]

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

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

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".

ADDENDUM: OPINION AND JUDGMENT

In the United States Court of Federal Claims

No. 16-649C

(Filed: February 9, 2017)

MODA HEALTH PLAN, INC., Plaintiff, v. THE UNITED STATES, Defendant.	Patient Protection and Affordable Care Act § 1342; Risk Corridors; Presently-Due Money Damages; Ripeness; Chevron Deference; Appropriation Restriction Limiting Statutory Obligation; Judgment Fund; Implied-in-Fact Contract Created by Statute.

Steven J. Rosenbaum, with whom were *Caroline M. Brown* and *Philip J. Peisch*, Covington & Burling LLP, Washington, D.C., for Plaintiff.

Phillip M. Seligman, with whom were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Ruth A. Harvey*, Director, and *Kirk T. Manhardt*, Deputy Director, as well as *Terrance A. Mebane*, *Charles E. Canter*, *Serena M. Orloff*, *Frances M. McLaughlin*, and *L. Misha Preheim*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for Defendant.

OPINION AND ORDER

WHEELER, Judge.

Plaintiff Moda Health Plan, Inc. ("Moda") offers health insurance plans through Health Benefit Exchanges created under the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010). To encourage insurers like Moda to offer health insurance on the exchanges, the ACA created a system of risk corridors under which the Government would pay insurers if they suffered losses during the first three years of the ACA's implementation (2014–2016). Conversely, insurers would pay the Government a percentage of any profits they received in each of these first three years. Moda suffered losses on its health insurance plans during 2014 and 2015. To date, the

Government has paid 12.6 percent of Moda's claimed risk corridors payment for 2014, and has made no risk corridors payments for 2015.

Moda brought this case in June 2016 to obtain full risk corridors payments for the 2014 and 2015 plan years—in total, over $214 million. Moda primarily alleges that the Government is liable for the payments under the ACA and its implementing regulations, and argues in the alternative that the ACA's risk corridors program created an implied-in-fact contract between insurers and the Government. The Government has moved to dismiss this case under Rules 12(b)(1) and 12(b)(6) of the Court of Federal Claims ("RCFC"). It argues that the court lacks jurisdiction over this case because risk corridor payments are not "presently due," and that the case is not ripe because the Government has until the end of 2017 to make full risk corridors payments. On the merits, the Government also argues mainly that (1) the risk corridors program is required to be budget-neutral, so the Government only owes risk corridors payments to the extent that profitable insurers pay money into the program; and (2) Congress's failure to appropriate money for risk corridors payments constitutes either a repeal of the Government's risk corridors obligations or an amendment that makes the program budget-neutral. The Government further argues that the ACA and its implementing regulations did not form a contract between insurers and the Government. Moda has cross-moved for partial summary judgment on the issue of liability.

The Court held oral argument on the cross-motions on January 13, 2017. After considering the parties' arguments in court and in their filings, the Court finds that the Government has unlawfully withheld risk corridors payments from Moda, and is therefore liable. The Court finds that the ACA requires annual payments to insurers, and that Congress did not design the risk corridors program to be budget-neutral. The Government is therefore liable for Moda's full risk corridors payments under the ACA. In the alternative, the Court finds that the ACA constituted an offer for a unilateral contract, and Moda accepted this offer by offering qualified health plans on the Health Benefit Exchanges. The Government's motion to dismiss is therefore DENIED, and Moda's cross-motion for partial summary judgment is GRANTED.

Background

Congress passed the ACA in 2010 in a dramatic overhaul of the nation's healthcare system. Central to the Act's infrastructure was a network of "Health Benefit Exchanges" ("Exchanges") on which insurers would offer Qualified Health Plans ("QHPs") to eligible purchasers. ACA §§ 1311, 1321, 42 U.S.C. §§ 18031, 18041 (2012). The ACA also drastically enlarged the pool of eligible insurance purchasers. It expanded Medicaid eligibility, ACA § 2001, and provided subsidies to low-income insurance purchasers, ACA §§ 1401, 1402; 42 C.F.R. § 155.305(f), (g). It also prohibited insurers from denying

coverage or setting increased premiums based on a purchaser's medical history. ACA § 1201(2)(A); 42 U.S.C. §§ 300gg-1–300gg-5 (2012).

In short, the ACA created a tectonic shift in the insurance market. It gave insurers like Moda access to a large new customer base, but insurers also had to comply with the ACA's rules if they wanted to offer QHPs on the Exchanges. To help insurers adjust to the Exchanges, Congress included three provisions in the ACA—commonly known as the "3Rs"—that reduced insurers' risk: reinsurance, risk corridors, and risk adjustment. See ACA §§ 1341–43. The second of these 3Rs, the risk corridors program, is the subject of this case.

A. Congress Creates the Risk Corridors Program

Section 1342 of the ACA sets out the risk corridors program. It reads as follows:

> (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.
>
> (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 [be] reduced by any risk adjustment and reinsurance payments received under section 1341 and 1343.

(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.

ACA § 1342 (codified at 42 U.S.C. § 18062 (2012)). Congress did not specifically appropriate funds for the risk corridors program in the ACA.

B. HHS Implements the Risk Corridors Program

1. HHS Promulgates a Final Rule

To "establish and administer" the risk corridors program in accordance with Section 1342, the Department of Health and Human Services ("HHS") subsequently began its rulemaking process. After a notice and comment period, HHS published its final rule on March 23, 2012. That rule states, in pertinent part:

> (a) General requirement. A QHP issuer must adhere to the requirements set by HHS in this subpart and in the annual HHS notice of benefit and payment parameters for the establishment and administration of a program of risk corridors for calendar years 2014, 2015, and 2016.
>
> (b) HHS payments to health insurance issuers. QHP issuers will receive payment from HHS in the following amounts, under the following circumstances:
>
> (1) When a QHP's allowable costs for any benefit year are more than 103 percent but not more than 108 percent of the target amount, HHS will pay the QHP issuer an amount equal to 50 percent of the allowable costs in excess of 103 percent of the target amount; and
>
> (2) When a QHP's allowable costs for any benefit year are more than 108 percent of the target amount, HHS will pay to the QHP issuer 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.
>
> (c) Health insurance issuers' remittance of charges. QHP issuers must remit charges to HHS in the following amounts, under the following circumstances:
>
> (1) If a QHP's allowable costs for any benefit year are less than 97 percent but not less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to 50 percent of the difference between 97 percent of the target amount and the allowable costs; and

> (2) When a QHP's allowable costs for any benefit year are less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the difference between 92 percent of the target amount and the allowable costs.

Risk Corridors Establishment and Payment Methodology, 77 Fed. Reg. 17251 (Mar. 23, 2012) (codified at 45 C.F.R. § 153.510). In another rule it released that day, HHS added, "A QHP issuer must submit to HHS data on the premiums earned with respect to each QHP that the issuer offers in the manner and timeframe set forth in the annual HHS notice of benefit and payment parameters." Risk Corridors Data Requirements, 77 Fed. Reg. 17251 (Mar. 23, 2012) (codified at 45 C.F.R. § 153.530(a)).

In the same publication, HHS also released an impact analysis of its proposed rules in which it cited the findings of the Congressional Budget Office. As HHS noted, the CBO did not score the risk corridors program in its projections:

> CBO estimated program payments and receipts for reinsurance and risk adjustment. . . . CBO did not score the impact of the risk corridors program, but assumed collections would equal payments to plans in the aggregate. The payments and receipts in risk adjustment and reinsurance are financial transfers between issuers and the entities running those programs.

Impact Analysis, 77 Fed. Reg. 17,220, 17,244 (Mar. 23, 2012).

Furthermore, HHS did not set deadlines in its new rules by which HHS needed to pay insurers, but it indicated that it was considering setting such deadlines:

> We suggested, for example, that a QHP issuer required to make a risk corridors payment may be required to remit charges within 30 days of receiving notice from HHS, and that HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers. We sought comment on these proposed payment deadlines in the preamble to the proposed rule.

Id. at 17,237.

2. CMS Promulgates an Additional Rule Governing the Schedule of the Risk Corridors Program

HHS had also delegated rulemaking authority for the risk corridors program to the Centers for Medicare and Medicaid Services ("CMS"), one of HHS's subsidiary agencies. See Delegation of Authorities, 76 Fed. Reg. 53,903-04 (Aug. 30, 2011). Pursuant to that authority, CMS on December 7, 2012 proposed adding language that would give the program an annual schedule. In its proposed rule's prefatory remarks, CMS noted that "[t]he temporary risk corridors program permits the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016. In this proposed rule, we propose . . . an annual schedule for the program and standards for data submissions." HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73,118, 73,121 (Dec. 7, 2012). To that end, CMS proposed a deadline of "July 31 of the year following the applicable benefit year" by which insurers would submit charges to HHS under the risk corridors program. Risk Corridors Establishment and Payment Methodology, 77 Fed Reg. 73,164 (proposed Dec. 7, 2012).

CMS's final rule, issued March 11, 2013, made two changes in HHS's earlier regulations. First, the rule added the following subsection to 45 C.F.R. § 153.510: "(d) Charge submission deadline. A QHP issuer must remit charges to HHS within 30 days after notification of such charges." Risk Corridors Establishment and Payment Methodology, 78 Fed. Reg. 15,531 (Mar. 11, 2013). It also amended Section 153.530 by adding the following subsection: "(d) Timeframes. For each benefit year, a QHP issuer must submit all information required under this section by July 31 of the year following the benefit year." Risk Corridors Data Requirements, 78 Fed. Reg. 15,531 (Mar. 11, 2013).

On the same day it released its rule governing the schedule of the risk corridors program, CMS also addressed several comments it had received about a potential situation in which HHS's required "payments out" could exceed profitable insurers' "payments in" to the program. CMS responded, "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the [ACA]." 78 Fed. Reg. at 15,473.

C. Moda Offers QHPs on the Exchanges, and HHS Announces the Transitional Policy

With the final risk corridors program rules in place, Moda submitted its QHPs and premium rates to state healthcare regulators in Alaska and Oregon. The state regulators approved the plans in July 2013. See App'x to Pl. Cross-Mot. ("Pl. App'x") at A7–22. As required by HHS regulations, Moda began selling QHPs to consumers on the Exchanges on October 1, 2013, with coverage effective January 1, 2014. See 45 C.F.R. § 155.410(b)–(c).

Shortly after Moda and other insurers began selling QHPs, it became apparent that some consumers' health insurance coverage would be terminated because it did not comply with the ACA. To minimize the hardship that these large-scale health insurance terminations would cause, HHS announced a transitional policy in November 2013.[1] Under the transitional policy, health plans in the individual or small group market that were in effect on October 1, 2013 were "not . . . considered to be out of compliance with the [ACA's] market reforms" for the 2014 plan year. Transitional Policy Letter at 1–2. This change was significant because consumers with non-compliant healthcare plans now were not required to purchase insurance on the Exchanges from insurers like Moda. These consumers tended to be healthier, so excluding them from the exchanges left a sicker (and therefore, potentially more expensive) group of potential insurance buyers.[2] HHS acknowledged the transitional policy's impact on insurers in its announcement, stating, "Though this transitional policy was not anticipated by health insurance issuers when setting rates for 2014, the risk corridor program should help ameliorate unanticipated changes in premium revenue. We intend to explore ways to modify the risk corridor program final rules to provide additional assistance." Transitional Policy Letter at 3. HHS has renewed the transitional policy twice, and it will now extend through October 1, 2017.[3]

Although HHS cited the risk corridors program as an ameliorating force in the Transitional Policy Letter, it noted in further rulemaking on March 11, 2014—three months after the QHPs Moda had sold were in effect—that it "intend[ed] to implement this program in a budget neutral manner." HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014). It elaborated:

> Our initial modeling suggests that th[e] adjustment for the transitional policy could increase the total risk corridors payment amount made by the Federal government and

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[1] See Ltr. From Gary Cohen, Dr., Ctr. For Consumer Info. and Ins. Oversight ("CCIIO"), to State Ins. Comm'rs (Nov. 14, 2013), https://www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf ("Transitional Policy Letter").

[2] See, e.g., HHS 2015 Health Policy Standards Fact Sheet (Mar. 5, 2014) ("Because issuers' premium estimates did not take the transitional policy into account, the transitional policy could potentially lead to unanticipated higher average claims costs for issuers of plans that comply with the 2014 market rules."), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2014-Fact-sheets-items/2014-03-05-2.html.

[3] See Gary Cohen, Dir., CCIIO, Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016, CMS (Mar. 5, 2014), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf; Kevin Counihan, Dir., CCIIO, Insurance Standards Bulletin Series – INFORMATION – Extension of Transitional Policy through Calendar Year 2017, CMS (Feb. 29, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/final-transition-bulletin-2-29-16.pdf

> decrease risk corridors receipts, resulting in an increase in payments. However, we estimate that even with this change, the risk corridors program is likely to be budget neutral or, will result in net revenue to the Federal government.

Id. at 13,829.

In adopting budget neutrality as a goal for the risk corridors program, HHS reversed the statement it had made exactly one year earlier. Compare 79 Fed. Reg. at 13,787 with 78 Fed. Reg. at 15,473. Furthermore, the CBO apparently disagreed with HHS's budget-neutral interpretation. In February 2014—before HHS's first statement on budget neutrality—the CBO released a report that addressed the ACA's effects on the federal budget.[4] Addressing the risk corridors program, the CBO noted:

> By law, risk adjustment payments and reinsurance payments will be offset by collections from health insurance plans of equal magnitudes; those collections will be recorded as revenues. As a result, those payments and collections can have no net effect on the budget deficit. In contrast, risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit. CBO projects that the government's risk corridor payments will be $8 billion over three years and that its collections will be $16 billion over that same period . . . .

CBO Report at 59. Thus, while the CBO believed the risk corridors program would result in a net gain of $8 billion for the Government, it specifically noted that the program—unlike the risk adjustment and reinsurance programs—was not budget-neutral.

D. HHS Grapples with Budget Neutrality

HHS, like CBO, expected that "payments in" to the risk corridors program would equal or exceed "payments out" of the program. Still, HHS realized that implementing the program in a budget-neutral manner at least hypothetically might result in a shortfall in risk

[4] See The Budget and Economic Outlook: 2014 to 2024 (Feb. 2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45010-outlook2014feb0.pdf. ("CBO Report").

corridors payments to insurers. On April 11, 2014, it released a memorandum to address such a situation in the form of questions and answers.[5] HHS stated, in pertinent part:

> Q1: In [prior rulemaking], HHS indicated that it intends to implement the risk corridors program in a budget neutral manner. What risk corridors payments will HHS make if risk corridors collections for a year are insufficient to fund risk corridors payments for the year, as calculated under the risk corridors formula?
>
> A1: We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall. Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.
>
> * * *
>
> Q2: What happens if risk corridors collections do not match risk corridors payments in the final year of risk corridors?
>
> A2: We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments over the life of the three-year program. However, we will establish in future guidance or rulemaking how we will calculate risk corridors payments if

[5] See HHS, Risk Corridors and Budget Neutrality (Apr. 11, 2014), https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf ("Risk Corridors Mem.").

> risk corridors collections (plus any excess collections held over from previous years) do not match risk corridors payments as calculated under the risk corridors formula for the final year of the program.
>
> * * *
>
> Q4: In the 2015 Payment Notice, HHS stated that it might adjust risk corridors parameters up or down in order to ensure budget neutrality. Will there be further adjustments to risk corridors in addition to those indicated in this FAQ?
>
> A4: HHS believes that the approach outlined in this FAQ is the most equitable and efficient approach to implement risk corridors in a budget neutral manner. However, we may also make adjustments to the program for benefit year 2016 as appropriate.

Risk Corridors Mem. at 1–2. Therefore, HHS acknowledged that it would make annual "payments out" to lossmaking QHP issuers, but it would reduce these payments pro rata if "payments in" did not equal its liability for "payments out."

HHS elaborated on its two-page memorandum in further notice and comment rulemaking on May 27, 2014. It acknowledged that it "intend[ed] to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually," despite several commenters' concerns that such an approach would violate the intent of Section 1342. Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014). Still, HHS recognized its obligation under the ACA to make full risk corridors payments:

> [W]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. That said, we appreciate that some commenters believe that there are uncertainties associated with rate setting, given their concerns that risk corridors collections may not be sufficient to fully fund risk corridors payments. In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations.

Id.

In sum, HHS decided in 2014 that it would administer the risk corridors program in a budget-neutral manner over the three-year life of the program. It considered a shortfall in "payments in" unlikely, and believed that "payments in" would balance "payments out" of the program. Importantly, it recognized that a shortfall in "payments in" would not vitiate its statutory duty to make full "payments out."

E. Congress Restricts Appropriations to the Risk Corridors Program

1. The GAO Opines on Risk Corridors Funding

On September 30, 2014, the Government Accountability Office ("GAO") responded to a request from Senator Jeff Sessions and Congressman Fred Upton. See GAO Op., Pl. App'x at A151. The two members of Congress had asked the GAO for an "opinion regarding the availability of appropriations" for risk corridors payments. Id. The GAO found that the CMS Program Management appropriation for fiscal year 2014 "would have been available" for risk corridors payments. Id. at A154. It further found that the "payments in" from profitable insurers under Section 1342(b)(2) of the ACA were available for risk corridors payments because they were "properly characterized as user fees." Id. at A156. In other words, profitable QHP issuers who paid into the program were "paying for the certainty that any potential losses related to [their] participation in the Exchanges [were] limited to a certain amount." Id. The letter also noted that HHS itself had not identified the CMS Program Management appropriation as available for risk corridors payments, but that it had identified the "user fees" paid under Section 1342(b)(2). Id. The GAO concluded that HHS could continue to access user fees from "payments in" in future plan years. Id. In contrast, it stated that Congress would need to include similar appropriations language in future CMS Program Management appropriations to allow HHS to continue to access the CMS Program Management account for risk corridors payments. Id.

2. Congress Restricts Appropriations for Risk Corridors Payments in 2015 and 2016

In fiscal years 2015 and 2016, Congress made the CMS Program Management appropriation unavailable for risk corridors payments. On December 16, 2014, Congress enacted the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, for the 2015 fiscal year. In the HHS appropriation, the Act states:

> 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 [the ACA] (relating to risk corridors).

Id. at div. G, tit. II, § 227, 128 Stat. at 2491. The Chairman of the House Committee of Appropriations explained this provision as follows:

> In 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. The agreement includes new bill language to prevent the CMS Program Management appropriation account from being used to support risk corridors payments.

160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014).

Congress included the exact same funding restriction in the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 at div. H, tit. II, § 225, 129 Stat. 2242, 2624. The 2016 Act also included a further funding provision related to risk corridors:

> 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 [the ACA] or Public Law 111-152 (or any amendment made by either such Public Law) or to supplant any other amounts within such account.

Id. at div. H, tit. II, § 226, 129 Stat. at 2625. To explain this language, the Senate Committee on Appropriations noted in a June 25, 2015 report that "[t]he Committee continues bill language requiring the administration to operate the Risk Corridor program in a budget neutral manner by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program." S. Rep. No. 114-74, at 12.

F. HHS Pays Insurers a Fraction of Their Risk Corridors Claims

On October 1, 2015, HHS announced that it owed insurers $2.87 billion in Risk Corridors payments for the 2014 plan year.[6] Insurers' "payments in" under Section 1342(b)(2), however, were only $362 million. 2014 Proration Notice at 1. HHS therefore adopted the pro rata payment methodology it had announced in April 2014, which meant that it would only pay insurers 12.6 percent of the amounts they were owed. Id. HHS owed Moda $1,686,016 in Alaska risk corridors payments, and $87,740,414.38 in Oregon risk corridors payments. With the proration, HHS paid Moda $212,739 for Alaska and $11,070,968 for Oregon. See Decl. of James Francesconi ¶ 20, Pl. App'x at A4.

HHS explained its proration policy to Robert Gootee, president and CEO of Moda, in a letter dated October 8, 2015. See Pl. App'x at A101–02. In the letter, the HHS representative noted:

> I wish to reiterate to you that [HHS] recognizes that the [ACA] requires the Secretary to make full payments to issuers, and that HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States Government for which full payment is required.

Id. at A102.

On September 9, 2016, HHS announced that it would not make any payments toward its 2015 risk corridors obligations, and would instead use all money it received from profitable plans in 2015 to offset its obligations for the 2014 plan year.[7] For the 2015 plan year, Moda submitted documentation showing that HHS owed it $136,253,654 in risk corridors payments ($31,531,143 for Alaska, $93,362,051 for Oregon, and $11,360,460 for Washington). Decl. of James Francesconi ¶ 21, Pl. App'x at A4. In its 2015 announcement, CMS once again noted that it recognized its liability to insurers for the full amount of its risk corridors obligations. 2015 Payment Notice at 1. To date, HHS has made no further payments to Moda under the risk corridors program. Moda claims it is

[6] See CMS, Risk Corridors Payment Proration Rate for 2014 (Oct. 1, 2015), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf ("2014 Proration Notice").

[7] See CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.pdf ("2015 Payment Notice").

owed $214,396,377 for the 2014 and 2015 plan years. Decl. of James Francesconi ¶ 22, Pl. App'x at A4.

It is important to note that the Government now disagrees with the statements HHS has made throughout the risk corridors program's implementation. HHS has repeatedly recognized its obligation to pay insurers the full amount of their owed risk corridors payments. At oral argument, however, the Government stated that HHS has no obligation to pay Moda the full amount it is owed if Congress fails to appropriate additional funds for the program. See Oral Arg. Tr. 25:6–12, Dkt. No. 22 (Jan. 13, 2017). In other words, the Government contends not merely that HHS had the authority to decide to administer the risk corridors program in a budget-neutral manner over the three-year life of the program, but that the program itself was budget-neutral from the beginning (or at least, that it became budget-neutral later).

G. Procedural History

Moda filed its complaint on June 1, 2016, seeking damages equal to the difference between the amount it received in risk corridors payments for 2014 and 2015 and the amount it should have received under Section 1342. See Compl. at 34, Dkt. No. 1. Moda's complaint asserts causes of action under the ACA and under an implied-in-fact contract theory. The Government moved to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6) on September 30, 2016. See Mot. to Dismiss, Dkt. No. 8. It argues first that this Court has no subject matter jurisdiction because (1) Moda's claims are not for "presently due" money damages, and (2) Moda's claims are not ripe. It further argues that Moda's claims do not state a claim upon which relief may be granted because (1) the ACA does not require HHS to make risk corridors payments in excess of amounts collected from profitable plans; (2) in the alternative, Congress permissibly made the risk corridors program budget-neutral through its subsequent appropriations riders; and (3) no contract existed between Moda and the Government.

In response to the Government's motion, Moda cross-moved for partial summary judgment as to the Government's liability. See Cross Mot., Dkt. No. 9 (filed Oct. 25, 2016). Before the Government could respond, Judge Charles Lettow of this Court issued a decision in a related case: Land of Lincoln Mutual Health Insurance Co. v. United States, 129 Fed. Cl. 81 (2016), appeal docketed, No. 17-1224 (Fed. Cir. Nov. 16, 2016). Judge Lettow's decision addressed all of the issues in this case and found in the Government's favor on the merits. The Government subsequently filed a motion to stay this case pending the outcome of the plaintiff's appeal in Land of Lincoln, and this Court denied the motion. See Order, Dkt. No. 12 (filed Nov. 28, 2016).

After the parties completed their briefing on the cross-motions, Judge Margaret Sweeney of this Court issued a decision in another related case: Health Republic Insurance

Co. v. United States, — Fed. Cl. —, 2017 WL 83818 (2017). In Health Republic, the Government had moved to dismiss solely under RCFC 12(b)(1). See id. at *1. Judge Sweeney held that the Court had subject matter jurisdiction over Health Republic's claims, see id. at *10–12, and that those claims were ripe because the Government owed insurers annual payments under Section 1342, see id. at *12–18. Though the parties here could not address the Health Republic decision in their briefs, they had the opportunity to do so at oral argument on January 13, 2017. Several other insurers have filed similar suits against the Government in this Court, but Health Republic remains the most recent risk corridors decision.

Discussion

A. The Court Has Subject-Matter Jurisdiction Over Moda's Claims

1. Standard of Review

When a defendant moves to dismiss a complaint under RCFC 12(b)(1), the Court must "assume all factual allegations to be true and . . . draw all reasonable inferences in plaintiff's favor." Wurst v. United States, 111 Fed. Cl. 683, 685 (2013) (quoting Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995)). Still, the plaintiff must support its jurisdictional allegations with "competent proof." McNutt v. Gen. Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936). Accordingly, a plaintiff must establish that jurisdiction exists "by a preponderance of the evidence." Wurst, 111 Fed. Cl. at 685 (citing Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988)).

2. The Court Has Subject-Matter Jurisdiction Over Moda's Statutory and Contractual Claims

As sovereign, the United States is immune from suit unless it consents to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941). The Tucker Act, 28 U.S.C. § 1491(a)(1) (2012), waives sovereign immunity for claims predicated on the Constitution, a federal statute or regulation, or a contract with the Government. Still, the Tucker Act does not create a separate right to money damages, so a plaintiff suing the Government for money damages must base its claims upon a separate source of law that does create such a right. See United States v. Testan, 424 U.S. 392, 398 (1976). Here, Moda first predicates its claims on Section 1342 of the ACA and its implementing regulations. In the alternative, it claims damages for the breach of an implied-in-fact contract with the United States.

Where a plaintiff bases its claims on a statutory or regulatory provision, courts generally find that the provision is money-mandating if it provides that the Government "shall" pay an amount of money. Greenlee Cnty., Ariz. v. United States, 487 F.3d 871,

877 (Fed. Cir. 2007). On their face, Section 1342 of the ACA and its implementing regulation, 45 C.F.R. § 153.510, require the Government to pay money to Moda and other similarly situated insurers. Section 1342 states that the Secretary of HHS "shall pay" specific amounts to insurers that offer QHPs, and the regulation states that "QHP issuers will receive payment from HHS." 45 C.F.R. § 153.510(b). Thus, these provisions are clearly money-mandating, and the Court has subject-matter jurisdiction over Moda's statutory claim.

Where a plaintiff claims that the Government has breached an implied-in-fact contract, it need only make a "non-frivolous *allegation* of a contract with the government." Mendez v. United States, 121 Fed. Cl. 370, 378 (2015) (quoting Engage Learning, Inc. v. Salazar, 660 F.3d 1346, 1353 (Fed. Cir. 2011)) (emphasis in original). To show jurisdiction, a plaintiff must therefore plead the elements of a contract with the Government: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the government's representative to bind the government." Fisher v. United States, 128 Fed. Cl. 780, 785 (2016) (quoting Biltmore Forest Broad. FM, Inc. v. United States, 555 F.3d 1375, 1380 (Fed. Cir. 2009) (citation omitted)).

Here, Moda alleges that the Government showed mutuality of intent to contract by establishing the risk corridors program, which offers monetary payments to insurers if they offer QHPs on the Exchanges. Moda further alleges that the parties exchanged consideration: Moda agreed to offer QHPs on the exchanges pursuant to HHS requirements in exchange for the Government's promise to make risk corridors payments if Moda's QHPs turned out to be unprofitable. Under Moda's theory, HHS extended an offer for a unilateral contract that insurers could accept by offering QHPs on the exchanges, and Moda accepted this offer when it began offering QHPs. Moda further alleges that the Secretary of HHS has the authority to bind the Government. Finally, Moda alleges that the Government breached its contract with Moda by paying it less than Moda is owed under the terms of the contract. At the jurisdictional stage, these non-frivolous allegations are all that is required. Therefore, the Court also has subject-matter jurisdiction over Moda's contract claim. Accord Land of Lincoln, 129 Fed. Cl. at 98–99.

The Government does not dispute that both of Moda's claims could conceivably create a right to money damages. Instead, the Government argues that any money the Government is required to pay Moda is not "presently due" because it is not due until the end of 2017. It claims that this "presently due" requirement bars the Court's jurisdiction over both of Moda's claims. See Mot. to Dismiss at 15–19. However, the Court finds Health Republic persuasive on this point. See 2017 WL 83818 at *11–12. The Health Republic court correctly construed the Government's "presently due" argument as a ripeness argument in disguise. Id. at *12. The cases from which the Government draws

the requirement go to whether equitable relief would be necessary before a court could award the plaintiff monetary relief. See id. at *11 (distinguishing the Government's cases). In such a situation, monetary damages are not "presently due" because their availability depends on prior equitable relief, so the plaintiff has not alleged a claim under a money-mandating source of law. See Todd v. United States, 386 F.3d 1091, 1093–94.

Obviously, the situation is quite different in this case. Here, the statutory and regulatory provisions Moda cites either require immediate monetary damages or they do not—no equitable relief is involved. The same is true of Moda's contract claims. Therefore, in rejecting the Government's "presently due" requirement, the Court merely finds, as a threshold matter, that it has subject-matter jurisdiction over Moda's statutory and contractual claims pursuant to the Tucker Act. Whether those claims are ripe is a separate question that deserves a more in-depth treatment.

B. Moda's Claims are Ripe

Even where a court has subject-matter jurisdiction over a plaintiff's claims, it cannot adjudicate those claims if they are not ripe for judicial review. Health Republic, 2017 WL 83818 at *12. Though Article III courts developed the ripeness doctrine, its principles are equally applicable in this Article I Court. See CW Gov't Travel, Inc. v. United States, 46 Fed. Cl. 554, 557–58 (2000). "Ripeness is a justiciability doctrine that prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Shinnecock Indian Nation v. United States, 782 F.3d 1345, 1348 (Fed. Cir. 2015) (citations and internal punctuation omitted). Therefore, "[a] court should dismiss a case for lack of ripeness when the case is abstract or hypothetical . . . . A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." Rothe Dev. Corp. v. Dep't of Def., 413 F.3d 1327, 1335 (Fed. Cir. 2005).

The Government argues that Section 1342 of the ACA does not set a risk corridors payment schedule. It follows that HHS has no responsibility to make annual risk corridors payments, but may exercise its discretion to decide when it will make payments over the three-year span of the program. The last plan year in the program—2016—just ended, and insurers are not required to submit claims for their 2016 plan years until mid-2017. Therefore, the Government argues, HHS has until the end of 2017 to pay Moda the full amount of its owed risk corridors payments, and Moda's claims are not yet ripe because payment is not yet due.[8]

[8] The Court notes, parenthetically, that this ripeness argument is at odds with the Government's argument on the merits of the case. In its ripeness argument, the Government argues that full payment is not due until the end of 2017. In its merits argument, it argues that full payment may never be due.

The Health Republic court dealt exhaustively with the Government's arguments in its comprehensive opinion. It found (1) that Section 1342 and its legislative history require annual risk corridors payments, and (2) in the alternative, that HHS also has interpreted Section 1342 to require annual payments. See Health Republic, 2017 WL 83818 at *12–18. Therefore, the insurer's claims were ripe for adjudication because two annual payments were due (for the 2014 and 2015 plan years). Id. at *18. This Court concurs in full with the Health Republic court's analysis, so there is no need to reinvent a perfectly good wheel. Still, for the sake of clarity, the Court will summarize that analysis here.

1. Section 1342 Requires Annual Risk Corridors Payments

The Health Republic court first turned to Section 1342 itself. See id. at *13–14. That Section does not set a specific payment schedule for the risk corridors program. Still, Section 1342 does offer clues as to Congress's intent. It directs the Secretary of HHS to "establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016," rather than a program for "calendar years 2014 through 2016." Id.; 18 U.S.C. § 18062(a). HHS also must calculate "payments in" and "payments out" of the program on the basis of insurers' costs in "any plan year," not over the life of the program. 18 U.S.C. § 18062(b)(1), (b)(2), (c)(1), (c)(2). These two references to distinct years in Section 1342, while not dispositive, tend to suggest that Congress wanted HHS to make annual payments. Health Republic, 2017 WL 83818 at *14.

Next, the Health Republic court noted that Section 1342 explicitly based the risk corridors program on the Medicare Part D program. See id. at *14; 18 U.S.C. § 18062(a). The statute that created the Medicare Part D program requires the Secretary of HHS to establish a risk corridor "[f]or each plan year," and sets out the requirements that govern each "risk corridor for a plan for a year." 42 U.S.C. § 1395w-115(e)(3)(A). In that statute's implementing regulations, HHS clearly sets out an annual payment schedule for the Medicare Part D risk corridors, and HHS in fact follows an annual payment schedule. See 42 C.F.R. § 423.336(c); Health Republic, 2017 WL 83818 at *14. As the Land of Lincoln court noted, the Medicare Part D statute and Section 1342 are worded differently, so the fact that Section 1342 is "based on" Medicare Part D does not necessarily mean that Section 1342 adopted Medicare Part D's annual payment structure. See Land of Lincoln, 129 Fed. Cl. at 105–06. Still, though the two statutes are worded differently, the differences do not mean Section 1342 rejected an annual payment structure. Indeed, one possible reading of Section 1342 is that the statute incorporates Medicare Part D's annual payment structure by reference. See, e.g., Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Therefore, although Congress's reference to Medicare Part

D is not dispositive, it at least tends to show that Congress "approved" of annual risk corridors payments. Health Republic, 2017 WL 83818 at *14.

Finally, the Health Republic court analyzed the function of the risk corridors program. Id. at *15. The program is part of the 3Rs trifecta: reinsurance, risk adjustment, and risk corridors. All three of these programs reflect "a concern that insurers' costs would detrimentally exceed the premiums collected." Id. (describing each of the three programs). The risk corridors program specifically helps avoid this problem by cushioning the initial financial blow to insurers who "underestimated their allowable costs and accordingly set their premiums too low." Id. As such, Congress was aware that if the 3Rs "did not provide for prompt compensation to insurers upon the calculation of amounts due, insurers might lack the resources to continue offering plans on the exchanges." Id. This incentive alone indicates that a three-year payment framework is unlikely, given that courts generally do not "interpret federal statutes to negate their own stated purposes." N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973); see also King v. Burwell, 135 S. Ct. 2480, 2496 (2015) ("Congress passed the [ACA] to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."). Furthermore, an insurer's risk corridors payment for a plan year is reduced if the insurer receives payments under the risk-adjustment or reinsurance programs for the same year. See 42 U.S.C. § 18062(c)(1)(B). Therefore, the function and structure of the risk corridors program as part of the ACA's 3Rs suggest that Congress envisioned annual risk corridors payments.

In sum, this Court concurs with the Health Republic court in finding that the above factors—the text of Section 1342, its reference to the Medicare Part D program, and the Section's function—together mean that Congress required HHS to make annual risk corridors payments.[9] Thus, Moda's injury is not abstract or hypothetical because the annual payment deadlines for the 2014 and 2015 plan years have passed, and Moda's claims are ripe.

2. HHS Also Interprets Section 1342 to Require Annual Risk Corridors Payments

Even if Section 1342 were ambiguous as to the risk corridors payment schedule, HHS's interpretation of the program shows that annual payments are required. Courts

[9] Even were the Court to accord less weight to these factors, this result would be reasonable because courts read statutes to preserve common law principles. See United States v. Texas, 507 U.S. 529, 534 (1993). Under the common law, a statute that does not set a specific payment timetable nevertheless requires parties to make payments within a reasonable period of time. See Eden Isle Marina, Inc. v. United States, 113 Fed. Cl. 372, 493 (2013); Goodman v. Praxair, Inc., 494 F.3d 458, 465 (4th Cir. 2007). Insurers offer their QHPs on a yearly schedule, so yearly payments are reasonable.

defer to an agency's interpretation of ambiguous provisions in a governing statute if that interpretation is reasonable. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). This standard applies "if Congress either leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill, or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred authority and other statutory circumstances.'" Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1361 (Fed. Cir. 2005) (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)). Finally, courts "must give substantial deference to an agency's interpretation of its own regulations." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (citation omitted).

In Section 1342, Congress delegated to the Secretary of HHS the authority to "establish and administer a program of risk corridors." 42 U.S.C. § 18062(a). So, as Health Republic noted, if Section 1342 is ambiguous as to the risk corridors payment schedule, its delegation of authority to HHS unquestionably gave HHS the power to create that schedule. See 2017 WL 83818 at *16. Under its statutory grant of authority, HHS promulgated final regulations that govern the risk corridors program. Those rules also are ambiguous as to the program's payment schedule, so the Court therefore must analyze and give deference to HHS's interpretation of its own rules.

Before going on, a clarification is necessary. There are two similar but conceptually distinct questions in this case: (1) whether *annual* payments are required, and (2) whether *full* annual payments are required. The former is a ripeness question, and the latter goes to the merits of this case. There has been considerable confusion on this distinction. The payment schedule alone—i.e., whether *annual* payments are required—is relevant to the Court's ripeness analysis because it alone determines whether Moda's injury is fixed or hypothetical. If annual payments are not required, then payment for the entire risk corridors program would only be due at the end of the program—i.e., sometime in 2017. In that case, it would not matter whether the risk corridors program were budget-neutral; Moda's claims would not be ripe because the Government could conceivably still pay Moda for the 2014 and 2015 plan years. In other words, its injury would be hypothetical. If, as the Court finds, annual payments *are* required, then the case is ripe (regardless of whether full payment was required every year) because the 2014 and 2015 payment deadlines have passed. In the latter case, Moda's damages, if any, for each of the two years are fixed, and any further payments HHS makes to Moda for those years would merely mitigate those damages.[10]

[10] This point is easily overlooked. For example, Land of Lincoln analyzed the risk corridors payment schedule as a merits issue, reasoning that "[t]he government's argument addresses the merits of whether and when [Plaintiff] is entitled to recover money under the statute. . . ." 129 Fed. Cl. at 98. For ripeness purposes, separating the "when" from the "whether" is a necessary step.

The Government argues that HHS's interpretation "established a three-year payment framework . . . with final payment not due until the final payment cycle in 2017." See Mot. to Dismiss at 17. This argument conflates the merits question with the ripeness question. It is true 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." 79 Fed. Reg. at 30,260. In this and similar statements, however, HHS merely announced that it intended to pay out only what it took in from profitable QHPs over the program's three years. In other words, HHS announced that it would not make *full* annual payments. This statement goes to the required quantum of HHS's annual payments—a merits issue the Court analyzes below—but it is, at most, ambiguous as to HHS's actual payment schedule.

So, the Court turns to HHS's interpretation of its payment schedule under its promulgated regulations. To that end, it is significant that HHS (through CMS) indicated repeatedly that it would make payments every year. See 77 Fed. Reg. at 17,237 (Mar. 23, 2012) ("QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers."); 77 Fed. Reg. 73,121 (Dec. 7, 2012) ("[W]e propose . . . an annual schedule for the program and standards for data submissions."); Risk Corridors Mem. at 1 ("[I]f risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall."). Furthermore, HHS in fact calculated payments on an annual basis. For the 2014 plan year, HHS actually paid insurers, albeit in prorated amounts. HHS did not make payments for the 2015 plan year, but its notice to insurers shows that it calculated the amount it owed insurers for that plan year and recognized its obligation to pay that amount. See 2015 Payment Notice. Importantly, none of HHS's pronouncements or actions indicate that it believed it could "choose not to make annual risk corridors payments to insurers" if it had the funds to make payments. Health Republic, 2017 WL 83818 at *16. Instead, HHS followed a rigid annual schedule in practice as well as in interpretation. In sum, the Court finds that HHS interpreted Section 1342 and its own regulations as requiring annual risk corridors payments to insurers.

Both Section 1342 and HHS's interpretation of Section 1342 require annual payments to insurers. Moda's injury is "not abstract or hypothetical, and resolution of the issues in this case "does not rest upon contingent events." Id. As a result, the Court can quite easily determine whether or not full risk corridors payments were required for the 2014 and 2015 plan years. Moda's claims are therefore ripe for adjudication.

C. Moda is Entitled to Partial Summary Judgment on the Issue of Liability

The parties have filed cross-motions that address the merits of this case. First, the Government has moved to dismiss this case under RCFC 12(b)(6) for failure to state a claim upon which relief may be granted. Under that Rule, a court should dismiss a

plaintiff's claims "when the facts asserted by the [plaintiff] do not entitle [it] to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). The Court also must construe allegations in the complaint favorably to the plaintiff. See Extreme Coatings, Inc. v. United States, 109 Fed. Cl. 450, 453 (2013). Still, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted)).

Moda has cross-moved for partial summary judgment on the issue of liability. A party is entitled to summary judgment under RCFC 56(a) if the party can show "that there is no genuine dispute as to any material fact and the [party] is entitled to judgment as a matter of law." A court may dispose of statutory interpretation issues and "other matters of law" on a motion for summary judgment. Santa Fe Pac. R. Co. v. United States, 294 F.3d 1336, 1340 (Fed. Cir. 2002). The cross motions essentially debate two legal questions: (1) whether Section 1342 requires full annual payments to insurers, and (2) whether HHS entered into and breached a contract with Moda. The Court will address each issue in turn.

1. Section 1342 Requires Full Annual Payments to Insurers

The Court already has found that HHS was required to make annual risk corridors payments, but determining the amount HHS owed Moda in each annual payment is a merits issue that requires further analysis. Moda argues that the formula set out in Section 1342 itself requires full annual payments. The Government responds with two main arguments. First, it maintains that Congress designed the risk corridors program to be budget-neutral from the beginning. This interpretation would mean that "payments out" of the program to unprofitable insurers would be entirely contingent on the amount of "payments in" to the program from profitable insurers. Second, the Government argues that Congress subsequently affirmed its intent to make the program budget-neutral by limiting the program's funding in appropriations riders—or, alternatively, that these appropriations riders amended the program to make it budget-neutral.

a. Congress did not Design Section 1342 to be Budget-Neutral

The Court finds that Section 1342 is not budget-neutral on its face. The Section states that the Secretary of HHS "shall pay" specific amounts of money to insurance plans. See 42 U.S.C. § 18062(b)(1). The amount of money the Secretary must pay is tied to each respective plan's ratio of costs to premiums collected, and the Section gives the Secretary no discretion to increase or reduce this amount. Id.; § 18062(c). It is true that Section 1342(a) gives the Secretary the authority to "establish and administer" the risk corridors program, but the later directive that the Secretary "shall pay" unprofitable plans these specific amounts of money is unambiguous and overrides any discretion the Secretary

otherwise could have in making "payments out" under the program. Finally, there is no language of any kind in Section 1342 that makes "payments out" of the risk corridors program contingent on "payments in" to the program. Instead, Section 1342 simply directs the Secretary of HHS to make full "payments out." Therefore, full payments out he must make.

To avoid this obvious conclusion, the Government first points to the preexisting risk corridors program under Medicare Part D. That program's authorizing statute 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). Still, while including such language in Section 1342 may have shortened this opinion considerably, excluding it does not make a statute budget-neutral. In fact, other differences between the two statutes suggest that this was not Congress's intent. For example, the Medicare Part D statute provides only that the Government "shall establish a risk corridor," not that the Secretary of HHS "shall pay" specific amounts to insurers. The stronger payment language in Section 1342 obligates the Secretary to make payments and removes his discretion, so a further payment directive to the Secretary is unnecessary.

The Government next notes that the CBO did not score the risk corridors program when assessing the financial impact of that program, and argues that this lack of scoring means that Congress believed the program would be budget-neutral when it passed the ACA. See, e.g., Land of Lincoln, 129 Fed. Cl. at 104 (noting that Congress "explicitly relied on the CBO's findings" when it enacted the ACA). However, the Court believes the CBO's failure to speak on Section 1342's budgetary impact was simply a failure to speak. After all, the CBO did score the reinsurance and risk-adjustment programs, both of which are explicitly required to be budget-neutral under their governing regulations.[11] Therefore, one would assume that it would not be particularly difficult for the CBO to simply score the risk corridors program alongside its budget-neutral sister programs if it expected the program to be budget-neutral. Instead, the CBO initially kept silent on the risk corridors program's budgetary impact.

Furthermore, the only time the CBO expressly addressed Section 1342's budgetary impact occurred after Congress had passed the ACA. At that time, the CBO baldly stated

[11] See 45 C.F.R. § 153.230(d) (requiring the reinsurance program to be budget-neutral); 78 Fed. Reg. at 15,441 (describing the risk-adjustment program as budget-neutral). Note that HHS regulations require these two programs to be budget-neutral, not their governing statutes. A key difference between the risk corridors program and its two sister programs is that nothing in the other programs' governing statutes requires the Secretary of HHS to pay insurers specific amounts. See 42 U.S.C. §§ 18061, 18063. So, it is fair to say that Congress gave HHS discretion to determine whether the risk-adjustment and reinsurance programs would be budget-neutral.

that "risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit." CBO Report at 59. In sum, the CBO's initial failure to score the risk corridors program despite scoring other budget-neutral programs, together with its later statement, suggests that the CBO may never have believed the risk corridors program to be budget-neutral.

Second, the Government argues that Congress did not appropriate additional funds to the risk corridors program specifically, so "payments in" to the program must always have been the only source of such funds available for risk corridors payments. It cites the September 30, 2014 GAO Opinion, which notes that "Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)." Pl. App'x at A153. However, if one continues reading the GAO opinion, the GAO actually found two sources of funding for risk corridors payments: the 2014 CMS Program Management appropriation and "payments in" from profitable plans (which it characterized as "user fees"). Id. at A157.[12] The fiscal year 2014 CMS Program Management appropriation was $3.6 billion—more than enough to cover HHS's 2014 risk corridors obligations to Moda. See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 div. H, tit. II, 128 Stat. 5, 374 (2014). HHS chose not to use the Program Management appropriation for 2014 risk corridors payments, but that appropriation was available for such payments. Therefore, Congress did not restrict the funding for the risk corridors program to the "payments in" under the program.

Finally, though the Court finds the unambiguous language of Section 1342 dispositive, it is worth noting that HHS itself did not believe the risk corridors program to be budget-neutral from the beginning. The Land of Lincoln court appeared to be under the opposite impression. In other words, the court believed HHS's view to be that HHS would never owe money to lossmaking insurers beyond the amount of "payments in" from profitable insurers. See Land of Lincoln, 129 Fed. Cl. at 106–07. The court even gave Chevron deference to HHS's supposed view. Id. This analysis is puzzling. In Land of Lincoln and in this case, the Government has only ever argued that Chevron deference is appropriate when considering HHS's three-year payment framework (a ripeness issue). See Land of Lincoln Oral Arg. Tr., App'x to Pl. Reply Br. at A175, Dkt. No. 18-1 (filed Dec. 22, 2016) ("We are asking for deference to the three-year program as it relates to when payments are due on the statute. [W]here we say that the statute doesn't require payments beyond collections, we are not asking for deference on that. I don't think that's an appropriate question for deference."); see also Def. Reply Br. at 12 n.7 (noting, in a

[12] The Government implausibly argues that only "user fees" were available for risk corridors payments because HHS only began making payments during fiscal year 2015. See Def. Reply Br. at 16–17, Dkt. No. 14 (filed Dec. 9, 2016). The GAO's opinion flatly contradicts this argument. It finds that the 2014 CMS Program Management Appropriation "would have been available" for 2014 risk corridors payments. Pl. App'x at A157. The fact that HHS decided not to use the appropriation for that purpose is immaterial.

footnote, that the Court "alternatively" could follow Land of Lincoln's approach). The Government does not seriously argue that deference is appropriate on the merits issue of HHS's required payment amounts. Indeed, the gravamen of the Government's argument is that *Congress* intended Section 1342 to be budget-neutral, not that HHS understood the statute to be budget-neutral. See Def. Reply Br. at 12 ("Count I Fails to State a Claim Because Congress Intended That Risk Corridors Payments Be Limited to Collections.").

It is easy to see why the Government has not argued that HHS's interpretation of its payment obligations deserves deference: it would undermine the Government's position. HHS has consistently recognized that Section 1342 is not budget-neutral. As it formulated its regulations, HHS even stated, "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the [ACA]." 78 Fed. Reg. at 15,473. Though it later changed course and averred that it "intend[ed] to implement this program in a budget neutral manner," see 79 Fed. Reg. 13,787, its later statements show that it clearly recognized an obligation to provide full risk corridors payments to insurers at some point. See 79 Fed. Reg. at 30,260 (May 27, 2014) ("HHS recognizes that the [ACA] requires the Secretary to make full payments to issuers. . . . HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations."); Robert G. Gootee, Ltr., Pl. App'x at A102 (Oct. 8, 2015) (" [HHS] recognizes that the [ACA] requires the Secretary to make full payments to issuers, and . . . HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligations of the United States Government for which full payment is required"); 2015 Payment Notice at 1 (Sept. 9, 2016) ("HHS recognizes that the [ACA] requires the Secretary to make full payments to issuers."). Indeed, HHS has put off answering questions as to what it plans to do if "payments in" for 2016 do not cover its full outstanding obligations to insurers—a situation that, barring a miracle, seems certain to occur. See 2015 Payment Notice at 1 ("[I]n the event of a shortfall for the 2016 benefit year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments."). To be sure, HHS has not been able to pay insurers because it does not have the funds to do so. Still, it has never conflated its inability to pay with the lack of an obligation to pay.

To summarize, the Court finds that Congress did not initially make Section 1342 budget-neutral. Therefore, Section 1342 only could have become budget-neutral through later repeal or amendment.

b. Later Appropriations Riders did not Vitiate HHS's Statutory Duty to Make Risk Corridors Payments

The Government argues that even if funds were initially available for risk corridors payments, Congress's subsequent appropriations riders restricted these funds' availability and made Section 1342 budget-neutral.[13] As noted above, the GAO informed Congress in 2014 that two sources of funding existed for risk corridors payments: "payments in" to the program and the 2014 CMS Program Management appropriation. Congress passed appropriations riders for the fiscal years 2015 and 2016 that placed the CMS Program Management appropriation off-limits for risk corridors payments. In both years, the text of the restriction was as follows:

> 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 [the ACA] (relating to risk corridors).

128 Stat. at 2491; 129 Stat. at 2624. As noted above, the 2016 Act had another funding restriction:

> 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

[13] The Court notes parenthetically that, under the GAO's logic, certain CMS Program Management appropriation funds probably were available for 2015 risk corridors payments. Congress passed three continuing resolutions in the first two-and-a-half months of fiscal year 2015. See Continuing Appropriations Resolution, 2015, Pub. L. 113-164, § 101(a)(8), 128 Stat. 1867, 1867 (2014); Joint Resolution, Pub. L. 113-202, 128 Stat. 2069 (2014); Joint Resolution, Pub. L. 113-203, 128 Stat. 2070 (2014). The previously-enacted 2014 appropriations statute had provided $3.6 billion to the CMS Program Management account, and the continuing resolutions continued funding this account "at a rate of operations as provided in the applicable appropriations acts for fiscal year 2014," with a small decrease of about 0.6 percent. 128 Stat. at 1867–68. Therefore, the resolutions allocated roughly $750 million of unrestricted appropriations to the CMS Program Management account for the first two-and-a-half months of fiscal year 2015. Though Congress later restricted the use of the CMS Program Management appropriation, the GAO's logic means that this $750 million likely was available for 2015 risk corridors payments. The fact that this sum would not have been enough to satisfy other insurers' risk corridors claims is immaterial for the purposes of this case. See Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2189-90 (2012).

> 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 [the ACA] or Public Law 111-152 (or any amendment made by either such Public Law) or to supplant any other amounts within such account.

Id. at 2625.

The Government argues that these funding limitations either show that Congress initially meant for the risk corridors program to be budget-neutral or that they constitute a later amendment that made the program budget-neutral. The Court already has found that Section 1342 was not initially budget-neutral.[14] Therefore, the remaining question is whether Congress's later appropriations riders made it budget-neutral.

Generally, a funding restriction in an appropriations law does not amend or repeal a substantive law that imposes payment obligations on the Government. N.Y. Airways, Inc. v. United States, 369 F.2d 743, 749 (Ct. Cl. 1966). Further, "[r]epeals by implication are not favored." United States v. Langston, 118 U.S. 389, 393 (1886). Courts have applied this approach for practical reasons. Repealing an obligation of the United States is a serious matter, and burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might precipitate. See Gibney v. United States, 114 Ct. Cl. 38, 51 (1949). So, "the uniform rule was that if [the restriction] were simply a withholding of funds and not a legislative provision under the guise of a withholding of funds[,] it had no effect whatever on the legal obligation." Id.

Therefore, for an appropriations law to affect the underlying legal obligation, "[t]he intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest." N.Y. Airways, 369 F.2d at 749. In general, to determine whether Congressional intent was clearly manifest, courts look first to the language of the appropriations law. See, e.g., id. at 750 ("If the purpose of the limiting language in the appropriation under consideration . . . was to suspend or amend section 406(c) of the Federal Aviation Act of 1958, it was not so expressed by statute."). They then look to ancillary considerations, such as the legislative history of the appropriations

[14] Furthermore, given the vagaries of the political system, it would be illogical to divine the intent of a former Congress from the actions of a later one. See, e.g., United States v. United Mine Workers of Am., 330 U.S. 258, 281-82 (1947) ("We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932."). If anything, this is even more true in the context of the ACA, which has been the subject of a highly public political battle since its inception.

law, although any congressional intent expressed therein must be "clear and uncontradicted." Id.

Several courts have refused to find that appropriations laws amended or repealed the Government's substantive obligations, while others have found the opposite when confronted with different statutes. To determine which category applies to the appropriations riders in this case, it therefore is necessary to examine the features courts look for in appropriations laws that result in repeal or amendment.

Four relevant cases have refused to find a repeal or amendment. For example, in Langston, the Supreme Court analyzed the Government's failure to appropriate funds to pay the U.S. Ambassador to Haiti his full salary. 118 U.S. at 393. His salary was $7,500, but Congress appropriated only $5,000 to pay him for two subsequent years. Id. The Supreme Court reasoned that the appropriations acts did not "contain[] any language to the effect that such sum shall be 'in full compensation' for those years; nor was there in either of them an appropriation of money 'for additional pay,' from which it might be inferred that congress intended to repeal the [salary] act." Id. The Court therefore found "no words that expressly, or by clear implication, modified or repealed the previous law." Id. at 394.

The Court of Claims (the predecessor to the Federal Circuit) subsequently decided Gibney. In Gibney, the Federal Employees Pay Act of 1946 provided that "employees should be paid, for work beyond an eight-hour day on ordinary days, one-half day's additional pay for each two hours or major fraction thereof, and, for work on a Sunday or holiday, two additional days' pay." 114 Ct. Cl. at 48. In a later appropriations act, Congress included the following language:

> *Provided*, That none of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services other than as provided in the Federal Employees Pay Act of 1945 (Public Law 106, 79th Cong., 1st sess.), and the Federal Employees Pay Act of 1946 (Public Law 390, 79th Cong., 2d sess.).

Id. at 44. The Court of Claims found that this language "was a mere limitation on the expenditure of a particular fund (the funds appropriated to the Immigration and Naturalization Service) and had no other effect." Id. at 50.

The Court of Claims further developed its jurisprudence on the substantive effects of appropriations laws in New York Airways. In that case, the Civil Aeronautics Board set a monthly subsidy for helicopter companies, as authorized by statute. 369 F.2d at 744. In an appropriations law, Congress included the following provision:

> For payments to air carriers of so much of the compensation fixed and determined by the Civil Aeronautics Board under section 406 of the Federal Aviation Act of 1958 (49 U.S.C. 1376), as is payable by the Board, including not to exceed $3,358,000 for subsidy for helicopter operations during the current fiscal year, $82,500,000, to remain available until expended.

Id. at 812. The subsidy Congress granted was less than the amount the Board had fixed pursuant to its authorizing statute. Id. at 810–11. The Court of Claims found that the House of Representatives had included this provision "to gradually eliminate helicopter subsidies from appropriations." Id. at 814. Nevertheless, "key congressmen who spoke on the subject fully understood that the commitment to pay subsidy compensation decreed by the Board for helicopter carriers was a binding obligation of the Government in the courts even in the failure of Congress to appropriate the necessary funds." Id. at 815. Therefore, the appropriations law did not amend or repeal the Government's substantive obligation. Id. at 815, 818.

Finally, in District of Columbia v. United States, 67 Fed. Cl. 292 (2005), the Government argued that Congress's failure to appropriate funds to HHS for statutorily required building renovations necessarily narrowed the Government's liability for those renovations. Id. at 346. The court disagreed, finding that Congress's failure to appropriate sufficient funds did "not mean that the government's obligation ha[d] been fulfilled under the . . . Act, or that the [Plaintiff] is precluded from seeking additional funds owed to it." Id. at 335. Citing New York Airways, the court noted that "an appropriation with limited funding is not assumed to amend substantive legislation creating a greater obligation." Id. (citing N.Y. Airways, 177 F.2d at 749). Though the Government cited some legislative history that suggested an intent to partially defund the renovations, this history was not "unambiguous," so the court did not accord it much weight. Id.

In contrast, two other relevant decisions have analyzed appropriations laws that suspended or repealed previous statutory obligations. First, in United States v. Dickerson, the Supreme Court confronted a situation where a statute promised an enlistment allowance to honorably discharged soldiers who reenlisted. 310 U.S. 554, 554–55 (1940). Congress passed an appropriations law that stated, in pertinent part:

> [N]o part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment of any enlistment allowance for reenlistments made during the fiscal year ending June 30, 1939,

> notwithstanding the applicable portions of [the act authorizing reenlistment payments].

Id. at 555 (internal punctuation omitted). The Court extensively analyzed the legislative history of the appropriations law. Id. at 555–62. It found "that Congress intended the legislation . . . as a continuation of the suspension enacted in each of the four preceding years." Id. at 561. Therefore, the plaintiff could not recover. Id. at 562.

Next, in United States v. Will, 449 U.S. 200 (1980), several appropriations laws purported to eliminate a pay raise for federal judges. Specifically, the first of the appropriations statutes the Court analyzed provided that "[n]o part of the funds appropriated in this Act or any other Act shall be used to pay the salary" of these judges at a rate that exceeded the previous salary rate. Id. at 205–06. The second, enacted for the next fiscal year, stated that the raises "shall not take effect" that year. Id. at 206–07. For the next fiscal year, another statute provided that "[n]o part of the funds appropriated for the fiscal year . . . by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position" in the judicial branch that exceeded the preexisting rate. Finally, in the fourth consecutive fiscal year, another statute stated that funds would not be appropriated to pay any judges "in excess of [a] 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." Id. at 208.

Faced with such unequivocal statutory language, the Court found that Congress had intended to repeal or postpone the judges' pay increases in each of these fiscal years. Id. at 222. The legislative history confirmed this intent, and even referred to these statutes variously as "pay freezes" or "caps." Id. at 223–24. Therefore, "[t]hese passages indicate[d] clearly that Congress intended to rescind these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable." Id. at 224.[15]

This case is more like the first group of cases than the second. First, the statutory language supports this conclusion. The appropriations riders at issue here are the most similar to the funding restriction in Gibney. As in Gibney, the appropriations riders limit only the use of funds appropriated to a specific account: the "Centers for Medicare and Medicaid Services-Program Management" account. 128 Stat. at 2491; 129 Stat. at 2624. Furthermore, unlike in Dickerson and Will, the riders do not expand the limitation to other sources of funds. In Dickerson, the appropriations act stated that no appropriation

[15] The Government also cites a Tenth Circuit case with similar appropriations language. In Republic Airlines, Inc. v. U.S. Department of Transportation, 849 F.2d 1315 (10th Cir. 1988), a statute stated that, "notwithstanding any other provision of law," funds payable to air carriers under a certain statute "shall not exceed" $14 million. Id. at 1317–18. The court held that this modified the substantive statutory obligation. Id. at 1322.

"contained in this or any other Act" for the current fiscal year would be used to make reeinlistment payments, "notwithstanding" the law authorizing such payments. Similarly, in Will, no funds "appropriated in this Act or any other Act" were to be used for the judges' pay raises. In fact, one of the statutes in Will stated that the raises "shall not take effect" during one fiscal year. In contrast, the appropriations riders at issue here state only that "[n]one of the funds made available by this Act" from specific funds "to the 'Centers for Medicare and Medicaid Services-Program Management' account, may be used for payments." Thus, the limitation in this case singles out a specific use for a specific account. It does not, unlike Dickerson and Will, bar any appropriated funds from being used for a given purpose.

The difference in wording between the appropriations riders here and the appropriations restrictions in Dickerson and Will is not merely semantic or historical. In fact, the very same appropriations laws in which the CMS Program Management restriction appears contain appropriations restrictions that are virtually identical to those in Dickerson and Will. Consider, for example, Section 753 of the appropriations law for fiscal year 2015:

> None of the funds made available by this Act or any other Act may be used to exclude or restrict, or to pay the salaries and expenses of personnel to exclude or restrict, the eligibility of any variety of fresh, whole, or cut vegetables (except for vegetables with added sugars, fats, or oils) from being provided under the Special Supplemental Nutrition Program for Women, Infants, and Children under section 17 of the Child Nutrition Act of 1966 . . . .

128 Stat. at 2172. The presence of this language in the 2015 appropriations law and in the Dickerson and Will statutes suggests that Congress has consistently used similar phrases whenever it wishes to block a statutory obligation in an appropriations law. In other words, Congress knows that this phrase represents a silver bullet to whatever statutory obligation it targets. With that it mind, it is telling that Congress did not use the "this act or any other act" language in the CMS Program Management restriction. The omission suggests that Congress meant only to prevent HHS from using the CMS Program Management account for risk corridors payments, not that it meant to bar all other sources of funding for such payments.

The legislative history also supports this conclusion. In the fiscal year 2015 appropriations rider, Congress indicated in an Explanatory Statement that the funding restriction was intended "to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." 160 Cong. Rec. H9838. Similarly,

in the fiscal year 2016 appropriations rider, the Senate Committee Report stated that the rider "requir[es] the administration to operate the Risk Corridor program in a budget neutral manner by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program. S. Rep. No. 114-74, at 12. Both of these statements indicate that Congress knowingly cut off funding for the risk corridors program from one specific account—the CMS Program Management account—and from that account only. It did not believe it was depriving the risk corridors program of funding from other accounts. As the Senate Committee Report notes, cutting off this source of funding for risk corridors payments forced the administration to operate the program in a budget-neutral manner. It did not reduce the obligation of the Government as a whole.[16]

Importantly, this Court is not the administration, and its judgments are not paid out of the CMS Program Management account. The Government argues that limiting the availability of the CMS Program Management account meant that the Government was only obligated to make "payments out" equal to the "payments in" from profitable QHPs. Other than these "payments in," the logic goes, there was no appropriation left that could cover the excess cost of the "payments out." After all, "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. art I, sec. 8, cl. 7.

However, there is an appropriation here. The Judgment Fund pays plaintiffs who prevail against the Government in this Court, and it constitutes a separate Congressional appropriation. See 28 U.S.C. § 2517(a); 31 U.S.C. § 1304(a)(3)(A). Its authorizing statute was "intended to establish a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment." Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994). The Federal Circuit has clarified that the Judgment Fund is even available where an agency has refused to pay the plaintiff because Congress has limited the funds from which the agency may draw. In Bath Iron Works, Congress had passed a statute that limited "payment of appropriated Defense Department funds for administrative adjustments by a Defense Department Service Secretary." Id. The Federal Circuit reasoned that the appropriations statute did not purport to amend either the statute that obligated the Government to pay money—the Contract Disputes Act—or the Judgment

[16] Furthermore, given the then-President's strong opposition to any legislation that sought to amend or repeal the ACA, it is somewhat unlikely that Congress could have expressed an intent to effectively amend the risk corridors program. If it had, then the appropriations laws may have faced a veto threat. See, e.g., Gregory Korte, Obama Uses Veto Pen Sparingly, But Could That Change?, USA Today, Nov. 19, 2014 (noting that President Obama had threatened to veto twelve different bills that would have repealed or amended the ACA), http://www.usatoday.com/story/news/politics/2014/11/19/obama-veto-threats/19177413/.

Fund statute. Id.; see also Wetsel-Oviatt Lumber Co. v. United States, 38 Fed. Cl. 563, 571 (1997) ("[A]ssuming the [agency] does not have appropriations from which to compensate Wetsel, there exists a statutory appropriation [in the Judgment Fund] from which the government is permitted to pay Wetsel.").

At oral argument, the Government averred that the Court cannot consider the availability of the Judgment Fund at all in finding liability *ex ante*. See Oral Arg. Tr. at 55. The Court disagrees. In a way, the differences between the statutes in Dickerson and Gibney only become significant when one considers the availability of the Judgment Fund. If an appropriations law limits funds appropriated "in this or any other Act," for example, "any other Act" includes the Judgment Fund appropriation (31 U.S.C. § 1304), so the Government's liability in this Court is foreclosed. In contrast, making funds from a specific account unavailable to a specific agency for a specific purpose "prevents the accounting officers of the Government from making disbursements," but private parties may still recover their funds in this Court. N.Y. Airways, 369 F.2d at 749. As a policy matter, it is certainly unfortunate that HHS's inability to access the CMS Program Management account for risk corridors payments means that insurers like Moda must receive risk corridors payments from the Judgment Fund. However, Congress has not modified those insurers' substantive right to those payments under Section 1342, so the Judgment Fund is the only path Congress has left open. Therefore, the Court finds that the appropriations riders at issue here did not modify or repeal the Government's obligation under Section 1342 to make "payments out" to lossmaking QHP issuers.

In conclusion, the Court finds that Moda is entitled to summary judgment on the issue of liability. Section 1342 requires full annual payments to insurers, and the Government has not made these payments. Furthermore, Congress has not modified the risk corridors program to make it budget-neutral. As a result, there is no genuine dispute that the Government is liable to Moda under Section 1342.

2. In the Alternative, the Government Breached an Implied-in-Fact Contract with Moda by Refusing to Make Full Risk Corridors Payments

Though the Court could rest on its statutory entitlement ruling, the facts just as strongly indicate that the Government breached an implied-in-fact contract when it failed to pay Moda. Therefore, the Court finds in the alternative that Moda is entitled to summary judgment on that basis.

The elements of an implied-in-fact contract are identical to those of an express contract. See Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). So, to establish liability on a breach of contract claim, the plaintiff seeking summary

judgment must show that there is no genuine dispute as to four elements: (1) mutuality of intent to contract, (2) consideration, (3) "lack of ambiguity in offer and acceptance," and (4) that the "[G]overnment representative whose conduct is relied upon [has] actual authority to bind the [G]overnment in contract." Lewis v. United States, 70 F.3d 597, 600 (Fed. Cir. 1995) (citation omitted).

a. There was Mutuality of Intent to Contract

Clearly, the Government does not intend to bind itself in contract whenever it creates a statutory or regulatory incentive program. Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985). Therefore, "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 but merely declares a policy to be pursued until the legislature shall ordain otherwise." Id. (citation omitted). 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 v. Dunlop Mfg. Inc., 702 F.3d 624, 631 (Fed. Cir. 2012).

However, statutory or regulatory provisions that do bind the Government in contract have certain hallmarks. First, the provision must create a program that offers specified incentives in return for the voluntary performance of private parties. See Radium Mines, Inc. v. United States, 153 F. Supp. 403, 405–06 (Ct. Cl. 1957). This performance must be in the form of an actual undertaking; simply "fill[ing] in the blanks of a Government prepared form," such as an application, does not constitute acceptance by performance. Cutler-Hammer, Inc. v. United States, 441 F.2d 1179, 1183 (Ct. Cl. 1971). Second, the provision must be promissory; in other words, it must give the agency officials administering the program no discretion to decide whether or not to award incentives to parties who perform. See Radium Mines, 153 F. Supp. at 406. In short, statutes or regulations show the Government's intent to contract if they have the following implicit structure: if you participate in this program and follow its rules, we promise you will receive a specific incentive.

For example, in Radium Mines, the Government created an incentive program in which an agency Circular promised payment at a "guaranteed minimum price" to private parties who had uranium and wished to sell it. Id. at 404–05. Further, the Government had restricted private uranium production to such an extent that private parties essentially produced uranium for sale to the Government only. Id. at 406. The Government argued that it did not intend to make an offer in its Circular, but merely an invitation to offer. Id. at 405. The Court of Claims rejected this argument, stating,

> It could surely not be urged that one who had complied in every respect with the terms of the Circular could have been told by the Government that it would pay only half the 'Guaranteed Minimum Price,' nor could he be told that the Government would not purchase his uranium at all."

Id. at 406. So, agency officials had no discretion to determine (1) whether they would purchase uranium offered to them, or (2) the price they would pay producers. Therefore, the Circular was an offer, and the Government had shown intent to contract. Id. at 405–06.

New York Airways also is instructive. In that case, as noted above, a statute authorized the Civil Aeronautics Board to set a monthly subsidy for helicopter companies. 369 F.2d at 744. The statute further stated, "The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section. . . ." Id. at 745. Congress then failed to appropriate the necessary funds to pay the compensation the Board "fixed and determined," so the Postmaster General did not pay the helicopter companies. Id. at 745–46. While the Court of Claims found that helicopter companies could recover under the original statute (see above), it also ruled in the alternative that "[t]he Board's rate order was, in substance, an offer by the Government to pay the plaintiffs a stipulated compensation for the transportation of mail, and the actual transportation of the mail was the plaintiffs' acceptance of that offer." Id. at 751. So, again, both of the required elements were present: (1) an incentive program that private parties could join voluntarily by performing services according to the program's rules, and (2) a firm Government promise to pay those parties a fixed amount if they performed the required services.

It is true that ARRA Energy Co. I v. United States, 97 Fed. Cl. 12 (2011), disagrees with this framework. In ARRA Energy, the court articulated a simpler test, namely, that the plaintiff "must point to specific language in [the statute] or to conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract." Id. at 27. The court took this statement quite literally, finding that Section 1603 of the American Recovery and Reinvestment Act of 2009 did not show the Government's intent to contract because it did not specifically require the Government to enter into contracts. Id. at 27–28. The Court disagrees with ARRA Energy's interpretation. Neither Radium Mines nor New York Airways turned on the invocation of the magic word "contract" in the statutes they examined. Rather, both cases examined the *structure* of a statutory program and determined whether the Government had expressed its intent to contract by using that structure.

The ACA meets the criteria set out in Radium Mines and New York Airways. First, it created an incentive program in the form of the Exchanges on which insurers could voluntarily sell QHPs. Insurers' performance went beyond filling out an application form; they needed to develop QHPs that would satisfy the ACA's requirements and then sell those QHPs to consumers. In return for insurers' participation, the Government promised risk corridors payments as a financial backstop for unprofitable insurers. Finally, as discussed in detail above, Section 1342 specifically directs the Secretary of HHS to make risk corridors payments in specific sums, and HHS has no discretion to pay more or less than those sums. Therefore, the Government intended to enter into contracts with insurers, and there was mutuality of intent to contract.

b. Moda Accepted the Government's Offer, and the Condition Precedent to Payment was Satisfied

Of course, because the ACA shows that the Government intended to enter into contracts with insurers, it is also an offer on the part of the Government. Specifically, the Government offered to enter into a unilateral contract with insurers like Moda. In a unilateral contract, the offeree may only accept the offer by performing its contractual obligations. See Contract, Black's Law Dictionary (10th ed. 2014) (defining "unilateral contract" as "[a] contract in which only one party makes a promise or undertakes a performance."); see also Lucas v. United States, 25 Cl. Ct. 298, 304 (1992) (explaining that a prize competition is a unilateral contract because it requires participants to submit entries in return for a promise to consider those entries and award a prize). Here, the Government has promised to make risk corridors payments in return for Moda's performance. Moda accepted this offer through performance. It sold QHPs on the health benefit exchanges while adhering to the ACA's requirements.

At oral argument, the Government claimed that Moda's reliance on the Government's promise to pay was immaterial to its contractual claim. See Oral Arg. Tr. at 14. Reliance may be immaterial to contract formation; however, Moda has not really made a reliance argument here. When the offeree fully performs under a unilateral contract in response to the offeror's promise of payment, then one does not say that the offeree performed "in reliance" on the offeror's promise. Rather, the offeree's performance constitutes an acceptance, and it means that the offeror's duty to pay has fully matured under the contract. See, e.g., Restatement (Second) of Contracts § 53 (Acceptance by Performance); cf. Winstar Corp. v. United States, 64 F.3d 1531, 1545 (Fed. Cir. 1995) ("When the plaintiffs satisfied the conditions imposed on them by the contracts, the government's contractual obligations became effective and required it to recognize and accept the purchase method of accounting . . . and the use of supervisory goodwill and capital credits as capital assets for regulatory capital requirements."), aff'd and remanded, 518 U.S. 839 (1996).

In addition, for the Government's payment obligation under the unilateral contract to mature, a condition precedent had to be satisfied: Moda's QHPs needed to be lossmaking. A condition precedent is an event that, if it does not occur, can discharge one party's duty to perform under the contract. See Restatement (Second) of Contracts § 224. If Moda's QHPs were profitable, then no risk corridors payments would have come due under Section 1342. Because the QHPs were unprofitable, the condition precedent was therefore satisfied.

c. There was Consideration

Consideration is a bargained-for performance or return promise. Restatement (Second) of Contracts § 71. Here, the Government offered consideration in the form of risk corridors payments under Section 1342. In return, Moda offered performance under the contract by providing QHPs to consumers on the Health Benefit Exchanges. Therefore, there was consideration.

d. The Secretary of HHS had Actual Authority to Contract on the Government's Behalf

"An agent's actual authority to bind the Government may be either express or implied." Marchena v. United States, 128 Fed. Cl. 326, 333 (2016) (citing Salles v. United States, 156 F.3d 1383, 1384 (Fed. Cir. 1998)). Authority is implied when it is "considered to be an integral part of the duties assigned to a government employee." H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989) (citation omitted). Here, Section 1342 states that the Secretary of HHS "shall establish" the risk corridors program and "shall pay" risk corridors payments. More generally, the Secretary is responsible for administering the ACA. See ACA §§ 1301(a)(1)(C)(iv), 1302(a)–(b), 1311(c)–(d). As discussed above, the ACA itself creates a contractual framework. Therefore, entering into contracts pursuant to the contractual structure of the risk corridors program is an integral part of the Secretary's duties in administering and implementing the ACA, and the Secretary had implied actual authority to contract.

The Government argues that the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B), cabins the Secretary's authority to enter into contracts under the ACA. That Act provides that the Government "may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." The Court of Claims faced a similar statute in New York Airways, stating, "Since it has been found that the Board's action created a 'contract or obligation (which) is authorized by law', obviously the statute has no application to the present situation." 369 F.2d at 152. Similarly, the Secretary of HHS is explicitly authorized to make risk corridors payments in specific amounts under the ACA. Therefore, the secretary is "authorized by law" under

the ACA to make risk corridors payments pursuant to implied-in-fact contracts with insurers, and the implied-in-fact contract does not fall under the Anti-Deficiency Act.[17]

e. No Further Discovery is Necessary

Finally, the Government claims that further discovery is necessary before the Court can rule that an implied-in-fact contract exists between Moda and the Government. Def. Reply Br. at 30–31. The Court disagrees. As shown above, the Court finds as a matter of law that an implied-in-fact contract exists between Moda and the Government, and further discovery as to the parties' subjective intentions would not change the Court's conclusion. Furthermore, if the nonmovant on a summary judgment motion believes "it cannot present facts essential to justify its opposition," it is required to bring this belief to the Court's attention "by affidavit or declaration." RCFC 56(d). The Court highly doubts that the Government does not have access to the facts necessary to justify its opposition. Regardless, the Government has not submitted the necessary affidavit or declaration. Therefore, the Government's informal request for discovery is denied.

In sum, the ACA created an implied-in-fact contract with insurers like Moda under which the Government owed Moda risk corridors payments if (1) Moda sold QHPs on the Exchanges and (2) those QHPs were lossmaking. Moda sold QHPs and suffered losses. The Government has breached the contract by failing to make full risk corridors payments as promised. Therefore, there is no genuine dispute that the Government is liable to Moda under the implied-in-fact contract, and Moda also is entitled to partial summary judgment on that basis.

Conclusion

There is no genuine dispute that the Government is liable to Moda. Whether under statute or contract, the Court finds that the Government made a promise in the risk corridors program that it has yet to fulfill. Today, the Court directs the Government to fulfill that promise. After all, "to say to [Moda], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970). Moda's cross-motion for partial summary judgment is GRANTED. The Government's motion to dismiss is DENIED.

[17] Furthermore, just as Congress did not modify its statutory obligation through the appropriations riders, it also did not modify its contractual obligation. See, e.g., Salazar, 132 S. Ct. at 2189 ("[T]he Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends.").

The Court requests that counsel for the parties submit a joint status report on or before March 1, 2017, indicating the proposed steps and schedule for completing the resolution of this action.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 16-649 C

MODA HEALTH PLAN, INC.

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed February 9, 2017, granting plaintiff's cross-motion for partial summary judgment and denying defendant's motion to dismiss, and the court's Order, filed March 2, 2017,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff recover of and from the United States the sum of $209,830,445.79. Reasonable costs are awarded to plaintiff.

Lisa L. Reyes
Acting Clerk of Court

March 6, 2017 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 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 Appellant

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 13,174 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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