IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	No. 16-259C
v.	)	(Judge Sweeney)
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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Plaintiff Health Republic Insurance Company ("Health Republic") brought this action under the Tucker Act, 28 U.S.C. § 1491(a), and seeks damages under section 1342 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18062, alleging that the Department of Health and Human Services ("HHS") has not made risk corridors payments as required by statute. Under well-established Supreme Court precedent, the Tucker Act waives sovereign immunity only to the extent a plaintiff seeks "actual, presently due money damages." Section 1342 does not require annual risk corridor payments in full, and HHS, under its authority to "establish and administer" the risk corridors program, implemented a three-year payment framework in a budget neutral manner, such that final payment is not due until the end of the temporary, three-year program. Congress subsequently passed two appropriations restrictions for fiscal years 2015 and 2016, acknowledging and approving HHS's three-year framework. Under this framework, unpaid risk corridors amounts as determined by the statutory formula are not presently due. Accordingly, the narrow, legal question before the Court at this time is whether section 1342 requires annual payments in full. As set forth in the United States' Motion to Dismiss (the "Motion") and for the reasons that follow, HHS's three-year payment framework is entitled to deference, and the case, therefore, must be dismissed.

I. The Court Lacks Jurisdiction Because Risk Corridors Are Not Presently Due

A. The Tucker Act's Waiver of Sovereign Immunity Extends Only to Claims for Presently Due Money Damages

"The ability of the Court of Federal Claims to entertain suits against the United States is limited." *Annuity Transfers, Ltd. v. United States*, 86 Fed. Cl. 173, 177 (2009). To fall within the Tucker Act's waiver of sovereign immunity, a claim "must seek 'actual, presently due money damages from the United States.'" *Id.* at 179 (quoting *United States v. King*, 395 U.S. 1, 3 (1969)); *see also Johnson v. United States*, 105 Fed. Cl. 85, 94-95 (2012); *Lummi Tribe of Lummi*

Reservation v. United States, 99 Fed. Cl. 584, 596-597 (2011). Thus, where a plaintiff has received all the money it is currently due as of the filing of the complaint, as Health Republic has here, a court must dismiss the complaint for lack of jurisdiction. *Annuity Transfers*, 86 Fed. Cl. at 179-80.

Ignoring this Court's 2009 *Annuity Transfers* opinion, Health Republic misreads the *en banc* portion of *Fisher* to support its argument that "presently due" is no longer a requirement for Tucker Act jurisdiction. Plaintiff Health Republic Insurance Company's Opposition to the United States' Motion to Dismiss ("Opposition") at 19 (citing *Fisher v. United States*, 402 F.3d 1167, 1173-74 (Fed. Cir. 2005) (en banc)). But *Fisher* merely held that the issue of whether a statute is money-mandating is determined in a single step that resolves the question of both the court's jurisdiction and, on the merits, whether the plaintiff "has a money-mandating source on which to base his cause of action." *Fisher*, 402 F.3d at 1173. *Fisher* does not abrogate the independent requirement that a plaintiff seek "actual, presently due money damages." And because the Supreme Court has interpreted the Tucker Act to impose this requirement, *King*, 395 U.S. at 3, the Federal Circuit could not abrogate it.

Nor has this Court "repeatedly recognized that 'presently due' is not a test for subject matter jurisdiction" as Health Republic claims. Opposition at 19. *Annuity Transfers* and *Johnson* belie this claim. Moreover, the three cases cited by Health Republic concerned promotion-related claims under the Military Pay Act, 37 U.S.C. § 204, and whether the plaintiffs sought presently due money damages was not an issue. In *Miller v. United States*, the Court noted that it had jurisdiction over an officer's promotion claim because it was brought under the Military Pay Act, which is money-mandating, and, relying on *Fisher*, rejected the government's argument that promotion-related claims fell outside the ambit of the Military Pay Act. 119 Fed. Cl. 717, 729-30

(2015). In *House v. United States*, the Court determined that it had jurisdiction over an officer's claim for back pay based on an automatic promotion following his allegedly involuntary retirement. 99 Fed. Cl. 342, 347 (2011). And in *Tippett v. United States*, the Court concluded that it had jurisdiction over a promotion claim because it was founded on the Military Pay Act. 98 Fed. Cl. 171, 178-79 (2011). Each of the plaintiffs in these cases sought pay or benefits that they would have *already received* but for the alleged wrongful action by the military. Whether the plaintiffs sought "presently due" damages was thus not an issue.

B. Risk Corridors Payments Are Not Presently Due

Here, Health Republic seeks risk corridors payments under section 1342 of the ACA and 45 C.F.R. § 153.510 for benefit years 2014 and 2015. As explained in the Motion, however, neither the statute nor the regulation specifies a due date by which payments must be made. HHS, under its express authorization to administer the risk corridors program, 42 U.S.C. § 18062(a), has elected to establish a three-year framework, with final payment not due until after the conclusion of the three-year program. *See* Centers for Medicare & Medicaid Services, Risk Corridors and Budget Neutrality, April 11, 2014 ("April 2014 Guidance"), at 1 (attached to the Motion in Appendix 2); Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014); HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015). Thus, under HHS's administrative framework, final risk corridors payments for benefit year 2014 are not presently due.

Nor is there any basis for Health Republic's contention that risk corridors payments are presently due for benefit year 2015. *See* Opposition at 34-35. All Health Republic can say is that it has estimated its 2015 risk corridors payment and that HHS is unlikely to collect sufficient funds to make that payment. Whatever the accuracy of Health Republic's predictions, they do not

establish that "[t]he Government already owes risk corridors amounts for 2015 . . . ." Opposition at 35. Under any plausible reading of section 1342 and 45 C.F.R. § 153.510, risk corridors payments are not due until HHS finally determines charges and payments.[1] Only after HHS has breached some duty to pay Health Republic can Health Republic seek "actual, presently due money damages" under the Tucker Act. *See United States v. Mitchell*, 463 U.S. 206, 219 (1983) (to establish Tucker Act jurisdiction, the law must "fairly be interpreted as mandating compensation for damages sustained as a result of *a breach of . . . duties [it] impose[s]*.") (emphasis added); *Annuity Transfers*, 86 Fed. Cl. at 179; *Wood v. United States*, 214 Ct. Cl. 744, 745 (1977) ("At best, plaintiff is claiming that he is not going to get [when the time comes] what is due him; such a claim is for future relief which we may not now entertain.") (citations omitted).

Accordingly, this Court should grant the motion to dismiss because Health Republic does not seek "actual, presently due money damages." *King*, 395 U.S. at 3.

C. HHS's Three-Year Payment Framework Must Be Upheld

Because HHS has reasonably interpreted the statute not to require annual payment in full, Health Republic must demonstrate that section 1342, in fact, *requires* annual payments in full. Under established rules of administrative law and statutory interpretation, however, Health Republic cannot meet its burden.[2]

Courts must defer to an agency's interpretation of ambiguous statutory provisions, so long as the agency's interpretation is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense*

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[1] On September 9, 2016, HHS released preliminary information concerning risk corridors payments for benefit year 2015. That guidance is attached.

[2] Health Republic alludes to unspecified disputed facts concerning whether payments are presently due. Opposition at 21 & 22. However, the sole question for the Court at this stage of the case is whether section 1342 requires annual payment, a question of law. No facts are material to this question.

Council, Inc., 467 U.S. 837, 842-43 (1984). The Federal Circuit has stated that "the *Chevron* standard of deference applies" where, as here, "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)).

1. Chevron Deference Applies

Health Republic does not dispute—indeed it cannot dispute—that section 1342 is silent as to when risk corridors payments are due. Likewise, section 1342's implementing regulation, 45 C.F.R. § 153.510, says nothing about when risk corridors payments are due. Furthermore, Congress expressly delegated to HHS authority to "establish and administer" a temporary risk corridors program for three benefit years, thereby authorizing the agency to decide when payments should be made consistent with programmatic objectives and funding constraints. 42 U.S.C. § 18062(a). Had Congress intended to require full annual payment, it easily could have done so by, for example, providing that the Secretary "shall pay *annually*" or "shall pay each year." Instead, Congress left to the agency the specifics of when charges would be collected and payments made. When confronted with such a gap in the statute and an express authorization to "establish and administer" a program, *Chevron* deference applies. *Cathedral Candle*, 400 F.3d at 1361.

Contrary to Health Republic's contention, the Supreme Court's recent decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), does not alter the analysis. There the Court was confronted with whether tax credits intended to improve the affordability of health insurance—one of the ACA's three key reforms—were available in States that have a Federal Exchange. 135 S. Ct. at 2485. Because the issue went to the very heart of the ACA's statutory scheme and because nothing in

the provision at issue indicated that Congress intended to delegate to the IRS a critical question of health insurance policy, the Court concluded that the case was "not a case for the IRS" and declined to apply the *Chevron* framework. *Id.* at 2489. Nothing in *King* supports Health Republic's contention, Opposition at 31-33, that *Chevron* deference does not apply to the ACA generally, especially when considering a provision such as section 1342, which expressly delegates to HHS responsibility to "establish and administer" the program.[3]

Here, HHS exercised its discretion and reasonably filled the statutory gap left by Congress in section 1342. First, HHS, more than two years before any charges were assessed, promulgated 45 C.F.R. § 153.510(d), providing a 30-day deadline for QHPs to remit risk corridors charges to HHS. HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013). Second, less than four months into the first benefit year of the temporary, three-year program, HHS released guidance explaining that 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. April 2014 Guidance. HHS reiterated and expanded upon this guidance in final rules issued after notice and comment. *See* Exchange and Insurance Market

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[3] Health Republic also misconstrues the phrase "death spiral" as it has been used in relation to the ACA and in *King*. The "death spiral" Congress sought to avoid in the ACA is the product of adverse selection resulting from combining a "guaranteed issue" requirement, which bars insurers from denying coverage based on a person's health, with a "community rating" requirement which generally bars insurers from charging a person higher premiums for the same reason. *King*, 135 S. Ct. at 2485. Unless those reforms were coupled with a requirement that individuals either purchase insurance or pay a penalty, purchasers of insurance would predominately be sick, forcing health insurers to raise premiums higher and higher, inducing fewer and fewer people to purchase insurance until they are already ill. *Id*. at 2485-86. The tax credits at issue in *King* are a critical component to the success of the ACA's requirement to purchase insurance or pay a penalty and, hence, the ACA's market reforms. *Id*. at 2487. Contrary to Health Republic's suggestion, Opposition at 8, 17, 30, 33, withdrawal of some QHPs from the Exchanges because a portion of risk corridors payments under a temporary program have not yet been paid would not be a "death spiral" in any sense in which that phrase has been used in relation to the ACA.

Standards for 2015 and Beyond, 79 Fed. Reg. at 30,260; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. at 10,779.[4] Health Republic is simply incorrect when it states that "HHS did not 'establish a three-year payment framework.'" Opposition at 12.

Nor is the three-year framework a "*post hoc* rationalization apparently motivated by the difficult position in which Congress put the agency with the 2015 and 2016 Spending Bills." Opposition at 33. The three-year framework pre-dates the 2015 Spending Law by more than six months and pre-dates this suit—the first suit for risk corridors payments filed—by nearly two years. *Cf. Reizenstein v. Shinseki*, 583 F.3d 1331, 1336 (Fed. Cir. 2009) (rejecting attempt to cast agency's interpretation as a *post hoc* rationalization and holding "[i]n order to defeat [an agency's] claim to deference, [plaintiff] must give us a 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question'") (quoting *Cathedral Candle,* 400 F.3d at 1364). Instead, the three-year framework embodies the agency's considered position set forth in the Federal Register and is entitled to deference.

Health Republic is also incorrect when it states that HHS's interpretation of section 1342 has changed. *See* Opposition at 11-12, 33. Health Republic's support for this erroneous contention is HHS's non-binding statements 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." Opposition at 11 (quoting Standards Related to Reinsurance, Risk

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[4] An agency's interpretive rule for a statute relating to matters of procedure, subject to notice and comment if required, need not be published in the Code of Federal Regulations to be entitled to deference. *See Wheatland Tube Co. v. United States,* 495 F.3d 1355, 1359-61 (Fed. Cir. 2007) (affording *Chevron* deference to interpretive ruling by Department of Commerce published in Federal Register but not embodied in regulation published in Code of Federal Regulations); *Manufactured Hous. Inst. v. U.S. Envtl. Prot. Agency,* 467 F.3d 391, 399 (4th Cir. 2006) (holding that agency's policy statement in Federal Register that was not codified in Code of Federal Regulations was "an equally binding" agency action).

Corridors and Risk Adjustment, 76 Fed. Reg. 41,930, 41,943 (July 15, 2011) & Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. 17,220, 17,238 (Mar. 23, 2012)). In both statements, HHS was clear that it was *not* proposing a deadline by which risk corridors payments would be made. 76 Fed. Reg. at 41,943 ("we are not proposing deadlines at this time"); 77 Fed. Reg. at 17,238 ("we did not propose deadlines in the proposed rule . . . We suggested, for example, . . . 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."). Moreover, in both statements, HHS was expressing one possible set of deadlines that, for example, might be possible if resource constraints were not a consideration; HHS did not purport to interpret section 1342 as *requiring* full payment each year.

When HHS announced the three-year framework, it assumed, consistent with CBO projections, that risk corridor charges would be sufficient to pay for all risk corridors payments. *See* April 2014 Guidance at 1. HHS has made risk corridors payments in accordance with the three-year framework as set forth in the April 2014 Guidance and subsequent rule-making. But none of HHS's statements identified by Health Republic indicates that HHS has interpreted section 1342 to require full payment each year.[5] Accordingly, the Court must defer to HHS's payment framework unless that framework is unreasonable.

[5] In the 2014 final rule, HHS stated, "The risk corridors program is not statutorily required to be budget neutral." HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. at 15,473. The implementation of the three-year framework, in which HHS has thus far operated the program as budget neutral, is not inconsistent with this statement. But whether the program must, in fact, be budget neutral is not before the Court at this time.

2. The Three-Year Framework Is Reasonable and Gives Effect to Both Section 1342 and the Spending Laws

The three-year payment framework reasonably fills a statutory gap left by Congress as to when final risk corridors payments are due, and this framework is consistent with Congress' funding limitation that restricts the amount of aggregate risk corridors payments made to issuers in fiscal years 2015 and 2016 to the amount collected in risk corridors charges. As noted, Congress and HHS assumed that collections would meet or exceed payments, but although that assumption was mistaken as to benefit year 2014, the three-year framework preserves the possibility that the program can still be implemented in a budget neutral manner depending on the extent of future collections and appropriations by Congress.

The 2015 and 2016 Spending Laws confirm that HHS has discretion to implement the program using a three-year payment framework. In fact, Congress expressly acknowledged the three-year framework in the Explanatory Statement to the 2015 Spending Law. Cong. Rec. Vol. 160, No. 151—Book II, H9838 (Dec. 11, 2014) ("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."). Congress explained that the 2015 Spending Law "prevent[s] the CMS Program Management appropriation account from being used to support risk corridors payments." *Id.* The following year, the Senate Committee Report to the 2016 Spending Law stated that the spending restriction "requir[es] the administration to operate the Risk Corridor program in a budget neutral manner." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, Senate Report 114-74, Calendar No. 137 (June 25, 2015), at 12. In short, Congress was fully aware of HHS's interpretation of section 1342 permitting a three-year payment framework and, rather than repudiating that interpretation, passed legislation recognizing it.

"If Congress does not appropriate enough money to meet the needs of a class of beneficiaries prescribed by Congress, and if Congress is silent on how to handle this predicament, the law sensibly allows the administering agency to establish reasonable priorities and classifications." *City of Los Angeles v. Adams*, 556 F.2d 40, 49–50 (D.C. Cir. 1977). In other words, the Court and HHS must harmonize and give effect to the text of both the Spending Laws and section 1342. Even though HHS arrived at the three-year framework before passage of the Spending Laws, HHS must administer section 1342 under the funding constraints subsequently imposed by Congress; the Court, in turn, must consider those constraints when confronted with a challenge to the agency's administration of its statutes. *Cf. Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1101 (D.C. Cir. 2003) ("[T]he agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.") (quoting *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)); *Cobell v. Norton*, 428 F.3d 1070, 1076 (D.C. Cir. 2005) (concluding that in light of statutory ambiguity and appropriations shortfalls, "the district court owed substantial deference" to the agency's plan because "[t]he choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators.").

HHS's three-year framework—consistent with section 1342 as enacted—gives effect both to section 1342's statutory formula and clear congressional limits on appropriated funds for risk corridors payments in fiscal years 2015 and 2016. Under HHS's framework, HHS each year pays as much in risk corridors payments as its funding authority permits. To the extent HHS is unable to pay the full risk corridors amounts as determined by the statutory formula each year, that is because Congress has enacted the Spending Laws, which restrict HHS's ability to do so. HHS has

stated that, "[i]n the event of a shortfall for the 2016 program 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." November 19 Guidance Document. In the meantime, however, any shortfall in collections is a "problem stemm[ing] from a lack of resources" and is therefore "a problem for the political branches to work out." *Mashpee Wampanoag Tribal Council, Inc*., 336 F.3d at 1101 (quoting *In re Barr Laboratories*, 930 F.2d at 75).

3. Health Republic Cannot Demonstrate that Full Risk Corridors Payments Are Presently Due

The burden of proving that the Court possesses subject matter jurisdiction lies at all times with the plaintiff. *Annuity Transfers*, 86 Fed. Cl. at 176-77 (2009) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Health Republic attempts to subvert this well-established rule, suggesting that the burden is on the United States to "identify why [Health Republic's] interpretation is not 'reasonably amenable' to the requirement that the Government pay full risk corridors amounts annually." Opposition at 21. To the contrary, Health Republic must demonstrate that the Court has jurisdiction, *i.e.*, that Health Republic's claims are for "actual, presently due money damages."

Health Republic cannot demonstrate that section 1342 requires annual payments in full. First, as set forth in the Motion and above, nothing in the text of section 1342 addresses when payment is due. Second, the annual nature of risk corridors calculations merely demonstrates that charges and payments are calculated for each plan year; to the extent the annual nature of the risk corridors calculations has any bearing on when payments are due, it reflects that payments *are not due* until sometime after the conclusion of the benefit year and determination of QHPs' allowable costs and target amounts. *See* Opposition at 23-25. Regarding risk adjustment and reinsurance,

payments made under those programs are factored into the risk corridors calculations, but less-than-full risk corridors payments does not impede determinations or payments under the other programs. Third, contrary to Health Republic's assertion, Medicare Part D does not *require* full, annual payments. Opposition at 25-26. Instead, the Medicare Part D statute, 42 U.S.C. § 1395w-115, and regulation, 42 C.F.R. § 423.336, merely *permit* interim and annual payments. Nor does the legislative history address annual risk corridors payments. In any event, section 1342's requirement that risk corridors "shall be based on" Medicare Part D does not mandate that the ACA risk corridors program be identical in all respects.[6]

At best, Health Republic's arguments may demonstrate that full, annual payments are beneficial as a matter of policy. But that is not enough to establish a judicially enforceable right to presently due money damages; Health Republic must demonstrate that risk corridors payments are due in full annually to establish this court's jurisdiction under the Tucker Act. Moreover, Health Republic's position gives no effect to the Spending Laws. In Health Republic's view, full, annual payments are due, and the Spending Laws merely transfer responsibility for payment from HHS to this Court and the Judgment Fund; congressional intent embodied in the Spending Laws is simply ignored. In contrast, HHS's three-year payment framework gives effect to congressional

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[6] Health Republic's reliance on the common law duty to pay in a reasonable time is similarly unavailing. First, as Health Republic's citations confirm, the duty arises in contract, and the risk corridors program is not established under a contract between QHPs and the United States, but rather by statute and regulation. Second, the argument begs the question because, as Health Republic's citations confirm, the common law rule could only apply *after* an obligation becomes due. *Eden Isle Marina, Inc. v. United States*, 113 Fed. Cl. 372, 493 (2013) ("a breach of contract is a failure to perform a contractual duty *when it is due*.") (internal citation omitted); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 465 (4th Cir. 1997) (noting plaintiff failed to plead a commercially reasonable time for payment such that plaintiff could establish breach of contract). Final risk corridors payments are not presently due under HHS's three-year framework.

intent embodied in both section 1342 and the Spending Laws by providing for payments as determined under the statutory formula over the course of the three-year program while also limiting total payments to amounts collected for each year the Spending Laws are in effect.

The Federal Circuit's en banc opinion in *Slattery v. United States* is not to the contrary. 635 F.3d 1298 (2011). Health Republic misreads *Slattery* for the proposition that Congress cannot deprive this Court of jurisdiction through an appropriation. *See* Opposition at 3, 27 & n.19. But *Slattery* says nothing about congressional power to withdraw jurisdiction from federal courts. Indeed, the Supreme Court has long recognized Congress' power to define the subject matter jurisdiction of federal courts. *See Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."). *Slattery* held that (1) a court has Tucker Act jurisdiction over an asserted breach of contract claim, unless Congress has "explicitly withheld or withdrawn" jurisdiction by statute, and (2) the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. 635 F.3d at 1321. Thus, *Slattery* has no bearing on this case. First, this is not a breach of contract case; Health Republic's risk corridors claims arise, if at all, under statute and regulation. Second, as should be apparent from the preceding discussion, the 2015 and 2016 Spending Laws are relevant because they confirm that the three-year framework is a permissible construction of section 1342 and that Congress understands that payments are not due until the conclusion of the program. The Spending Laws themselves do not deprive this Court of jurisdiction. Rather, the Court lacks jurisdiction over Health Republic's Complaint because the Tucker Act requires that payments be presently due, and risk corridors payments are not presently due under section 1342.

In sum, HHS's three-year payment framework is a permissible construction of section 1342 and entitled to deference because it (1) fills a gap in the statute left by Congress; (2) reflects the

agency's considered deliberation, including in notice and comment rulemaking; and (3) is consistent with subsequently enacted laws governing expenditures during fiscal years 2015 and 2016. *Cf. W.E. Partners II, LLC v. United States*, 119 Fed. Cl. 684, 692 (2015) (giving reasons for deference to an agency's notice and guidance). Because risk corridors payments are not presently due under the three-year framework, the Court lacks jurisdiction, and the case should be dismissed.

II. Under the Three-Year Framework, Health Republic's Claims are Not Ripe

As set forth above, HHS's three-year payment framework is permissible under section 1342 and the Spending Laws. Under that framework, Health Republic necessarily has not been damaged in any legally meaningful sense by HHS's payment determinations because Health Republic has received to date all that it is presently due. Moreover, under the framework, this Court cannot determine how much Health Republic will ultimately receive in risk corridors payments. Because Health Republic was not a QHP issuer in 2016, Health Republic is not entitled to any risk corridors payments for that year; its 2014 and 2015 risk corridors amounts may well be paid in full under the three-year payment framework. Accordingly, this case is not fit for judicial decision until no earlier than the conclusion of the three-year risk corridors program, when the parties will be in a position to know whether there are any risk corridors payments owing for any benefit year.

Withholding a decision does not result in any hardship for Health Republic. Again, under the three-year framework, no additional money is presently owed to Health Republic. Health Republic has already stopped offering QHPs, and 2016 is the last year for which QHPs can receive risk corridors payments. Delay will not affect whether Health Republic will offer QHPs in the future. Conversely, exercising restraint until the dispute ripens permits resolution through the

political process and conserves judicial resources should the dispute move from conjectural to concrete.

The Court should not short-circuit what Congress mandated is a temporary three-year program. 42 U.S.C. § 18062(a) ("The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 . . . ."). As the Spending Laws and their legislative history make clear, Congress is well aware that HHS is administering the risk corridors program under a three-year payment framework and has essentially blessed the agency's decision to do so. Payments and charges for the last two years of the risk corridors program have yet to be calculated, and it is presently unknown and unknowable whether payment shortfalls will exist at the conclusion of the program. HHS has committed to working with Congress to address any shortfalls that may remain, and Congress may well appropriate sufficient funds to provide for all payments under the statutory formula. Therefore, the case should be dismissed now because Health Republic's claims are not ripe.

III. Health Republic's Claims for Non-Monetary and Special Relief Must Be Dismissed

Health Republic asks the Court to award a variety of non-monetary and special relief, including "consequential damages, special damages, or other damages that result as a consequence of the Defendant's non-performance"; "appropriate injunctive relief, including but not limited to an injunction requiring Defendant to pay all amounts for 2014 and 2015"; "pre-judgment and post-judgment interest at the maximum rate permitted under the law"; and "appropriate declaratory relief, including but not limited to a declaration and judgment that Defendant's conduct alleged in the complaint violates the laws alleged in the complaint." Compl. at Prayer for Relief ¶¶ C-F. In the Motion, at 22-25, the United States explained that these claims must be dismissed because the Court lacks jurisdiction to award such relief. In its Opposition, at 39, Health Republic argues only

that it is entitled to post-judgment interest. Accordingly, Health Republic's claims for consequential damages, special damages, pre-judgment interest, and declaratory relief must be dismissed for the reasons set forth in the Motion.

CONCLUSION

The Complaint should be dismissed.

Respectfully submitted,

Dated: September 9, 2016

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CERTIFICATE OF SERVICE

I certify that on September 9, 2016, a copy of the attached, United States' Reply in Support of Its Motion to Dismiss, was served via the Court's CM/ECF system on Plaintiff's counsel, Stephen Andrew Swedlow.

/s/ Charles E. Canter
Charles E. Canter
U.S. Department of Justice

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

Date: September 9, 2015

Subject: Risk Corridors Payments for 2015

Section 1342 of the Affordable Care Act directs the Secretary of the Department of Health and Human Services (HHS) to establish a temporary risk corridors program that provides issuers of qualified health plans (QHPs) in the individual and small group markets additional protection against uncertainty in claims costs during the first three years of the Marketplace. This program, which was modeled after a similar program used in the Medicare prescription drug benefit, encouraged issuers to keep their rates stable as they adjusted to the new health insurance reforms in the early years of the Marketplaces.

Under the risk corridors program, the federal government shares risk with QHP issuers – collecting charges from the issuer if the issuer's QHP premiums exceed claims costs of QHP enrollees by a certain amount, and making payments to the issuer if the issuer's premiums fall short by a certain amount, subject to certain adjustments for taxes, administrative expenses, and other costs and payments. On April 11, 2014, HHS issued a bulletin titled "Risk Corridors and Budget Neutrality," which described how we intend to administer risk corridors over the three-year life of the program. We stated that if risk corridors collections for a particular year are insufficient to make full risk corridors payments for that year, risk corridors payments for the year will be reduced pro rata to the extent of any shortfall.

Today, HHS is announcing preliminary information about risk corridors for the 2015 benefit year. Risk corridors submissions are still undergoing review and complete information on payments and charges for the 2015 benefit year is not available at this time. However, based on our preliminary analysis, HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments. HHS expects to begin collection of risk corridors charges and remittance of risk corridors payments on the same schedule as last year. Collections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments, then for 2015 benefit year risk corridors payments, then for 2016 benefit year risk corridors payments.

As we have said previously, in 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. HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required.

We know that a number of issuers have sued in federal court seeking to obtain the risk corridors amounts that have not been paid to date. As in any lawsuit, the Department of Justice is vigorously defending those claims on behalf of the United States. However, as in all cases where there is litigation risk, we are open to discussing resolution of those claims. We are willing to begin such discussions at any time.