

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

AETNA HEALTH INC. (FLORIDA);)
AETNA HEALTH INC. (GEORGIA);)
AETNA HEALTH INC. (PENNSYLVANIA);)
AETNA HEALTH OF IOWA, INC.;)
AETNA HEALTH OF UTAH, INC.;)
AETNA LIFE INSURANCE CO.;)
COVENTRY HEALTH AND LIFE)
INSURANCE CO.; COVENTRY HEALTH)
CARE OF FLORIDA, INC.; COVENTRY)
HEALTH CARE OF ILLINOIS, INC.;)
COVENTRY HEALTH CARE OF KANSAS)
INC.; COVENTRY HEALTH CARE OF)
NEBRASKA, INC.; COVENTRY HEALTH)
CARE OF VIRGINIA, INC.; INNOVATION)
HEALTH INSURANCE CO.;)
INNOVATION HEALTH PLAN, INC.,)
)
Plaintiffs,)
)
v.)) No. 19-1338 C
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

COMPLAINT

Plaintiffs Aetna Health Inc. (Florida); Aetna Health Inc. (Georgia); Aetna Health Inc. (Pennsylvania); Aetna Health of Iowa, Inc.; Aetna Health of Utah, Inc.; Aetna Life Insurance Co.; Coventry Health and Life Insurance Co.; Coventry Health Care of Florida, Inc.; Coventry Health Care of Illinois, Inc.; Coventry Health Care of Kansas, Inc.; Coventry Health Care of Nebraska, Inc.; Coventry Health Care of Virginia, Inc.; Innovation Health Insurance Co. (Virginia); and Innovation Health Plan, Inc. (Virginia), (collectively “Plaintiffs” or “Aetna”) bring this action against Defendant the United States of America (“Defendant,” “United States,” or “Government”), seeking to recover amounts owed under the Risk Corridors Program created

pursuant to Section 1342 of the Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18062), and allege as follows:

I. INTRODUCTION

1. In enacting the ACA in 2010, Congress instituted a series of major changes to the health care industry to increase competition in the health insurance marketplace and to broaden health insurance access to millions of previously uninsured Americans. To advance these goals, Congress created “Health Benefit Exchanges” (“Exchanges”), which enabled participating insurers to sell affordable individual and small group insurance plans—referred to as “qualified health plans” (“QHPs”)—across state-wide marketplaces. 42 U.S.C. § 18031(b)(1)(A).

2. Although the ACA’s establishment of Exchanges created new marketplaces for the sale and purchase of health insurance, insurers like Plaintiffs faced a dilemma in considering whether to participate in these marketplaces: The Exchanges offered access to a new population of individuals, many of whom were previously uninsured, but insurers lacked adequate experience and data regarding the number and projected expenses of these potential enrollees. Participating insurers thus had no way to meaningfully assess risk or accurately set premium rates for the population of new enrollees they would be covering.

3. Congress recognized this uncertainty could discourage insurers from offering QHPs on the Exchanges and cause participating insurers to set premiums too high. To address these challenges, Congress included in the ACA three premium stabilization programs.

4. This case concerns one of those programs. Section 1342 of the ACA created a mechanism for limiting the risk borne by insurers entering a new market, based on a similar program in Medicare Part D that allocated risk between participating insurers and the Government. 42 U.S.C. § 18062. Under this “[R]isk [C]orridors” Program, insurers whose costs of participating in the Exchanges exceeded target amounts during each of the first three years of

operation of the marketplaces—calendar years 2014, 2015, and 2016—were entitled to receive annual payments from the Government pursuant to a statutorily prescribed formula, offsetting in part some of the insurers’ losses. *Id.* § 18062(b)(1). In contrast, insurers whose costs of participating in the Exchanges were below the statutorily prescribed amount were required to remit annual payments to the Government. *Id.* § 18062(b)(2).

5. The Risk Corridors Program was thus designed to ease the transition between old and new health insurance marketplaces, and to provide participating insurers with stability as they entered new markets covering a population about which they lacked sufficient information to accurately set premiums. The Program also sought to dissuade participating insurers from being excessively conservative in their cost estimates, which would have increased enrollees’ premiums as well as the Government’s liability for the premium tax credits that the ACA established to help low-income individuals purchase QHPs. *See* 26 U.S.C. § 36B.

6. With its affiliates, Aetna is one of the country’s leading managed health care companies and among its largest sellers of traditional and consumer directed health care insurance plans. Although Aetna recognized the uncertainty that participating in the ACA’s Exchanges would bring, it decided—in part based on Congress’s inclusion of the three premium stabilization programs—to become a leading QHP issuer in the ACA’s Exchanges. Specifically, Aetna created, priced, and sold QHPs in 18 states and the District of Columbia for calendar years 2014, 2015, and 2016.

7. While Aetna’s participation in the Exchanges from 2014 to 2016 greatly benefited the individuals enrolled through those Exchanges—as well as the federal government, which subsidized their enrollment—Aetna suffered significant losses as a result of its participation

during those years. Aetna's costs of participating in the Exchanges exceeded the target amounts under the Risk Corridors Program for each of calendar years 2014, 2015, and 2016.

8. Pursuant to the statutorily prescribed formula in Section 1342, Aetna was entitled to risk corridors payments from the Government in the amount of \$122,043,120 for calendar year 2014, in the amount of \$117,674,228 for calendar year 2015, and in the amount of \$93,246,968 for calendar year 2016.

9. The Government, however, has failed to make full risk corridors payments to Aetna as required under the Risk Corridors Program.

10. Although the Government initially recognized its statutory obligation to pay insurers under the statutory formula, and repeatedly assured insurers that it would do so, more recently the Government has taken the position that the Program would be implemented in a “budget neutral” manner—i.e., that payments out of the Program to insurers would not exceed payments in to the Program from insurers.

11. The Government’s “budget neutral” approach has evolved over time in ways that conflict directly with the Government’s statutory obligations under the Risk Corridors Program. When the Government first introduced this “budget neutral” approach after the ACA was enacted, it sought merely to delay its required risk corridors payments, while assuring insurers that this “budget neutral” approach was temporary and that it would still make all statutorily required payments at the end of the three-year Program. Yet the Government has taken the position in subsequent litigation that even now, well after the end of this period, it has no obligation to make *any* risk corridors payments beyond the amounts collected under the Program.

12. Under this “budget neutral” approach, the Government has paid Aetna only \$20,446,128 of the \$122,043,120 it is owed under the Risk Corridors Program for the 2014 calendar year, thus leaving a remaining balance of \$101,596,992.

13. For the 2015 calendar year, the Government has not paid *any* of its risk corridors obligations, because it did not receive enough collections from the Program to first cover its outstanding 2014 risk corridors obligations. Aetna therefore is owed the entirety of the \$117,674,228 in 2015 risk corridors payments to which it is entitled.

14. For the 2016 calendar year, the Government has not paid *any* of its risk corridors obligations, because it did not receive enough collections from the Program to cover its outstanding 2014 and 2015 risk corridors obligations. Aetna therefore is owed the entirety of the \$93,246,968 in 2016 risk corridors payments to which it is entitled.

15. This action seeks damages from the Government for the remaining risk corridors payments due but unpaid.

II. JURISDICTION

16. This Court has jurisdiction pursuant to the Tucker Act because Plaintiffs seek judgment on a claim over \$10,000 against the United States for its violations of money-mandating federal statutes, regulations, and contracts. 28 U.S.C. § 1491(a)(1). A cause of action under the Tucker Act accrues where, as here, all events have occurred to fix the Government’s alleged liability, i.e., when all statutory, regulatory, or contractual preconditions for payment have been met.

17. The Government’s obligations to make payments under Section 1342 of the ACA are actionable under the Tucker Act because Section 1342 is a money-mandating statute that provides that the Government “shall pay” to Aetna an amount specified by statute when certain criteria have been met. 42 U.S.C. § 18062.

18. The Government's obligations to make payments under the regulations implementing the Risk Corridors Programs, 45 C.F.R. § 153.510, also are actionable under the Tucker Act because those regulations provide that "QHP issuers" like Aetna "will receive" risk corridors payments from the Government under the same criteria as set forth in Section 1342.

19. The Tucker Act further provides jurisdiction for this Court to resolve Aetna's claims based on the Government's breach of implied-in-fact contract and breach of its duty of good faith and fair dealing.

III. PARTIES

20. Plaintiff Aetna Health Inc. (Florida) is a company incorporated in Florida and headquartered in Tampa, Florida. Aetna Health Inc. (Florida) was a QHP issuer on the federally facilitated Florida Exchange for calendar year 2015.

21. Plaintiff Aetna Health Inc. (Georgia) is a company incorporated in Georgia and headquartered in Atlanta, Georgia. Aetna Health Inc. (Georgia) was a QHP issuer on the federally facilitated Georgia Exchange for calendar years 2015 and 2016.

22. Plaintiff Aetna Health Inc. (Pennsylvania) is a company incorporated in Pennsylvania and headquartered in Blue Bell, Pennsylvania. Aetna Health Inc. (Pennsylvania) was a QHP issuer on the federally facilitated Pennsylvania Exchange and the locally run District of Columbia Exchange for calendar years 2014, 2015, and 2016. In addition, Aetna Health Inc. (Pennsylvania) was a QHP issuer on the state-run Maryland Exchange for calendar year 2015; the state-federal partnership Delaware Exchange for calendar years 2015 and 2016; and the federally facilitated Arizona, Illinois, North Carolina, and South Carolina Exchanges for calendar year 2016.

23. Aetna Health Inc. (Pennsylvania) is also the successor in interest, by merger, to three additional QHP issuers: Coventry Health Care of the Carolinas, Inc.; Coventry Health Care of Delaware, Inc.; and HealthAmerica Pennsylvania, Inc.

a. Coventry Health Care of the Carolinas, Inc. was a QHP issuer on the federally facilitated North Carolina and South Carolina Exchanges for calendar years 2014 and 2015.

b. Coventry Health Care of Delaware, Inc. was a QHP issuer on the state-federal partnership Delaware Exchange and the state-run Maryland Exchange for calendar years 2014 and 2015.

c. HealthAmerica Pennsylvania, Inc. was a QHP issuer on the federally facilitated Pennsylvania Exchange for calendar years 2014 and 2015.

24. Plaintiff Aetna Health of Iowa, Inc. is a company incorporated in Iowa and headquartered in Urbandale, Iowa. Aetna Health of Iowa, Inc. was a QHP issuer on the state-federal partnership Iowa Exchange for calendar years 2014, 2015, and 2016. Aetna Health of Iowa, Inc. was formerly known as Coventry Health Care of Iowa, Inc.

25. Plaintiff Aetna Health of Utah, Inc. is a company incorporated in Utah and headquartered in South Jordan, Utah. Aetna Health of Utah, Inc. was a QHP issuer on the federally facilitated Utah Exchange for calendar years 2014 and 2015. Aetna Health of Utah, Inc. was formerly known as Altius Health Plans, Inc.

26. Plaintiff Aetna Life Insurance Co. is a company incorporated in Connecticut and headquartered in Hartford, Connecticut. Aetna Life Insurance Co. was a QHP issuer on the federally facilitated Texas Exchange and the locally run District of Columbia Exchange for calendar years 2014, 2015, and 2016. In addition, Aetna Life Insurance Co. was a QHP issuer on

the federally facilitated Arizona, Florida, Oklahoma, Pennsylvania, and Virginia Exchanges and the state-federal partnership Illinois Exchange for calendar years 2014 and 2015; the federally facilitated Ohio Exchange for calendar year 2015; and the state-federal partnership Delaware Exchange and the state-run Maryland Exchange for calendar years 2015 and 2016.

27. Plaintiff Coventry Health and Life Insurance Co. is a company incorporated in Missouri and headquartered in Bethesda, Maryland. Coventry Health and Life Insurance Co. was a QHP issuer on the federally facilitated Kansas, Missouri, Ohio, and Oklahoma Exchanges; the state-federal partnership Delaware and Illinois Exchanges; and the state-run Maryland Exchange for calendar years 2014 and 2015.

28. Plaintiff Coventry Health Care of Florida, Inc. is a company incorporated in Florida and headquartered in Sunrise, Florida. Coventry Health Care of Florida, Inc. was a QHP issuer on the federally facilitated Florida Exchange for calendar years 2014 and 2015.

29. Plaintiff Coventry Health Care of Illinois, Inc. is a company incorporated in Illinois and headquartered in Champaign, Illinois. Coventry Health Care of Illinois, Inc. was a QHP issuer on the state-federal partnership Illinois Exchange for calendar years 2014, 2015, and 2016.

30. Plaintiff Coventry Health Care of Kansas, Inc. is a company incorporated in Kansas and headquartered in Overland Park, Kansas. Coventry Health Care of Kansas, Inc. was a QHP issuer on the federally facilitated Kansas and Oklahoma Exchanges for calendar years 2014 and 2015.

31. Plaintiff Coventry Health Care of Nebraska, Inc. is a company incorporated in Nebraska and headquartered in Omaha, Nebraska. Coventry Health Care of Nebraska, Inc. was a

QHP issuer on the federally facilitated Nebraska Exchange for calendar years 2014, 2015, and 2016.

32. Plaintiff Coventry Health Care of Virginia, Inc. is a company incorporated in Virginia and headquartered in Richmond, Virginia. Coventry Health Care of Virginia, Inc. was a QHP issuer on the federally facilitated Virginia Exchange for calendar years 2014, 2015, and 2016.

33. Plaintiff Innovation Health Insurance Co. is a company incorporated in Virginia and headquartered in Falls Church, Virginia. Innovation Health Insurance Co. was a QHP issuer on the federally facilitated Virginia Exchange for calendar years 2014, 2015, and 2016.

34. Plaintiff Innovation Health Plan, Inc. is a company incorporated in Virginia and headquartered in Falls Church, Virginia. Innovation Health Plan, Inc. was a QHP issuer on the federally facilitated Virginia Exchange for calendar year 2016.

35. Defendant is the United States of America. The Section 1342 Risk Corridors Program was administered by the Centers for Medicare & Medicaid Services (“CMS”), a federal agency within the Department of Health and Human Services (“HHS”).

IV. FACTUAL ALLEGATIONS

A. Congress Enacts the Risk Corridors Program To Stabilize the New Health Insurance Marketplaces Created by the ACA.

36. Congress’s enactment of the ACA on March 23, 2010 introduced a series of significant reforms to the health care industry aimed at increasing competition in the health insurance marketplace and broadening health insurance access to millions of Americans. Pub. L. No. 111-148, 124 Stat. 119.

37. Central to these reforms was the creation of “Health Benefit Exchanges” that enable insurers to sell individual and small group insurance plans across state-wide

marketplaces. 42 U.S.C. § 18031. Depending on the state, these Exchanges may be operated by the federal government or the state government, or through a state-federal partnership. Health plans issued through these Exchanges—QHPs—are subject to a number of statutory and regulatory requirements.

38. Some of these conditions created significant challenges for insurers who were considering participating in the Exchanges. Most notably, the ACA provides that all individuals, including those who were previously uninsured, are eligible to purchase QHPs, so long as they are citizens, nationals, or lawfully present non-citizens of the United States; are not incarcerated; and meet specified residency requirements. 42 U.S.C. § 18032(f). Insurers lacked information for purposes of accurately predicting health care costs and pricing premiums for this new population of potential enrollees. The resulting uncertainty about the risk of losses threatened to discourage insurers from participating in the Exchanges at all, or to cause them to set premiums at cautiously high levels in the early years of the Exchanges—i.e., charge an additional risk premium for QHPs.

39. To address these challenges and mitigate insurers’ risks in the early years of the Exchanges, Congress included in the ACA three insurance “premium stabilization programs” (colloquially known as the “Three Rs”): (1) a permanent Risk Adjustment Program; (2) a three-year Reinsurance Program; and (3) a three-year Risk Corridors Program. 42 U.S.C. §§ 18061–18063; *see also* CMS, *The Three Rs: An Overview* (Oct. 1, 2015), <https://www.cms.gov/newsroom/fact-sheets/three-rs-overview>.

40. This lawsuit concerns the Risk Corridors Program. This temporary Program was, in CMS’s words, “intended to protect QHP issuers in the individual and small group market against inaccurate rate setting” during the first years of Exchange operation. Patient Protection

and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73,118, 73,200 (Dec. 7, 2012) (“December 2012 Rule”). This was to be accomplished by “sharing risk for allowable costs between the Federal government and QHP issuers” participating in the ACA’s Exchanges during the first three years of the Exchanges—calendar years 2014, 2015, and 2016. Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,930, 41,942 (July 15, 2011).

41. Congress expressly “based” the ACA’s Risk Corridors Program on a similar program implemented as part of the Medicare Part D prescription drug benefit program. 42 U.S.C. § 18062(a). The Medicare Part D program also utilizes risk corridors, under which the Government annually makes risk corridors payments to, or receives risk corridors payments from, plan sponsors, depending on whether a sponsor’s actual expenses exceed, or fall short of, anticipated expenses by specified amounts. 42 U.S.C. § 1395w-115(e). Notably, the Medicare Part D program is not budget neutral and requires that the Government make full, annual risk corridors payments regardless of the amount of collections received under the program.

42. Under the ACA’s Risk Corridors Program, the Government shares risk with health insurers who issue QHPs by making payments to QHP issuers (“payments out”) if premiums that the plan collects fall short by a statutorily specified amount, subject to adjustments for taxes, administrative expenses, and other costs. To ensure that QHP issuers share the risk evenly with the Government, the Government collects charges (“payments in”) from QHPs if the premiums that the plan collects exceed the costs that plan incurs by a statutorily specified amount.

43. To determine whether a QHP receives payment from or pays in to the Program, HHS compares (i) “allowable costs,” defined as “an amount equal to the total costs (other than

administrative costs) of the plan in providing benefits covered by the plan,” and (ii) the “target amounts,” defined as “an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan.” 42 U.S.C. § 18062(c). Both “allowable costs” and “target amount[s]” are statutorily defined on a “plan year basis.” *Id.*

44. Specifically, for payments out, Section 1342 provides that if “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.” *Id.* § 18062(b)(1)(A) (emphasis added). Similarly, if “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.” *Id.* § 18062(b)(1)(B) (emphasis added).

45. Conversely, for payments in, participating plans with allowable costs that are less than the target amounts are required to remit charges for a percentage of those costs savings to HHS. In that circumstance, Section 1342 provides that if “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.” 42 U.S.C. § 18062(b)(2). Similarly, Section 1342 provides that if “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.” *Id.*

46. Thus the Risk Corridors Program promised to shift a portion of participating insurers' losses to the Government when losses exceed 3 percent of insurers' target amount for a calendar year, and to shift a portion of their gains. December 2012 Rule, Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 73,200.

47. QHP issuers relied on the Government's promise to share part of the potential downside risk of insuring the new population both in deciding whether to participate in the Exchanges and in setting affordable premium rates—i.e., rates that did not include an additional risk premium accounting for actuarial uncertainties. The Program was designed to be temporary—running from 2014 to 2016—because Congress recognized that after that period QHPs issuers would have sufficient actuarial information to set accurate premiums. *See* 77 Fed. Reg. 17,220, 17,221, 17,236–39 (Mar. 23, 2012) (“March 2012 Rule”).

48. In enacting the ACA, Congress did not impose any financial limits or constraints on the Government's mandatory risk corridors obligations and payments to QHP issuers in either Section 1342 or any other section of the ACA. Congress also did not limit HHS's obligation to make full risk corridors payments owed to QHP issuers due to appropriations, restriction on the use of funds, or otherwise in Section 1342 or elsewhere in the ACA.

49. This is because such financial limits or constraints on the Government's risk corridors obligations and payments would have impeded the purpose of the Risk Corridors Program. Insurers would have no reason to take comfort in a risk-sharing mechanism that made payments out to insurers contingent on payments in during this three-year period, as it would offer them no protection in the event that the health care industry systematically underestimated the costs of participating in the Exchanges.

B. Aetna Participates in ACA Exchanges Based on HHS’s Assurances of Full and Timely Risk Corridors Payments.

50. After the ACA was enacted, HHS and CMS issued implementing regulations and other policy and guidance assuring insurers that they would receive full and timely risk corridors payments if they participated in the ACA’s Exchanges. *See, e.g.*, 45 C.F.R. Parts 144, 147, 148, 150, 153–56; March 2013 Rule, 78 Fed. Reg. 15,410; March 2012 Rule, 77 Fed. Reg. 17,220; CMS, *Federal Marketplace Progress Fact Sheet* (May 31, 2013), <http://go.cms.gov/2rxwxnD>; CMS, *Letter to Issuers on Federally-Facilitated and State Partnership Exchanges* (Apr. 5, 2013), <http://go.cms.gov/2tt4far>.

51. In March 2012, for example, HHS promulgated final regulations implementing the ACA’s Risk Corridors Program, in which it codified the amount eligible insurers “will receive … from HHS” using a formula identical to the statutory formula under Section 1342. March 2012 Rule, 77 Fed. Reg. at 17,251 (codified as amended at 45 C.F.R. § 153.510(b)). The regulation nowhere stated, or even suggested, that payments to insurers would be limited based on the amount of payments received by HHS from other insurers under the Program. The preamble to the final rule adopting these regulations further stated that “HHS would make [any risk corridor] payments [owed] to QHP issuers … within a 30-day period after HHS determines that a payment should be made”—the same period in which HHS intended QHPs to remit risk corridors payments to HHS. *Id.* at 17,238; *see* 45 C.F.R. § 153.510(d) (subsequently codifying HHS’s requirement that QHP issuers remit to the Government risk corridors payments within 30 days). HHS reasoned that QHP issuers would “want prompt payment,” and that “the payment deadlines should be the same for HHS and QHP issuers.” March 2012 Rule, 77 Fed. Reg. at 17,238.

52. In March 2013, HHS reaffirmed its risk corridors payment obligations in another final rule. March 2013 Rule, 78 Fed. Reg. at 15,410. The rule reiterated the regulatory formula for determining how much insurers “will receive” under the Risk Corridors Program. *Id.* at 15,473. The preamble to the rule expressly stated that “the risk corridors program is not statutorily required to be budget neutral,” meaning that HHS “*will remit* payments as required under [S]ection 1342” “[r]egardless of the balance of payment receipts.” *Id.* (emphases added). In other words, consistent with the clear language of Section 1342 (and like the Medicare Part D program that served as the Risk Corridors Program’s prototype), plans entitled to payments under the Program would receive such payments in full, regardless of whether the aggregate payments in exceeded the aggregate payments out.

53. Aetna accepted the Government’s offer to participate in the ACA’s Exchanges in return for the Government’s fulfillment of its obligation to provide risk corridors payments under the conditions prescribed by statute and regulation.

54. Plaintiffs who participated in federally facilitated or state-federal partnership Exchanges subsequently memorialized certain aspects of their arrangements with the Government to participate in those Exchanges through contracts called QHP Agreements. These Agreements were executed by representatives of the Government who had actual authority to bind the United States.

55. After accepting the Government’s offer to participate in the Exchanges, Aetna priced its QHPs and subsequently submitted its proposed QHP rates for 2014 to relevant state and federal regulators for review and approval. Consistent with CMS regulations and policy, Aetna began selling QHPs to consumers in Arizona, the District of Columbia, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maryland, Missouri, Nebraska, North Carolina, Ohio,

Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia in the fall of 2013, with coverage effective January 1, 2014. Throughout 2014, Aetna provided health care coverage under these QHPs pursuant to the terms required by state and federal law and policy.

56. Meanwhile, Congress's enactment of the appropriations bill for fiscal year 2014 confirmed that the Risk Corridors Program was not designed to be budget neutral. In January 2014, Congress enacted the final omnibus appropriations bill for 2014, which provided an appropriation that could be used to make risk corridors payments. Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 363, 374 (2014) ("2014 appropriations bill"). Specifically, the 2014 appropriations bill provided an appropriation "[f]or carrying out ... other responsibilities of [CMS]" of \$3,669,744,000, "together with ... such sums as may be collected from authorized user fees ... , which shall be credited to this account and remain available until September 30, 2019." *Id.* at 374. This appropriation thus made a substantial lump-sum appropriation available to fund a broad range of CMS's responsibilities. It also permitted CMS to fund those responsibilities through "user fees" collected by CMS from a variety of sources, including the Risk Corridors Program, as well as user fees from other programs. *Id.*

57. As the Government Accountability Office ("GAO") later concluded in a September 2014 report, the 2014 appropriations bill provided funding for HHS to make risk corridors payments from multiple sources. *See* Letter from Susan A. Poling, General Counsel, GAO, to Sen. Jeff Sessions (Sept. 30, 2014), <http://www.gao.gov/assets/670/666299.pdf>. GAO explained that HHS's program management appropriation for CMS's "other responsibilities" "include the risk corridors program"—meaning that risk corridors payments could be made from the lump-sum appropriation for CMS's "other responsibilities," as well as from user fees such as payments in to the Risk Corridors Program. *Id.* at 4 (internal quotation marks omitted). Even

though HHS would not make risk corridors payments until the following year, the 2014 program management appropriation was available to HHS for obligations incurred in 2014 because appropriations remain available for five years for the purpose of paying obligations incurred prior to the account's expiration. *See* I GAO Redbook at 1–37 (3d ed. 2004); 128 Stat. at 374. The September 2014 GAO report therefore confirmed HHS's position in its March 2012 Rule and March 2013 Rule that risk corridors payments could be made regardless of the amounts received in under the Program.

C. HHS Defaults on Its Obligation To Make Full and Timely Risk Corridors Payments.

58. In April 2014, HHS announced for the first time that it might not honor its commitment to make the full statutorily required risk corridors payments on an annual basis. CMS issued an informal bulletin stating that “if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year w[ould] be reduced pro rata to the extent of any shortfall.” CMS, *Risk Corridors and Budget Neutrality* 1 (Apr. 11, 2014) (“April 2014 CMS Bulletin”), <http://go.cms.gov/2rCp2qX>. CMS further explained that 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.” *Id.* “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,” by contrast, CMS stated that “the current year payments will be reduced pro rata to the extent of any shortfall.” *Id.*

59. CMS’s suggestion in the April 2014 CMS Bulletin that it might not make full risk corridors payments to insurers on an annual basis contradicted HHS’s prior statement that it

would make full payments to insurers within 30 days. March 2012 Rule, 77 Fed. Reg. at 17,238. Nevertheless, despite changing its position on the timing of payments, nothing in CMS’s bulletin undercut the Government’s obligation to eventually make full risk corridors payments. Instead, CMS’s bulletin stated that CMS would “establish in future guidance or rulemaking how we will calculate risk corridors payments if 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.” April 2014 CMS Bulletin 2.

60. HHS subsequently recognized that a budget neutral approach to implementing the Risk Corridors Program was not required by any limit on available appropriations. In May 2014, HHS acknowledged in a letter to GAO that, as GAO’s September 2014 report later confirmed, CMS’s general program management appropriation for fiscal year 2014 gave it the authority to make full risk corridors payments. *See* Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014).

61. Following its letter to GAO, HHS reiterated in May 2014 in a new rule that it was legally obligated to make risk corridors payments in full. Although HHS “*anticipate[d]* that risk corridors collections will be sufficient to pay for all risk corridor payments,” and accordingly intended to implement the Program in a budget neutral manner, HHS did not change its view of the underlying obligation—reflected in the statute itself, as well as in HHS’s 2012 and 2013 implementing regulations—that “the [ACA] requires the Secretary to make *full* payments to issuers,” including through “other sources of funding,” if necessary. Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) (emphasis added).

62. Neither the April 2014 CMS Bulletin, HHS's 2014 regulations, nor the agencies' other memoranda purported to reinterpret or alter Section 1342 or HHS's 2012 or 2013 implementing regulations regarding HHS's statutory obligations to make full payments to insurers under the Risk Corridors Program. Instead, the April 2014 CMS Bulletin and HHS's 2014 regulations suggested only that the agency intended to alter the timing of payment so that full payments would not be made until the end of the Risk Corridors Program, long after the 30-day period HHS initially promised. The agencies offered no justification for this change. *See* March 2012 Rule, 77 Fed. Reg. at 17,238.

63. HHS's official position after May 2014, therefore, remained that the risk corridors statute required the Government to eventually make full payments to issuers, regardless of the amount of payments collected under the Program. That remained HHS's position when Plaintiffs renewed their QHP Agreements and submitted their proposed QHP rates for the 2015 calendar year to relevant state and federal regulators for review and approval. Consistent with CMS regulations and policy, Aetna began selling QHPs to consumers in Arizona, the District of Columbia, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maryland, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia in the fall of 2014, with coverage effective January 1, 2015. Throughout 2015, Aetna provided health care coverage under these QHPs pursuant to the terms required by state and federal law and policy.

D. Congress Is Unsuccessful in Amending Risk Corridors Payment Obligations under the ACA and Instead Limits Funding through Appropriations Riders.

64. Meanwhile, congressional opponents of the ACA unsuccessfully attempted to amend the statute to require the Program to be budget neutral. *See, e.g.*, Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014). The proposed amendment failed, however, and the

Risk Corridors Program thus continued to require full and timely payments by the government for amounts owed.

65. Unable to command sufficient votes to alter the Government's obligations under the Risk Corridors Program, the sponsors of the failed amendment sought instead to temporarily limit specific sources of funding for the Program. On December 16, 2014—over a year after Aetna began selling QHPs on the Exchanges for calendar year 2014, and months after Aetna began selling QHPs on the Exchanges for calendar year 2015—Congress enacted the annual omnibus appropriations bill for fiscal year 2015, which for the first time prohibited HHS from using any of the lump-sum program management budget appropriated by that bill for payments under the Risk Corridors Program in the 2015 fiscal year. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014) (“2015 appropriations bill”).

66. Specifically, the 2015 appropriations bill provided:

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).

128 Stat. at 2491. Congress enacted an identical provision in the following year's appropriation bill for fiscal year 2016. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225, 129 Stat. 2242, 2624 (2015) (“2016 appropriations bill”).

67. Both the 2015 and 2016 appropriations bills were limited on their face to appropriations matters and did not purport to modify Section 1342 or make any change to the statutory formula for determining the Government's underlying obligations under the Risk Corridors Program. President Obama signed both appropriations bills without any signing

statement suggesting that, in doing so, he believed that he was substantially modifying the Risk Corridors Program or any other central component of the ACA.

68. Consistent with the limited effect of the appropriations bills, HHS continued to acknowledge its obligation to make full risk corridor payments after the enactment of the 2015 bill. For instance, HHS implemented a final rule in February 2015 explaining that “HHS recognizes that the Affordable Care Act requires the Secretary to make full [risk corridors] payments to issuers.” Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10750, 10779 (Feb. 27, 2015). In July 2015, CMS reaffirmed its commitment to making full risk corridors payments in a letter to state health insurance commissioners, stating that “CMS remains committed to the risk corridor program. As stated in our final payment notice for 2016, ‘We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.’” Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), <http://go.cms.gov/1TRpYkd>. Four months later, CMS likewise stated in a letter to QHP issuers that it “wish[ed] to reiterate to you that [HHS] recognizes that the Affordable Care Act *requires* the Secretary to make full payments to issuers.” Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS (Nov. 2, 2015) (emphasis added).

69. HHS’s official position continued to be that the risk corridors statute required the Government to eventually make full payments to issuers regardless of the amount of payments in collected under the Program. That remained HHS’s position when Plaintiffs renewed their QHP Agreements and submitted their proposed QHP rates for the 2016 calendar year. Consistent with CMS regulations and policy, Aetna began selling QHPs to consumers in Arizona, Delaware, the

District of Columbia, Georgia, Illinois, Iowa, Maryland, Nebraska, North Carolina, Pennsylvania, South Carolina, Texas, and Virginia in the fall of 2015, with coverage effective January 1, 2016. Throughout 2016, Aetna provided health care coverage under these QHPs pursuant to the terms required by state and federal law and policy.

70. Aetna was required to submit data concerning its 2014 risk corridors expenses to HHS by July 31, 2015. 45 C.F.R § 153.530(d) (2019). After Aetna and other QHP issuers submitted their risk corridor data for 2014, CMS announced on October 1, 2015 that, despite the Government's repeated assurances that it would ultimately pay insurers what they were owed under the statute, it would implement the Risk Corridors Program in a “[b]udget [n]eutral” manner and would not make full risk corridors payments for 2014. 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>. CMS stated that it expected to collect \$362 million in fees under the Program but owed \$2.87 billion in payments for the 2014 Program year. *Id.* Due to the shortfall and restriction on the use of its lump-sum program management budget for payments under the Program, CMS prorated risk corridors payments owed to QHP issuers to the amount collected from risk corridors payments in, resulting in a payment rate of just 12.6 percent. *Id.* CMS stated that the 87.4 percent shortfall could eventually be paid out of 2015 and 2016 risk corridors collections, but failed to explain how CMS would fulfill its 2015 and 2016 risk corridors obligations. *Id.* CMS also announced that it would collect full risk corridors charges from QHP issuers in November 2015, and would begin making the prorated risk corridors payments in December 2015. *Id.* Plaintiffs whose QHP expenditures fell short of the target amounts in 2014 thus remitted full risk corridors payments to

HHS even though some of these Plaintiffs were owed much greater amounts from HHS under the Program based on their participation in other Exchanges in which their QHP expenditures exceeded the target amounts.

71. Aetna was required to submit data concerning its 2015 risk corridors expenses to HHS by July 31, 2016. On November 18, 2016, after collecting risk corridors data from Aetna and other QHP issuers for calendar year 2015, CMS confirmed that all 2015 benefit year risk corridors collections would be used to pay a portion of balances on 2014 risk corridors payments. CMS explained that the payments received for 2015 would cover just 1.6 percent of the \$5.9 billion still owed for 2014 and 2015. *See CMS, Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf>. CMS also announced that it was collecting full risk corridors charges from QHP issuers in November 2016, and would begin making the prorated risk corridors payments in December 2016. *Id.* Thus, again, Plaintiffs whose QHP expenditures fell short of the target amounts remitted full risk corridors payments to HHS even though some of these Plaintiffs were owed much greater amounts from HHS under the Program based on their participation in other Exchanges in which their QHP expenditures exceeded the target amounts.

72. Aetna and other QHP issuers were required to submit risk corridors data for calendar year 2016 to HHS by July 31, 2017. On November 15, 2017, CMS confirmed that because 2015 benefit year collections were insufficient to pay 2014 benefit year payment balances in full, 2016 benefit year risk corridors collections, too, would be used to make payments toward those balances. *CMS, Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year* (Nov. 15, 2017), <https://www.cms.gov/CCIIO/Programs-and->

Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-Amounts-2016.pdf.

CMS also announced that it would collect full risk corridors charges from QHP issuers in November 2017, and would begin making the prorated risk corridors payments in January 2018.

Id. Again, Plaintiffs whose QHP expenditures fell short of the target amounts in 2016 thus remitted full risk corridors payments to HHS even though some of these Plaintiffs were owed much greater amounts from HHS under the Program based on their participation in other Exchanges in which their QHP expenditures exceeded the target amounts.

E. The Government Owes Aetna Risk Corridor Payments for the 2014, 2015, and 2016 Program Years.

73. The Government has paid a mere fraction of its risk corridor obligations to Aetna despite receiving the full benefit of Aetna's participation in the Exchanges, as well as Aetna's full compliance with all statutory and regulatory requirements that QHP issuers must satisfy to participate in the Exchanges and receive payments.

74. The Government owes Aetna Health Inc. (Florida) \$11,484,155 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Florida).

75. The Government owes Aetna Health Inc. (Georgia) \$18,355,168 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Georgia).

76. The Government owes Aetna Health Inc. (Georgia) \$780,033 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Georgia).

77. The Government owes Aetna Health Inc. (Pennsylvania) \$6,007,381 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that

obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Pennsylvania).

78. The Government owes Aetna Health Inc. (Pennsylvania) \$32,965,896 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Pennsylvania).

79. The Government also owes Aetna Health Inc. (Pennsylvania) additional risk corridor payments in Aetna Health Inc. (Pennsylvania)'s capacity as the successor in interest to Coventry Health Care of Delaware, Inc.; Coventry Health Care of the Carolinas, Inc.; and HealthAmerica Pennsylvania, Inc.:

a. The Government originally owed Coventry Health Care of Delaware, Inc., \$245,541 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Pennsylvania), as successor to Coventry Health Care of Delaware, Inc.

b. The Government originally owed Coventry Health Care of the Carolinas, Inc., \$15,277,631 in risk corridors payments for the 2014 Program year but to date has remitted only \$2,559,492 toward that obligation. The Government therefore continues to owe the remaining \$12,718,139 to Aetna Health Inc. (Pennsylvania), as successor to Coventry Health Care of Delaware, Inc.

c. The Government originally owed Coventry Health Care of the Carolinas, Inc. \$19,434,881 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe

the full amount to Aetna Health Inc. (Pennsylvania), as successor to Coventry Health Care of the Carolinas, Inc.

d. The Government originally owed HealthAmerica Pennsylvania, Inc., \$2,041,358 in risk corridors payments for the 2014 Program year but to date has remitted only \$341,993 toward that obligation. The Government therefore continues to owe the remaining \$1,699,365 to Aetna Health Inc. (Pennsylvania), as successor to HealthAmerica Pennsylvania, Inc.

e. The Government originally owed HealthAmerica Pennsylvania, Inc. \$1,046,557 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health Inc. (Pennsylvania), as successor to HealthAmerica Pennsylvania, Inc.

80. The Government originally owed Aetna Health of Iowa, Inc. \$2,706,455 in risk corridors payments for the 2014 Program year but to date has remitted only \$453,418 toward that obligation. The Government therefore continues to owe the remaining \$2,253,037 to Aetna Health of Iowa, Inc.

81. The Government owes Aetna Health of Iowa, Inc. \$705,180 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health of Iowa, Inc.

82. The Government owes Aetna Health of Iowa, Inc. \$1,370,536 in risk corridors payments for the 2016 Program year but to date has remitted to no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health of Iowa, Inc.

83. The Government originally owed Aetna Health of Utah, Inc. \$2,007,044 in risk corridors payments for the 2014 Program year but to date has remitted to only \$336,244 toward that obligation. The Government therefore continues to owe the remaining \$1,670,800 to Aetna Health of Utah, Inc.

84. The Government owes Aetna Health of Utah, Inc. \$3,061,829 in risk corridors payments for the 2015 Program year but to date has remitted to no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Health of Utah, Inc.

85. The Government originally owed Aetna Life Insurance Co. \$2,052,459 in risk corridors payments for the 2014 Program year but to date has remitted only \$343,852 toward that obligation. The Government therefore continues to owe the remaining \$1,708,607 to Aetna Life Insurance Co.

86. The Government owes Aetna Life Insurance Co. \$11,672,694 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Life Insurance Co.

87. The Government owes Aetna Life Insurance Co. \$7,000,271 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Aetna Life Insurance Co.

88. The Government originally owed Coventry Health and Life Insurance Co. \$53,013,438 in risk corridors payments for the 2014 Program year but to date has remitted only \$8,881,448 toward that obligation. The Government therefore continues to owe the remaining \$44,131,991 to Coventry Health and Life Insurance Co.

89. The Government owes Coventry Health and Life Insurance Co. \$22,668,781 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that

obligation. The Government therefore continues to owe the full amount to Coventry Health and Life Insurance Co.

90. The Government originally owed Coventry Health Care of Florida, Inc. \$30,586,353 in risk corridors payments for the 2014 Program year but to date has remitted only \$5,124,193 toward that obligation. The Government therefore continues to owe the remaining \$25,462,159 to Coventry Health Care of Florida, Inc.

91. The Government owes Coventry Health Care of Illinois, Inc. \$3,176,139 in risk corridors payments for the 2014 Program year but to date has remitted only \$532,105 toward that obligation. The Government therefore continues to owe the remaining \$2,644,034 to Coventry Health Care of Illinois, Inc.

92. The Government owes Coventry Health Care of Illinois, Inc. \$2,643,435 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Coventry Health Care of Illinois, Inc.

93. The Government originally owed Coventry Health Care of Kansas, Inc. \$10,755,583 in risk corridors payments for the 2014 Program year but to date has remitted only \$1,801,904 toward that obligation. The Government therefore continues to owe the remaining \$8,953,679 to Coventry Health Care of Kansas, Inc.

94. The Government owes Coventry Health Care of Kansas, Inc. \$2,312,994 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Coventry Health Care of Kansas, Inc.

95. The Government owes Coventry Health Care of Nebraska, Inc. \$18,035,629 in risk corridors payments for the 2015 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Coventry Health Care of Nebraska, Inc.

96. The Government owes Coventry Health Care of Nebraska, Inc. \$14,918,862 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Coventry Health Care of Nebraska, Inc.

97. The Government owes Coventry Health Care of Virginia, Inc. \$3,614,943 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Coventry Health Care of Virginia, Inc..

98. The Government originally owed Innovation Health Insurance Co. \$426,660 in risk corridors payments for the 2014 Program year but to date has remitted only \$71,479 toward that obligation. The Government therefore continues to owe the remaining \$355,181 to Innovation Health Insurance Co.

99. The Government owes Innovation Health Insurance Co. \$32,520,662 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Innovation Health Insurance Co.

100. The Government owes Innovation Health Plan, Inc. \$75,765 in risk corridors payments for the 2016 Program year but to date has remitted no money toward that obligation. The Government therefore continues to owe the full amount to Innovation Health Insurance Co.

101. In total, therefore, the Government owes Aetna \$101,596,992 in 2014 risk corridors payments, \$117,674,228 in 2015 risk corridors payments, and \$93,246,968 in 2016 risk corridors payments, or \$312,518,188 across all three years.

102. The Government has indicated that it will not pay any of the remaining risk corridors payments owed to Aetna because total collections were not sufficient for the Government to meet its outstanding obligation for 2014 risk corridors payments, much less any of its obligations for 2015 and 2016.

CLAIMS FOR RELIEF

COUNT ONE
(Violations of Section 1342 of the ACA and 45 C.F.R. § 153.510)

103. Plaintiffs re-allege and incorporate paragraphs 1–102 of the Complaint as if set forth fully herein.

104. Section 1342 of the ACA states that the Secretary of HHS “shall pay” qualified insurers statutorily defined amounts as part of the Risk Corridors Program. 42 U.S.C. § 18062. The statute is money-mandating.

105. HHS’s and CMS’s implementing regulation, codified at 45 C.F.R. § 153.510, also mandates payments under the Risk Corridors Program, stating that when QHP issuers’ allowable costs exceed the 3 percent risk corridors threshold, HHS “will pay” risk corridors payments to QHP issuers in accordance with the payment formula set forth in the regulation, which is identical to the statutorily defined amounts in Section 1342. *Id.*

106. Plaintiffs are qualified insurers that have satisfied all statutory and regulatory requirements for participation in the Risk Corridors Program in 2014, 2015, and 2016. Plaintiffs are thus presently owed risk corridors payments for those years.

107. HHS's and CMS's implementing regulation, codified at 45 C.F.R. § 153.510(d), also requires QHP issuers to remit charges to HHS within 30 days after notification of such charges. HHS's and CMS's statements published in the Federal Register on March 23, 2012 make clear that risk corridors "payment deadlines should be the same for HHS and QHP issuers." March 2012 Rule, 77 Fed. Reg. at 17,238.

108. The Government failed to make risk corridors payments owed to Aetna for 2014, in violation of Section 1342 and 45 C.F.R. § 153.510. Specifically, the Government has paid only \$20,446,128 of the total \$122,043,120 to which Aetna is entitled for calendar year 2014, and thus owes Aetna \$101,596,992 in 2014 risk corridors payments.

109. The Government has made no payments toward the amount owed for the Risk Corridor Program for calendar year 2015, and thus the Government owes Aetna the entirety of its \$117,674,228 in 2015 risk corridors payments.

110. Similarly, the Government has made no payments toward the amount owed for the Risk Corridor Program for calendar year 2016, and thus the Government owes Aetna the entirety of its \$93,246,968 in 2016 risk corridors payments.

111. At minimum, even if the Government were correct that Congress designed the Risk Corridors Program to be administered in a budget neutral manner (and it is not), the Government's payments to Plaintiffs would be insufficient to satisfy its obligations under Section 1342 and 45 C.F.R. § 153.510. There is no statutory or regulatory basis for requiring insurers who owe payments in for plans operated in one state and who are owed payments out for plans operated in another state to make their full payments in while receiving only a fraction of the payments out that they are due, rather than offsetting these obligations. For example, Aetna Life Insurance Co. owed payments in totaling under \$1 million for plans operated in the

District of Columbia and Virginia for calendar year 2014, but was owed payments out totaling over \$2 million for plans operated in Arizona, Illinois, Oklahoma, Pennsylvania, and Texas that same year. Even though Aetna Life Insurance Co. lost money overall across these jurisdictions, it was still required to pay in to the Risk Corridors Program the full amount owed for the District of Columbia and Virginia Exchanges, rather than have that amount offset against the larger amount the Government owed Aetna for the other Exchanges. Congress could not have intended this absurd result, which is contrary to the Program's goal of reducing the risk of participating in the Exchanges. Plaintiffs like Aetna Life Insurance Co. are at least entitled to the return of any payments in that should have been offset by payments out.

112. The mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the underlying substantive law, does not defeat a Government obligation created by statute. Because the Government is obligated to make full risk corridors payments to Aetna, Aetna is entitled to a money judgment, payable from the Judgment Fund or elsewhere, for the entire amount owed, including \$101,596,992 in 2014 risk corridors payments, \$117,674,228 in 2015 risk corridors payments, and \$93,246,968 in 2016 risk corridors payments, for a total of \$312,518,188.

COUNT TWO
(Breach of Implied-in-Fact Contract)

113. Plaintiffs re-allege and incorporate paragraphs 1–112 of the Complaint as if set forth fully herein.

114. Aetna entered into implied-in-fact contracts with CMS regarding its participation in the Exchanges, under which CMS was required to make risk corridors payments in the amount specified in Section 1342 and HHS's implementing regulations. Specifically, Aetna agreed to sell and provide health care coverage to individuals through QHPs in 2014, 2015, and 2016, in

exchange for timely reimbursement from the Government, including risk corridors payments in the amounts specified in Section 1342 and HHS's implementing regulations.

115. The terms of the offer and acceptance were unambiguously specified in the ACA, HHS's implementing regulations, and other statements by CMS and HHS. CMS agreed to this implied contract by and through the words and actions of Kevin Counihan, Director of CCIIO and CEO of the Health Insurance Marketplaces, and his predecessors in that position; Andrew Slavitt, Administrator of CMS, and his predecessors in that position; and other CMS and HHS officials, all of whom had actual authority to bind the Government.

116. Aetna satisfied its contractual obligations by selling and providing QHP coverage to qualifying individuals in 2014, 2015, and 2016, pursuant to state and federal laws, regulations, and policies.

117. The Government breached its contractual duty to Aetna by failing to timely pay it the full amount of risk corridors payments owed.

118. In the absence of an express modification of Section 1342 of the ACA, Congress's failure to appropriate sufficient funds for risk corridor payments did not defeat or abrogate the Government's contractual obligation to Aetna to make full and timely risk corridors payments.

119. As a result of the Government's material breaches of its implied-in-fact contracts, Aetna has suffered damages in the amount of at least \$312,518,188.

COUNT THREE
(Breach of Implied Covenant of Good Faith and Fair Dealing)

120. Plaintiffs re-allege and incorporate paragraphs 1–119 of the Complaint as if set forth fully herein.

121. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

122. Based on the implied-in-fact contracts entered into between Aetna and the Government, Aetna reasonably expected the Government to fully and timely pay risk corridor payments for 2014, 2015, and 2016—just as the Government expected that QHP issuers would fully and timely pay risk corridor remittance charges.

123. The Government violated Aetna's reasonable expectations regarding the terms of the implied-in-fact contracts by failing to make full and timely risk corridor payments, in breach of an implied covenant of good faith and fair dealing. Specifically, the Government breached the implied covenant of good faith and fair dealing by, among other things: requiring Aetna to remit full and timely risk corridors charges to the Government, but failing to make full and timely risk corridors payments to Aetna; creating a 30-day deadline for Aetna's remittance of risk corridors charges to the Government, but failing to create a similar deadline for the Government's full payment of risk corridors payments to Aetna, despite stating that QHP issuers and the Government should be subject to the same payment deadline, *see, e.g.*, March 2012 Rule, 77 Fed. Reg. at 17,238; attempting to limit through appropriations bills funding sources for risk corridors payments after Aetna had undertaken significant expenses in performing its obligations as a QHP issuer; and depriving Aetna of full and timely risk corridor payments after Aetna agreed to participate in the Exchanges and had fulfilled its statutory and regulatory obligations.

124. As a result of the Government's breaches of the covenant of good faith and fair dealing, Aetna has suffered damages in the amount of at least \$312,518,188.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask this Court to enter judgment in their favor and against Defendant and to:

- A. Award Plaintiffs monetary relief equal to the difference between the amount Plaintiffs received in risk corridors payments for calendar years 2014, 2015, and 2016, and the amount they should have received for those years under Section 1342 of the ACA and 45 C.F.R. § 153.510;
- B. Award Plaintiffs breach-of-contract damages equal to the difference between the amount Plaintiffs received in risk corridors payments for calendar years 2014, 2015, and 2016, and the amount they should have received under Section 1342 of the ACA and 45 C.F.R. § 153.510, together with damages and any losses sustained as a result of the Government's breach;
- C. Award Plaintiffs additional damages and other monetary relief as is available under applicable law;
- D. Award Plaintiffs pre-judgment and post-judgment interest;
- E. Award Plaintiffs costs and attorneys' fees; and
- F. Award Plaintiffs such other and further relief as this Court may deem necessary and proper.

Dated: August 30, 2019

Respectfully submitted,

s/ Craig D. Singer

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on August 30, 2019, a copy of the foregoing Complaint was filed electronically using the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on all parties by operation of the Court's ECF system.

s/ Craig D. Singer

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