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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
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U.S. COURT OF
FEDERAL CLAIMS

Premera Blue Cross, LifeWise Health Plan of Washington and LifeWise Health Plan of Oregon,

Plaintiffs,

v.

The United States of America,

Defendant.

Case No. 17-1155 C

COMPLAINT

Premera Blue Cross, LifeWise Health Plan of Washington and LifeWise Health Plan of Oregon (collectively, "Premera" or "Plaintiff"), by and through their undersigned attorneys, bring this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and allege as follows:

INTRODUCTION

1. Premera brings this action to obtain payment of amounts owed by Defendant pursuant to the mandatory payment obligations under the risk corridors program prescribed in Section 1342 of the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA") and its implementing federal regulations.

2. The ACA represents a significant change to the way in which health insurance coverage is provided to individuals and small groups in America, with the aim being to provide affordable health insurance coverage to all Americans. To that end, the ACA precludes health insurance companies from denying coverage to enrollees or their dependents based on pre-existing conditions and from pricing insurance coverage based on health status or medical history. (*See* 42 U.S.C. §§ 300gg-300gg-4 (2015).)

3. Individuals and small groups may purchase coverage under the ACA via health plans that are sold on either federally-facilitated marketplaces or state-based marketplaces (sometimes a state-based marketplace on a federally-facilitated information technology platform) (the "Exchanges"). The United States Department of Health and Human Services ("HHS"), through its Centers for Medicare and Medicaid Services ("CMS"), certifies plans sold on the federally-facilitated marketplaces, and the ACA delegates to states the authority to certify plans that are sold on state-based marketplaces. (42 U.S.C. § 18031.) Section 1334 of the ACA also authorizes the United States Office of Personnel Management ("OPM") to oversee a multi-state plan program to offer coverage across multiple states via multi-state plans ("MSPs"). (42 U.S.C. § 18054(a).) Plans that are certified by the appropriate state or federal authority and sold on the ACA Exchanges, including MSPs, are collectively referred to herein as "Qualified Health Plans" or "QHPs". The health insurance companies that offer QHPs to eligible insureds on the ACA Exchanges are referred to herein as QHP issuers.

4. ACA reforms impose significant risk, cost, and uncertainty on participating health insurance companies, which, absent any counterbalancing measures, would translate to increased premiums and threaten the ACA goal of affordable healthcare. To counterbalance the risk, cost, and uncertainty, the ACA includes a number of provisions intended to encourage participation in the ACA Exchanges and induce affordable pricing by QHP issuers. Such risk-offsetting elements of the ACA include the payment of subsidies to low-income insureds, penalties on individuals for failure to obtain coverage, and policies designed to stabilize risk born by participating QHP issuers.

5. The ACA's risk stabilization policies—which are commonly known as the "three Rs," *i.e.* the temporary reinsurance program, the temporary risk corridors program and the

permanent risk adjustment program—were implemented to prevent a "premium death spiral," whereby higher premium rates caused by inherent uncertainty in the new markets discourage participation by healthy individuals, leaving a relatively unhealthy and, therefore, more risky and expensive risk pool that, in turn, drives prices up higher and further discourages participation by healthy individuals, as well as health insurance companies.

6. Of the three risk stabilization policies, the risk corridors program is the subject of Premera's claims here. The risk corridors program was intended to stabilize premiums by requiring the Government to share in health insurance companies' profits or losses beyond specified thresholds. The ACA established the risk corridors program to operate during the early years of ACA implementation when the number and relative health of newly insured populations under the ACA could not be known by participating QHP issuers, and the expectation was that the newly insured populations would represent greater risk. The risk corridors program is a temporary program, obligating the Government to make payments during the first three years of operation of the ACA Exchanges, calendar years ("CYs") 2014 to 2016.

7. Premera is one of the largest health insurers in the Pacific Northwest. Premera created, priced and sold QHPs in Alaska, Oregon and Washington during all three years of the risk corridors program. But for Premera's efforts, there would have been few or no options for health insurance coverage in the Pacific Northwest, and premiums for enrollees would have been substantially higher.

8. Between the enactment of the ACA in 2010 and the launch of the Exchanges on January 1, 2014, Premera designed and priced QHPs to be sold on the Exchanges. Premera knew from experience gained during the period of Washington State health care reform in the late 1990s and early 2000s that there is increased risk in providing health insurance coverage to a

previously uninsured population on a guarantee issue-basis. The reforms in Washington that were developed and designed to provide coverage to previously uninsured populations in the 1990s and early 2000s yielded a market that eventually collapsed under its own weight and Premera sustained significant losses. Thus, Premera understood that the reforms contemplated under the ACA would require market stabilization programs in order for the ACA Exchanges to avoid the same fate that had been endured in connection with the state-based reforms in Washington. Consistent with the plain terms of the ACA, its regulations, and the assurances provided by CMS and HHS, Premera understood that the United States would annually share in losses from the sale of QHPs according to the statutory risk corridors formula in place during CY 2014, CY 2015 and CY 2016.

9. The financial protections that the Government provided in the statutory premium-stabilization programs, including the mandatory risk corridors program, provided Premera with the assurance, backed by federal law and the full faith and credit of the United States, to become a QHP issuer in Oregon, Washington, and Alaska, and to price its QHPs at competitive rates, despite the significant financial risks posed by the uncertainty in the new healthcare markets.

10. Based on its actual allowable costs, Premera is entitled to a risk corridors payment from the Government of $13,074,535 for its 2014 QHPs, $65,135,255 for its 2015 QHPs and $41,169,010 for its 2016 QHPs.

11. The United States has repeatedly admitted that it is obligated to pay the full amount of risk corridors payments owed to Premera for CYs 2014-2016. Nevertheless, the United States has breached its statutory and contractual obligations to make full risk corridors payments and, in so doing, has also violated Premera's constitutional rights under the Fifth Amendment and violated the implied covenant of good faith and fair dealing. For CY 2014, the

United States paid roughly 12.6 percent of the amounts due any QHP insurer, including Premera. Although the United States paid a portion of the amounts owing for CY 2014 one year later, it still has not paid $11,056,639 due for CY 2014. The United States has paid nothing for CYs 2015 or 2016.

12. This action seeks damages from the Government of at least $117,360,904, which represents the amount of risk corridors payments that the Government still owes to Premera for CY 2014 plus amounts owed for CY 2015 and CY 2016 under the mandatory statutory risk corridors payment program.

PARTIES

13. Plaintiff Premera Blue Cross is a nonprofit corporation organized under the laws of the state of Washington and based in Mountlake Terrance, Washington. Premera is registered as a health care service contractor in the state of Washington and a hospital and medical service corporation in the state of Alaska. Premera offered health insurance coverage through certified QHPs on a federally-facilitated exchange in Alaska for CYs 2014-2016 – doing business as "Premera Blue Cross Blue Shield of Alaska" – and on a state-based exchange in Washington for CYs 2014-2016.

14. Plaintiff LifeWise Health Plan of Washington ("LWWA") is a wholly-owned subsidiary of Premera Blue Cross. LWWA is a nonprofit corporation organized under the laws of the state of Washington and based in Mountlake Terrance, Washington. LWWA is registered as a health care service contactor in the state of Washington and offered health insurance coverage through state-approved health plans on a state-based exchange in Washington for CYs 2014-2016.

15. Plaintiff LifeWise Health Plan of Oregon ("LWOR") is a wholly-owned subsidiary of Premera Blue Cross. LWOR is a for profit corporation organized under the laws of the state of Oregon and based in Mountlake Terrace, Washington. LWOR offered health insurance coverage in Oregon through state-approved health plans on a state-based exchange for CY 2014 and a state-based partnership exchange with the federal government for CYs 2015-2016.

16. Defendant is the United States of America. HHS, an Executive Agency of the United States Government, has been tasked with administering the risk corridors program set forth in Section 1342 of the ACA. HHS has delegated its responsibility to CMS.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. Section 1491(a)(1), because Premera brings claims for damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress and a money-mandating regulation of an executive department, the Government's breach of an express and implied-in-fact contract with the United States, the Government's breach of the implied covenant of good faith and fair dealing and the Government's taking of Premera's property in violation of the Fifth Amendment of the Constitution.

18. The actions and/or decisions of the Government at issue in this lawsuit were conducted on behalf of the Defendant United States within the District of Columbia.

FACTUAL BACKGROUND

A. Risk Corridors Statutory Framework

19. The ACA required QHP issuers on the newly-formed Exchanges to navigate health insurance reforms while attempting to predict healthcare costs for the new population of

individuals about which the QHP issuers had no information or experience as well as offer coverage to anyone irrespective of health status (i.e., guarantee issue). As a result of this uncertainty, QHP issuers faced significant challenges in setting premium rates.

20. The three Rs, including the risk corridors program, were included in the ACA to address these uncertainties, promote participation in the newly-formed ACA Exchanges, and encourage affordable pricing of QHPs.

21. Recognizing the risk and uncertainty facing participating QHP issuers, CMS explained at the outset that the risk corridors program would operate by requiring "the Federal Government and [QHP issuers] to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016." (78 Fed. Reg. 15,409, 15,412 (March 11, 2013).) The risk corridors program was designed to protect QHP issuers such as Premera by allowing them "to lower rates by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." (*Id.* at 15,413.)

22. The payments owed to a QHP issuer under the risk corridors program are based on the ratio of the QHP issuer's "allowable costs," on the one hand, and a "target amount," on the other hand. (Pub. L. No. 111-148 § 1342 (codified at 42 U.S.C. § 18062).) Section 1342(c) defines allowable costs as "an amount equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan." (*Id.* at § 1342(c)(1)(A).) Section 1342(c) defines target amount as "an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan." (*Id.* at § 1342(c)(2).)

23. Under the ACA, HHS must make payments to any QHP issuer that, for the applicable year, had health care costs that were more than three percent greater than the target

amount based on aggregate premiums charged by the plan in the applicable year. Specifically, Section 1342 provides in relevant part:

> (b) PAYMENT METHODOLOGY, —
>
> (1) Payments out. — The Secretary shall provide under the program established under subsection (a) that if —
>
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the secretary ***shall pay*** to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary ***shall pay*** to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

(*Id.* at § 1342(b) (emphasis added).)

24. The Government intended the risk corridors program to offer stability to the health insurance markets in the early years of ACA implementation, 2014 through 2016, and to allow QHP issuers to keep premium rates at affordable levels instead of adding a risk premium to account for actuarial uncertainties.

25. By limiting risk to Premera, the risk corridors program encouraged Premera to participate in the ACA Exchanges. Without the program, Premera faced the possibility of significant losses given the unknown demographics of the new enrollees and that uncertainty would translate into higher premiums and less affordable health insurance coverage.

26. For the program to be effective in reducing uncertainty, lowering premium rates and stabilizing risk, however, QHP issuers had to trust that the risk corridors payments would be made in full. And for the risk corridors program to be effective during the critical early years of ACA implementation when insured data is unavailable, QHP issuers had to have confidence that the risk corridors payments would be timely made on an annual basis. A risk corridors program designed to provide only partial or uncertain payments would fail to serve (i) the risk stabilizing

objective of the risk corridors statute or (ii) the goal of the ACA to provide affordable health insurance to all Americans.

27. The risk corridors program also requires QHP issuers that charged higher-than-necessary premiums to cover their costs to share profits with the Government during the transitional period. Specifically, Section 1342(b)(2) provides that, in such circumstances, the health insurer "shall" make payments ***to*** the Government. (Pub. L. No. 111-148 § 1342(b)(2).) The statutory formula requires payments "in" to the extent a participating plan's allowable costs for any plan year are less than ninety-seven percent of the target amount. (*Id.*)

28. Importantly, the risk corridors program is not statutorily designed to be budget neutral. The statutory formula for payments "out" to QHP issuers under the risk corridors program is in no way dependent upon, or limited by, the amounts that are paid "in" to the risk corridors program by QHP issuers. There is also no language within the statute, or anywhere in the ACA, that requires budget neutrality, specifies the source of funding or otherwise limits the payments out of the program to the payments into the program or to other available funding.

29. Instead, the ACA requires payments owed to QHP issuers under the risk corridors program to be calculated according to the profit or loss incurred by each individual QHP issuer, independent of the profit or loss incurred by other QHP issuers, or the amounts that other QHP issuers may be obligated to pay into the program.

30. The risk corridors program is distinct from the other two risk stabilization mechanisms under the ACA. The statutory language governing the risk adjustment and temporary reinsurance programs—*i.e.*, the other two of the three "Rs"—either expressly allow for or require budget neutrality. The reinsurance program is statutorily required to be budget neutral, and the risk adjustment program statutorily allows for a budget neutral implementation.

31. Congress did not impose any limits or restraints on the Government's ability to make the mandatory risk corridors payments to QHP issuers in either Section 1342 or any other section of the ACA.

32. Congress also did not limit the HHS Secretary's obligation to make full risk corridors payments owed to QHP issuers, in Section 1342 or any other section of the ACA. In particular, Congress did not condition HHS's obligation to make full risk corridors payments on the availability of appropriations or restrict the ability of HHS to use available funds to make risk corridors payments.

33. Congress has not amended Section 1342 since enactment of the ACA.

34. Congress has not repealed Section 1342 of the ACA.

35. The Government is thus required to make one-hundred percent of the risk corridors payments due to Premera, as mandated by Section 1342 of the ACA.

B. Risk Corridors Regulations and Rulemaking

36. In addition to the statutory directive, since Congress's enactment of the ACA in 2010, and into the final year of the temporary program, HHS and CMS have repeatedly publicly acknowledged, confirmed, and thereby admitted the Government's obligations to make full and timely risk corridors payments to qualifying QHP issuers via regulations, rulemaking, bulletins or other public pronouncements. These public statements by HHS and CMS were made by representatives of the Government who had actual authority to bind the United States.

37. On July 11, 2011, HHS issued a fact sheet, published on HealthCare.gov, stating that under the risk corridors program, eligible QHP issuers "with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of those losses." (HealthCare.gov, *Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment* (July 11, 2011).)

38. On March 23, 2012, HHS issued implementing regulations for the risk corridors program pursuant to Congress' direction under Section 1342 of the ACA. (*See* Pub. L. No. 111-148 § 1342(a); 77 Fed. Reg. 17,219, 17,251 (March 23, 2012); Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment Under the Affordable Care Act, 45 C.F.R. §§ 153 *et seq.* (2013).) The final rule promulgated by HHS provides that "QHP issuers ***will receive payment*** from HHS" in amounts consistent with those set forth in Section 1342(b)(1) of the ACA. (45 C.F.R. § 153.510(b) (2013) (emphasis added).)

39. The Government also provided assurances to QHP issuers that they would receive their risk corridors payments promptly:

> While we did not promise deadlines in the proposed rule, we . . . suggested . . . that HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. ***QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers***.

(77 Fed. Reg. 17,219, 17,238 (Mar. 23, 2012) (emphasis added).)

40. One year later, on March 11, 2013, HHS confirmed that risk corridors payments would not be conditioned on the amounts paid into the program. HHS published another Final Rule that, among other things, included notice of benefit and payment parameters for CY 2014 to enable participating insurers to establish their rates for the first year of ACA implementation. In the preamble, CMS stated: "The risk corridors program ***is not statutorily required to be budget neutral***. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." (Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,409, 15,473 (Mar. 11, 2013) (emphasis added).) In other words, consistent with the clear language of Section 1342, issuers entitled to receive payments under the risk corridors program were supposed to receive such payment in full, regardless of the aggregate amount HHS received under the risk

corridors program from issuers whose expenditures fell short of the target amount such that they were required to pay into the program.

41. CMS also provided that the deadline for the Government to make risk corridors payments to issuers whose allowable costs exceeded the target amount "should be the same" as the deadline by which issuers with allowable annual costs below the target amount are required to make risk corridors payment to the Government. (77 Fed. Reg. 17,219, 17,238.) CMS ultimately imposed a thirty-day deadline for QHP issuers that owe payments under the program to make those payments to the Government. (45 C.F.R. § 153.510(d).) Pursuant to that deadline, issuers that owed risk corridors payments to the Government, including Premera's Washington plans in the CY 2014 individual market, remitted those payments to CMS before the end of the following year.

42. Nothing in the regulations implemented in 2012 or 2013 limit CMS's obligations to pay QHP issuers the full amount of risk corridors payments due under Section 1342 of the ACA. The Government did not condition CMS's obligation to make full risk corridors payments based on the availability of appropriations or restrict the ability of CMS to use available funds to make risk corridors payments.

C. Regulatory Approval of Premera's 2014 Qualified Health Plans

43. CMS offered to provide cost sharing subsidies, risk corridors payments, and other reimbursements to qualified entities – such as Premera – that agreed to sell and provide QHPs in CYs 2014, 2015 and/or 2016, under the terms and conditions set forth in the ACA, its implementing regulations, and CMS policy and guidance.

44. Premera accepted CMS's offer to sell and provide QHPs on the ACA Exchanges.

45. The ACA imposes certain conditions on QHP issuers. For example, QHP rates and other features must be approved by state insurance regulators according to state and federal

law, and QHPs must be certified for compliance with the federal requirements governing QHPs. In states that choose to operate their own ACA Exchange, as Washington and Oregon have done, state officials running the Exchange certify the QHPs for compliance with the federal QHP requirements. In states for which the federal government operates the ACA Exchange, such as Alaska, CMS certifies the QHPs for compliance with the federal QHP requirements.

46. Premera entered into QHP Agreements with federal and state authorities for the purposes of certifying Premera's QHPs and allowing Premera to sell QHPs in Washington, Oregon and Alaska. Premera also entered into Multi-State Plan Program Plan Participation Agreements ("Participation Agreements") authorizing the Blue Cross Blue Shield Association (the "BCBSA") to act as Premera's authorized agent to contract with OPM and bind Premera in connection with Premera's participation in the Multi-State Plan Program in Alaska and Washington. The BCBSA then entered into annual contracts with OPM (the "MSP Contracts") as the authorized agent of Premera. Premera also entered into annual Memoranda of Understanding ("MOUs") with the BCBSA requiring Premera to provide true, correct and complete information by way of attestations to the BCBSA or OPM for purposes of entering into the final MSP Contracts with OPM. Pursuant to these agreements, Premera participated in the Multi-State Plan Program and sold multi-state QHPs on the Washington state-based Exchange and the Alaska federally-facilitated Exchange.

47. Premera submitted its QHP rates for 2014 to Alaska state regulators for review and approval on April 29, 2013 (both individual and small group). Alaska state regulators approved Premera's rates on July 31, 2013.

48. Premera submitted its QHP rates for 2014 to Oregon state regulators for review and approval on April 29, 2013 (both individual and small group). Oregon regulators approved Premera's rates on July 10, 2013.

49. Premera submitted its QHP rates for 2014 to Washington state regulators for review and approval on April 28, 2013 (both individual and small group). Washington state regulators approved Premera's rates on July 31, 2013.

50. Premera agreed to become a QHP issuer and to enter into the QHP Agreements and MSP Contracts and related agreements for CY 2014 based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program.

51. Premera submitted its Alaska QHPs to state and federal authorities for review and certification on May 1, 2013. CMS certified Premera's 2014 Alaska QHPs on September 25, 2013 by executing the QHP Agreement. (Ex. 1.) The CY 2014 QHP Agreement with CMS for the sale of QHPs in Alaska was effective through December 31, 2014, the last day of CY 2014. (*See id.* 1 at § III(a).)

52. Premera submitted Oregon QHPs to the Cover Oregon Exchange for review and certification on April 29, 2013 (individual) and April 30, 2013 (small group). Cover Oregon certified Premera's 2014 Oregon QHPs on September 12, 2013.

53. Premera submitted Washington QHPs to the Washington Health Benefit Exchange for review and certification on April 30, 2013. The Washington Health Benefit Exchange certified Premera's QHPs on September 6, 2013.

54. Premera entered into Participation Agreements with the BCBSA, effective September 12, 2013, authorizing the BCBSA to act as Premera's authorized agent in entering

into MSP Contracts with OPM concerning Premera's participation in the Multi-State Plan Program in Alaska and Washington. (Exs. 2-3 at §§ 1.) The BCBSA entered into an MSP Contract with OPM as Premera's authorized agent on September 12, 2013, with an effective date of January 1, 2014. (Ex. 4 at p.2, §§1.1, 3.1.) Premera also entered into MOUs with the BCBSA on May 7, 2013 concerning Premera's obligation to provide true, correct and complete information related to its participation in the Multi-State Plan Program in Alaska and Washington for CY 2014. (*See* Exs. 5-6.)

55. The 2014 MSP Contract expressly incorporates the provisions of the Affordable Care Act, including the risk corridors provisions, as part of the agreement with OPM. (Ex. 4 at § 1.4(a).) The 2014 MSP Contract further provides that Premera must participate in the risk corridors program and comply with the obligations under ACA Section 1342 and the implementing regulations and rulemaking promulgated by HHS. (*Id.* at §§ 5.7, 10.2, Appendix C, ¶ 2.)

56. In addition to certifying that Premera is a QHP, the CY 2014 QHP Agreement with CMS expressly states that it is governed by United States law and HHS and CMS regulations, stating specifically that:

> This Agreement will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies, without regard to any conflict of laws statutes or rules.

(Ex. 1 at § V(g).)

57. Section II.d of the CY 2014 QHP Agreement with CMS further states that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." (*See id.* at § II(d).)

58. Guidance from HHS and CMS to Premera and other issuers on Federally-Facilitated Exchanges ("FFE") and State Partnership Exchanges on April 5, 2013, stated that, "A signed QHP Agreement with CMS will complete the certification process in an FFE or State Partnership Exchange. The Agreement will highlight and memorialize many of the QHP issuer's statutory and regulatory requirements and will serve as an important reminder of the relationship between the QHP issuer and CMS." (Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 23 (Apr. 5, 2013), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2014_letter_to_issuers_04052013.pdf.)

59. Additionally, HHS and CMS confirmed in the April 5, 2013 Guidance that "Applicants will . . . be required to attest to their adherence to the regulations set forth in 45 C.F.R. parts 155 and 156 and other programmatic requirements necessary for the operational success of an Exchange, and provide requested supporting documentation." (*Id.* at 20.)

60. Before Premera entered into the CY 2014 QHP Agreements and MSP Contracts, Premera executed dozens of attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges. (*See* Ex. 7; Exs. 5-6 at paras. 5, pp. 3; Ex. 4 at § 10.2, Appendix C, ¶ 2.)

61. By executing and submitting its annual attestations, Premera agreed to the many obligations and responsibilities imposed upon all QHPs that accept the Government's offer to participate in the ACA Exchanges. Those obligations and responsibilities that Premera undertook include, *inter alia*, licensing, reporting requirements, employment restrictions, marketing parameters, HHS oversight of the QHP's compliance plan, maintenance of an internal grievance process, benefit design standards, cost-sharing limits, rate requirements, enrollment

parameters, premium payment process requirements, participating in financial management programs established under the ACA (including the risk corridors program), adhering to data standards, and establishing dedicated and secure server environments and data security procedures.

62. Through the annual attestations to CMS, Premera affirmatively attested that it would agree to comply with certain "Financial Management" obligations, including, among others:

> 2.) Applicant attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:
>
> a. risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 CFR 153.510);
>
> b.) remit charges to HHS under the circumstances described in 45 CFR 153.510(c).

(*See* Ex. 7 at pp. 8-9.)

63. Similarly, through its annual attestations to OPM, Premera affirmatively attested that it would comply with the provisions of the Affordable Care Act, including the risk corridors program. (*See* Exs. 8-9 at § 10.2, Apps. C, ¶ 2; Exs. 5-6 at ¶ 5, pp. 3; Exs. 10-13 at ¶ 5, pp. 2.)

64. Consistent with federal regulations and policy, Premera began selling QHPs to consumers in Alaska, Washington and Oregon on October 1, 2013, with coverage effective January 1, 2014. Throughout 2014, Premera provided health insurance coverage under these QHPs to tens of thousands of enrollees in the Pacific Northwest, under the terms required by state and federal law and policy.

65. In executing the CY 2014 QHP Agreements and MSP Contracts with state or federal authorities, Premera relied upon the Government's representations that it would make full risk corridors payments annually to it as required in Section 1342 of the ACA.

66. In deciding to agree to become a QHP issuer and to accept the obligations and responsibilities of a QHP, Premera also relied upon the statements by HHS and CMS in its proposed and final rulemaking. Premera believed that the Government would deliver the full risk corridors payments owed to it promptly after it had been determined that Premera experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. Section 153.510.

D. Federal Action Increases Risk to QHP Issuers

67. In the final months of 2013, many health insurers began to cancel existing health insurance policies that were not compliant with the new ACA reforms that would become effective January 1, 2014. The cancellation of these policies created significant political pressure on the Government, as many people had believed that the ACA would not cause them to lose their existing coverage.

68. On November 14, 2013, CMS responded by announcing a "transitional policy" designed to curb the cancellation of existing policies. Under the transitional policy, any coverage in effect on October 1, 2013 was not considered noncompliant for failure to comply with certain ACA reforms that otherwise became effective on January 1, 2014. CMS announced that this transitional policy would apply only to plan years beginning before October 1, 2014. States were encouraged, but not required, to apply a similar transitional policy. (Letter from Gary Cohen, Dir., Ctr. For Consumer Information and Ins. Oversight ("CCIIO"), CMS, to State Insurance Commissioners (Nov. 14, 2013), https:/www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf. Oregon and Alaska both applied the transitional policy through at least the end of 2015.)

69. Absent this transitional policy, which was not announced until after Premera and other issuers began selling QHPs for 2014, millions of individuals who had existing individual

market coverage that did not comply with the ACA would have had that coverage terminated and thus would have transitioned to a QHP effective January 1, 2014. Under the transitional policy, these potential QHP enrollees and their dependents, who were generally less likely to have untreated healthcare conditions and therefore were less expensive than those who were uninsured prior to their QHP enrollment, were permitted to stay in their old plans under the transitional policy, rather than being required to purchase a QHP on the Exchanges. As a result, the risk pool for QHPs in states that applied the transitional policy at the federal government's behest, including Oregon and Alaska, was more expensive than what QHP issuers such as Premera anticipated when setting premiums.

70. CMS recognized that the transitional policy would negatively impact the risk pool. CMS further recognized that QHP issuers had set rates earlier that year based on the assumption that individuals who had existing individual market coverage under noncompliant plans would have transitioned to a QHP effective January 1, 2014. In its November 2013 announcement of the transition policy, CMS assured issuers and state insurance commissioners that the risk corridors payments would at least partially offset any losses arising out of the new transition policy:

> Though this transitional policy was not anticipated by health insurance issuers when setting rates for 2014, the risk corridor program should help ameliorate unanticipated changes in premium revenue.

(*Id.* at 3.)

71. On March 5, 2014, CMS announced that it was extending its transitional policy for two years, *i.e.*, to policy years beginning on or before October 1, 2016. On February 29, 2016, CMS extended it again by one year, to policy years beginning on or before October 1, 2017, provided that all policies end by December 31, 2017.

E. CMS References a Budget Neutral Implementation Yet Confirms Risk Corridors Obligations and Funding.

72. On April 11, 2014, over six months after Premera began selling QHPs for CY 2014 at approved rates, and over a year after HHS publicly stated that it would make full risk corridors payments "[r]egardless of the balance of payments and receipts" in the program, CMS issued a Question and Answer report suggesting that if risk corridors collections were insufficient to make risk corridors payments for a year, all risk corridors payments for that year would be reduced pro rata to the extent of any disparity. CMS indicated that risk corridors collections received for the next year would 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. (*See* CMS, *Risk Corridors and Budget Neutrality* 1 (Apr. 11, 2014), https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf.) After all issuers received full risk corridors reimbursement owed for the previous year, any remaining funds would be used to fund current year payments. (*Id.*)

73. The Question and Answer report was not accompanied by any modification or repeal of the risk corridors statute, its implementing regulations or other portions of the ACA.

74. Despite its suggestion of budget neutrality in April of 2014, one month later HHS reaffirmed its earlier pronouncements that it was required to make risk corridors payments under Section 1342 of the ACA and that it had the legal authority to pay its entire risk corridors obligation regardless of the amount of payments received into the program. HHS stated in a letter to the Government Accountability Office (the "GAO") that the CMS's general Program Management appropriation for fiscal year ("FY") 2014 (Pub. L. No. 113-76) gave it the authority and provided a source of funds for CMS 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).)

75. One week later, in the Final Rulemaking for Exchange and Insurance Market Standards for 2015 and Beyond, HHS again reiterated that it was legally obligated to make risk corridors payments in full. While HHS "anticipate[d] that risk corridors collections will be sufficient to pay for all risk corridors payments," HHS explained that, "[i]n the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers" and that, in that event, "HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." (Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,239, 30,260 (May 27, 2014).)

76. On June 18, 2014, HHS sent to U.S. Senator Sessions and U.S. Representative Upton identical letters stating that, "As established in statute, . . . [QHP issuers] with allowable costs at least three percent higher than the plan's target amount will receive payments from HHS to offset a percentage of those losses." (Letter from Sylvia M. Burwell, Secretary, HHS, to U.S. Representative Fred Upton, Chairman, Committee on Energy and Commerce (June 18, 2014).)

77. On September 30, 2014, the GAO issued a report on the ACA's risk corridors program, in which it concluded—in agreement with HHS—that the CMS Program Management appropriation for Fiscal Year 2014 provides the Government with the authority and appropriations to make full risk corridors payments. (GAO, *Department of Health and Human Services—Risk Corridors Program*, B-325630 4 (Sept. 30, 2014), http://gao.gov/assets/670/666299.pdf.)

F. Regulatory Approval of Premera's 2015 Qualified Health Plans

78. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, in 2014 Premera agreed to become a 2015 QHP issuer, priced its 2015 QHPs and entered into QHP Agreements and MSP Contracts with the Government for CY 2015.

79. Premera submitted its 2015 QHP rates to Alaska state regulators for review and approval on May 30, 2014 (small group) and June 13, 2014 (individual). Alaska state regulators approved Premera's 2015 rates on September 2, 2014 (small group) and September 4, 2014 (individual).

80. Premera submitted its 2015 QHP rates to Oregon state regulators for review and approval on June 2, 2014 (both individual and small group). Oregon state regulators approved Premera's 2015 rates on August 13, 2014 (individual) and August 15, 2014 (small group).

81. Premera submitted its 2015 QHP rates (for the individual market only) to Washington state regulators for review and approval on April 30, 2014. Washington state regulators approved Premera's 2015 QHP individual market rates on August 14, 2014.

82. Premera submitted Alaska QHPs to state and federal authorities for review and certification on May 16, 2014 (individual) and May 9, 2014 (small group). CMS certified Premera's 2015 Alaska QHPs on October 29, 2014. The CY 2015 QHP Agreement with CMS for the sale of QHPs in Alaska was effective through December 31, 2015, the last day of CY 2015. (Ex. 14 at § IV(a).)

83. Premera submitted Oregon QHPs to state and federal authorities for review and certification on March 5, 2014 (individual) and June 27, 2014 (small group). CMS certified Premera's 2015 Oregon QHPs on October 29, 2014 by executing the QHP Agreement. (Ex. 15.)

The CY 2015 QHP Agreement with CMS for the sale of QHPs in Oregon was effective through December 31, 2015, the last day of CY 2015. (*See id*. at § IV(a).)

84. Premera submitted Washington QHPs to the Washington Health Benefit Exchange for review and certification on April 30, 2014. The Washington Health Benefit Exchange certified Premera's Washington QHPs on September 16, 2014.

85. The BCBSA entered into the 2015 MSP Contract with OPM as Premera's authorized agent on November 12, 2014, with an effective date of January 1, 2015. (Ex. 8 at p. 2.) Premera entered into MOUs with the BCBSA related to its participation in the Multi-State Plan Program in Alaska and Washington for CY 2015 on June 10, 2014. (Exs. 10-11.)

86. The CY 2015 MSP Contract expressly incorporates the provisions of the Affordable Care Act, including the risk corridors provisions, as part of the agreement with OPM. (Ex. 8 at §1.4(a).) The CY 2015 MSP Contract further provides that Premera must participate in the risk corridors program and comply with the obligations under the ACA Section 1342 and the implementing regulations and rulemaking promulgated by HHS. (Id. at §§ 5.7, 10.2, App. C, ¶ 2.)

87. The CY 2015 QHP Agreements with CMS contain terms that are materially and substantially identical to those found in the CY 2014 QHP Agreement with CMS, including the requirement that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions" and that the Agreements are governed by United States law and HHS and CMS regulations. (See Ex.14 at §§ III(a), V(g).)

88. Consistent with CMS regulations and policy, Premera began selling CY 2015 QHPs to consumers in Alaska, Oregon and Washington on October 1, 2014. These QHPs offered coverage effective January 1, 2015. Throughout 2015, Premera provided health care

coverage under these QHPs to tens of thousands of enrollees in the Pacific Northwest, under the terms specified in state and federal law and policy.

89. In executing the 2015 QHP Agreements and MSP Contracts and related agreements with state or federal authorities, Premera relied upon the Government's representations that it would make full risk corridors payments annually to it as required in Section 1342 of the ACA.

90. In deciding to agree to continue to participate as a QHP issuer and to accept the obligations and responsibilities of a QHP, Premera also relied upon the statements by HHS and CMS in its proposed and final rulemaking. Premera believed that the Government would deliver the full risk corridors payments owed to it promptly after it had been determined that Premera experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. Section 153.510.

G. Congressional Action Purportedly Limits Funding for 2014 Risk Corridors Payments.

91. On December 16, 2014, Congress enacted the Consolidated and Further Continuing Appropriations Act for fiscal year 2015, which included a rider purporting to bar the use of certain funds, including the Program Management appropriation, for 2014 risk corridors payments:

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

(Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 § 227, 128 Stat. 2130, 2491 (2014) (the "2015 Appropriations Rider") (emphasis added).)

92. However, neither this restriction on the use of funds "made available by this Act" nor Congress's failure to appropriate other funds for payments due under the risk corridors program for CY 2014 modified or repealed Section 1342 of the ACA and, accordingly, do not defeat or otherwise abrogate the United States' statutory, contractual or common law obligation to make full and timely risk corridors payments to QHP issuers.

93. By the time the 2015 Appropriations Rider was enacted at the end of CY 2014, Premera and other QHP issuers had already agreed to offer (and had priced, designed, and sold) QHPs through the ACA Exchanges. Furthermore, Premera and the other QHP issuers had already committed to participating in the ACA Exchanges for CY 2015, in accordance with federal regulation. (*See* 45 C.F.R. §§ 155, Subpart K; CCIIO, 2015 Letter to Issuers in Federally-facilitated Marketplaces, at 8, 27 (Mar. 14, 2014), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-final-issuer-letter-3-14-2014.pdf.)

94. Once a QHP issuer has signed its QHP Agreement with CMS, the issuer may not withdraw any of its QHPs from the marketplace and must accept all eligible applicants for coverage, subject only to limited exceptions. (*See* 45 C.F.R. § 156.290(a)(2); 45 C.F.R. § 147.104.)

95. Thus, by the time the 2015 Appropriations Rider was enacted, Premera had already been providing coverage under QHPs for nearly a full year in CY 2014, incurred significant losses under those QHPs, designed and priced QHPs for CY 2015, and committed to providing those QHPs on the marketplace for CY 2015. Premera could not reverse its losses for CY 2014, withdraw its QHPs from the marketplace for CY 2015, change the pricing for those QHPs, or deny any eligible applicants coverage under those QHPs.

96. Despite the 2015 Appropriations Rider, CMS continued to affirm its risk corridors obligations. On February 27, 2015, HHS implemented another final rule, further confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." (80 Fed. Reg. 10,749, 10,779 (Feb. 27, 2015).)

97. On July 21, 2015, in a letter to state health insurance commissioners, CMS acknowledged its obligation and committed, yet again, to making risk corridors payments, on time and in full:

> **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, Chief Executive Officer, Health Insurance Marketplace, Dir., CCIIO, CMS, to State Insurance Commissioners (July 21, 2015), https:www.cms.gov/cciio/resources/letters/downloads/doi-commissioner-letter-7-20-15.pdf.)

H. Regulatory Approval of Premera's 2016 Qualified Health Plans

98. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, as well as CMS' repeated assurances through rulemaking and announcements, Premera agreed to become a QHP issuer and to enter into QHP Agreements and MSP Contracts and related agreements with the Government for CY 2016.

99. Premera submitted 2016 QHP rates to Alaska state regulators for review and approval on May 13, 2015 (individual and small group). Alaska state regulators approved Premera's 2016 rates on August 25, 2015.

100. Premera submitted its 2016 QHP rates to Oregon state regulators on April 30, 2015. Oregon state regulators approved Premera's 2016 rates on August 4, 2015.

101. Premera submitted 2016 QHP rates to Washington state regulators for approval on April 22, 2015. Washington state regulators approved Premera's 2016 rates on August 18, 2015.

102. Premera submitted Alaska QHPs to CMS for review and certification on May 1, 2015. Premera received a QHP Agreement from CMS for the sale of QHPs in Alaska on August 3, 2015 (individual) and August 10, 2015 (small group). CMS then certified Premera's 2016 Alaska QHPs on October 8, 2015. The CY 2016 QHP Agreement with CMS for the sale of QHPs in Alaska was effective through December 31, 2015, the last day of CY 2015. (Ex. 16 at § IV(a).)

103. Premera submitted Oregon QHPs to CMS for review and certification on March 20, 2015 (individual) and May 1, 2015 (small group). Premera received a QHP Agreement from CMS for Premera's Oregon QHP on August 11, 2015 (individual) and August 21, 2015 (small group). CMS then certified Premera's 2016 Oregon QHP on or before October 8, 2015. (Ex. 17 at p. 10.)

104. Premera submitted Washington QHPs to the Washington Health Benefit Exchange for review and certification on May 4, 2015. Premera received a QHP Agreement from the Washington Health Benefit Exchange on August 25, 2015. The Washington Health Benefit Exchange certified Premera's 2016 Washington QHPs on October 5, 2015.

105. The BCBSA entered into the 2016 MSP Contract with OPM as Premera's authorized agent on October 15, 2015, with an effective date of January 1, 2016. (Ex. 9 at p. 2.) Premera entered into MOUs with the BCBSA related to its participation in the Multi-State Plan Program in Alaska and Washington for the 2016 benefit year on July 15, 2015. (Exs.12-13.)

106. The CY 2016 MSP Contract expressly incorporates the provisions of the Affordable Care Act, including the risk corridors provisions, as part of the agreement with OPM. (Ex. 9 at §1.4(a).) The CY 2016 MSP Contract further provides that Premera must participate in the risk corridors program and comply with the obligations under the ACA Section 1342 and the implementing regulations and rulemaking promulgated by HHS. (*Id.* at §§ 5.7, 10.2, App. C, ¶ 2.)

107. The CY 2016 QHP Agreements with CMS contain terms that are materially and substantially identical to those found in the CY 2014 and CY 2015 QHP Agreements, including the requirement that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions" and that the Agreements are governed by United States law and HHS and CMS regulations. (See Exs. 16-17 at §§ III(a), V(g).)

108. Consistent with CMS regulations and policy, Premera began selling CY 2016 QHPs to consumers in Alaska, Oregon and Washington on October 1, 2015. These QHPs offered coverage effective January 1, 2016. Throughout 2016, Premera provided health care coverage under QHPs to tens of thousands of enrollees in the Pacific Northwest, under the terms specified in state and federal law and policy.

109. In executing the 2016 QHP Agreements and MSP Contracts with state or federal authorities, Premera relied upon the Government's representations that it would make full risk corridors payments annually to it as required in Section 1342 of the ACA.

110. In deciding to agree to continue to participate as a QHP issuer and to accept the obligations and responsibilities of a QHP, Premera also relied upon the statements by HHS and CMS in its proposed and final rulemaking. Premera believed that the Government would deliver the full risk corridors payments owed to it promptly after it had been determined that Premera

experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. Section 153.510.

I. CMS Fails to Make Full 2014 Risk Corridors Payments in October 2015

111. In October of 2015, CMS announced that the Government would not immediately make the full risk corridors payments for the first year of the program. Although the ACA risk corridors statute does not tie the payments "in" to the program under subsection (b)(1) to the payments "out" to QHP issuers under subsection (b)(2) of the statute, CMS indicated that it would so limit the risk corridors payments owed to QHP issuers for CY 2014. Since QHP issuers whose actual expenses exceeded their anticipated target amounts had submitted claims to the Government for $2.87 billion in risk corridors payments, while QHP issuers whose actual expenses fell short of the target amount owed the Government only $362 million in risk corridors charges, CMS stated that it would pay QHP issuers to whom money was owed only 12.6 percent of their 2014 risk corridors claims ($362 million divided by $2.87 billion).

112. At this point, Premera had already provided coverage under QHPs for all of CY 2014 and most of CY 2015, incurred significant losses under those QHPs, designed and priced QHPs for CY 2016, and committed to providing those QHPs on the marketplace for CY 2016.

113. However, CMS reassured issuers that the 87.4 percent shortfall would eventually be paid out of CY 2015 and CY 2016 risk corridors charges.

114. HHS and CMS also announced that they would be collecting full risk corridors charges from QHPs in November 2015, and would begin making the prorated risk corridors payments to QHPs starting in December 2015. (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.)

115. One month later, the Government acknowledged and published the full risk corridors payments amounts that it concedes it owes to Premera for CY 2014. (*See* Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015) ("CY 2014 Risk Corridors Report"), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf.)

116. In the CY 2014 Risk Corridors Report, HHS and CMS publicly announced that **"Risk corridors charges payable to HHS are not prorated, and the full risk corridors charge amounts are noted in the chart below. Only risk corridors payment amounts are prorated."** (*Id.*)

117. As calculated in 2015, Premera owed CY 2014 risk corridors amounts for its individual market plans in Washington according to the statutory formula. Since these charge amounts were not prorated, Premera timely submitted its risk corridors charge amounts for CY 2014 by the end of 2015.

118. CMS affirmed its obligations to make full risk corridors payments by confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and stated that "HHS is recording those amounts that remain unpaid following our 12.6% payment [for CY 2014 losses] . . . as fiscal year 2015 obligation of the United States for which full payment is required." (*See* Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), https://www.cms.gov/CCIIO/Resources/Regulations -and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.)

119. HHS and CMS's direct statements to Premera unequivocally confirmed the agencies' position that risk corridors payments owed to Premera are a binding obligation of the United States.

J. Congressional Action in December 2015 Purportedly Limits Funding for 2015 Risk Corridors Payments and Remaining 2014 Risk Corridors Payments

120. On December 18, 2015, Congress enacted the omnibus appropriations bill for fiscal year 2016, which again purported to limit the use of appropriations to make risk corridors payments:

> 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 account 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).

(Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 225, 129 Stat. 2242, 2624, (2015) (the "2016 Appropriations Act") (emphasis added).)

121. However, neither the restriction on the use of the funds "made available by this Act" nor Congress's failure to appropriate other funds for payments due under the risk corridors program for CY 2015 modified or repealed Section 1342 of the ACA and, accordingly, do not defeat or otherwise abrogate the United States' obligation to make full and timely risk corridors payments to QHP issuers.

122. CMS continued to confirm its risk corridors obligations in 2016. On September 9, 2016, HHS maintained that the CY 2014 and CY 2015 risk corridors payments at issue in this case are an "obligation of the United States Government for which full payment is required." (CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF.)

123. CMS also announced that it would make additional risk corridors payments to QHP issuers for their CY 2014 losses out of the risk corridors charges collected for CY 2015.

CMS indicated that those payments would be made on the same schedule as the prior year, *i.e.*, during the winter of 2016 to 2017. (*Id.*)

124. In November of 2016, HHS and CMS again acknowledged and published the full risk corridors payment amounts that the Government concedes it owes to Premera for CY 2015. (*See* Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016) (the "CY 2015 Risk Corridors Report"), https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/2015-rc-issuer-level-report-11-18-16-final-v2.pdf.)

125. On November 18, 2016, CMS also announced the amounts of the additional risk corridors payments that it expected to pay QHP issuers for their losses in CY 2014. (*Id.*) CMS announced that it expected to pay Premera an additional $434,314.09 for its CY 2014 losses, beginning in December 2016, as collections are received. (*Id.*) CMS further announced that it would not make risk corridors payments for CY 2015. (*Id.*)

126. By the end of CY 2016, CMS had not fully paid Premera risk corridors amounts owed for CY 2014, and CMS had not paid Premera any risk corridors amounts for CY 2015 despite its repeated assurances that the full amounts due are an obligation of the federal government.

K. Congressional Action Purportedly Limits Funding for 2016 Risk Corridors Payments

127. On May 5, 2017, Congress enacted the omnibus appropriations bill for fiscal year 2017, which again purported to limit the use of appropriations to make risk corridors payments:

> 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).

(Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 § 223 (2017) (the "2017 Appropriations Act") (emphasis added).)

128. However, neither the restriction on the use of the funds "made available by this Act" nor Congress's failure to appropriate other funds for payments due under the risk corridors program for CY 2016 modified or repealed Section 1342 of the ACA and, accordingly, do not defeat or otherwise abrogate the United States' obligation to make full and timely risk corridors payments to QHP issuers.

129. The calculations of risk corridors payments owed to Premera for CY 2016 have been made, and the Government owes Premera $41,169,010 for CY 2016 risk corridors obligations.

L. Risk Corridors Payments Owed to Premera

130. Premera expected to receive $13,074,535 in risk corridors payments for CY 2014. To date, Premera has received only $2,017,896. The Government owes Premera $11,056,639 in additional risk corridors payments for CY 2014.

131. For the 2015 payment year, the Government owes Premera $65,135,255 in risk corridors payments.

132. For the 2016 payment year, the Government owes Premera another $41,169,010 in risk corridors payments.

133. The Government has not paid the full risk corridors amounts owed for CY 2014 and it has not paid any of the risk corridors payments it owes to Premera for CYs 2015 or 2016.

134. The Government owes Premera a total of $117,360,904 in unpaid risk corridors amounts.

COUNT I
Violation of Statutory and Regulatory Mandates to Make Payments

135. Premera realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

136. Pursuant to Section 1342 of the ACA and its implementing regulations, the United States "shall establish" a risk corridors program under which the "Secretary shall pay" QHP issuers statutorily defined amounts as part of the risk corridors program.

137. Premera satisfied all statutory and regulatory requirements for participation in and payments under the risk corridors program.

138. In 2014, Premera's allowable costs exceeded its target amount by more than 103 percent in both markets in Alaska and in the individual market in Oregon. In 2015, Premera's allowable costs exceeded its target amount by more than 103 percent in both the individual and small group markets in Alaska, Washington and Oregon. In 2016, Premera's allowable costs exceeded its target amount by more than 103 percent in both the individual and small group markets in Oregon and the individual markets in Washington. Premera timely submitted all of the necessary data and complied with all other requirements for obtaining payment under the risk corridors program.

139. Accordingly, ACA Section 1342 and its corresponding regulations mandate compensation by the Government to Premera in the amount of $11,056,639 for CY 2014, $65,135,255 for CY 2015 and $41,169,010 for CY 2016.

140. The United States' failure to provide full and timely compensation to Premera is a violation of Section 1342 and its implementing regulations and Premera is damaged in the amount of at least $117,360,904.

COUNT II
Breach of Express Contract

141. Premera realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

142. Premera entered into valid written QHP Agreements with CMS for the sale of QHPs in Alaska for CYs 2014-2016 and in Oregon for CYS 2015-2016. (*See* Exs. 1, 14-17.) Premera, through its authorized agent, also entered into valid written MSP Contracts with OPM for the sale of MSPs in Washington and Alaska for CYs 2014-2016. (See Exs. 4, 8-9.)

143. The QHP Agreements and MSP Contracts were executed by representatives of the Government who had actual authority to bind the United States. The QHP Agreements and MSP Contracts were entered into with mutual assent and consideration by both parties.

144. By agreeing to become a QHP issuer, Premera agreed to provide health insurance on particular exchanges established under the ACA, and agreed and attested to accept the obligations, responsibilities and conditions the Government imposed on QHPs under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq*. and 155.10 *et seq*. (*See* Ex. 1 at §§ II(d), V(g), Ex. 14-17 at §§ III(a), V(g); Exs. 4, 8-9 at §§ 1.4(a), 5.7, 10.2 and Apps. C, ¶ 2; Exs. 4-5 at ¶5, p. 3, Exs. 10-13 at ¶5, p. 2; Ex. 7 at pp. 8-9.)

145. Premera satisfied and complied with its obligations and/or conditions under the QHP Agreements and MSP Contracts.

146. The QHP Agreements with CMS obligate the Government to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." (Ex. 1 at § II(d); Exs. 14-17 at § III(a).)

147. The MSP Contracts with OPM expressly incorporate the Affordable Care Act, including the rights and obligations under the risk corridors provision: "The applicable

provisions of the Affordable Care Act . . . constitute a part of this contract as if fully set forth herein and the other provisions of this contract must be construed so as to comply therewith." (Exs. 4, 8-9 at § 1.4(a).)

148. The QHP Agreements with CMS incorporate the provisions of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), by providing that will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies . . . ." (Exs. 1, 14-17 at § V(g).)

149. The Government's statutory and regulatory obligations to make full and timely risk corridor payments were significant factors material to Premera's agreement to enter into the QHP Agreements and the MSP Contracts.

150. The Government's failure to make full and timely risk corridor payments to Premera is a material breach of the Government's obligation to support Premera's functions as a QHP.

151. HHS and CMS have repeatedly acknowledged and affirmed that the full risk corridors amounts, including the payment amounts published in the CY 2014 and CY 2015 Risk Corridors Reports, are owed by the Government to Premera.

152. Congress's failure to appropriate sufficient funds for risk corridor payments, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridor payments to Premera.

153. The Government's breach of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) by failing to make full and timely CY 2014 risk corridor payments to Premera is a material breach of the QHP Agreements and the MSP Contracts.

154. As a result of the United States' material breaches of the QHP Agreements and the MSP Contracts, Premera has been damaged in the amount of at least $117,360,904.

COUNT III
Breach of Implied-In-Fact Contract

155. Premera realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

156. In the alternative, Premera entered into valid implied-in-fact contracts with the Government regarding the Government's obligation to make full and timely risk corridors payments to Premera for CYs 2014-16 in exchange for Premera's agreement to become a QHP issuer and participate in the ACA Exchanges.

157. Section 1342 of the ACA, HHS's implementing regulations, including 45 C.F.R. §153.510, and HHS's and CMS's statements that the Government is obligated to make full, risk corridors payments constitute a clear and unambiguous offer by the Government to make full risk corridors payments to health insurers, including Premera, that agreed to participate as QHPs in the CYs 2014-2016 ACA Exchanges.

158. Premera accepted the Government's offer by agreeing to become a QHP issuer and to participate in and accept the uncertain risks imposed by the ACA Exchanges.

159. By agreeing to become a QHP issuer, Premera agreed to provide health insurance on particular Exchanges established under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHP issuers—subject to the implied

covenant of good faith and fair dealing—under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq.*

160. Premera certified its agreement by executing the QHP Agreements, the MSP Contracts and the attestations required by the Government, including the attestations regarding risk corridors payments and charges.

161. Premera satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contracts.

162. The Government's agreement to make full and timely risk corridors payments was a significant factor material to Premera's agreement to become a QHP issuer and participate in the CY 2014, CY 2015, and CY 2016 ACA Exchanges.

163. The parties' agreement is further confirmed by the parties' conduct, performance and statements following Premera's acceptance of the Government's offer, the execution by the parties of the CY 2014, CY 2015, and CY 2016 QHP Agreements and MSP Contracts, Premera's execution of attestations, including the attestations regarding risk corridors payments and charges, and the Government's repeated assurances that full risk corridors payments would be made and would not be subject to budget limitations. (*See e.g.*, 78 Fed. Reg. 15,409, 15,473 (Mar. 11, 2013).)

164. Each of the implied-in-fact contracts were authorized by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

165. The protection from uncertain risk and new market instability offered by the risk corridors program was a real benefit that significantly influenced Premera's decision to agree to become a QHP issuer and participate in the CY 2014, CY 2015, and CY 2016 ACA Exchanges.

166. Premera, in turn, provided a real benefit to the Government by agreeing to become a QHP issuer and participate in the CY 2014, CY 2015, and CY 2016 ACA Exchanges, despite the uncertain financial risk.

167. Adequate insurer participation was crucial to the Government achieving the overarching goal of the ACA Exchange programs: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to market uncertainty.

168. The Government induced Premera to participate in the CYs 2014-2016 ACA Exchanges by including the risk corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to ameliorate the effects of risk selection and market uncertainty on participating health insurers.

169. Congress's failure to appropriate sufficient funds for risk corridors payments due, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridors payments to Premera.

170. The Government has not paid Premera the full amount of risk corridors payments owed for CY 2014 and it has made no risk corridors payments for CYs 2015 or 2016. The Government's failure to make full risk corridors payments to Premera is a material breach of the implied-in-fact contracts.

171. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with Premera regarding the ACA Exchanges, Premera has been damaged in the amount of at least $117,360,904.

COUNT IV
Breach of Implied Covenant of Good Faith and Fair Dealing

172. Premera realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

173. 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 – or fail to act – so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

174. The express or, alternatively, the implied-in-fact contracts entered into between the United States and Premera regarding the CYs 2014-2016 ACA Exchanges created the reasonable expectation for Premera that full and timely risk corridor payments would be paid by the Government to QHPs, just as the Government expected that any risk corridor remittance charges owed would be fully and timely paid by QHPs to the Government.

175. By failing to make full and timely risk corridor payments to Premera, the United States has destroyed Premera's reasonable expectations regarding the fruits of the express or, alternatively, the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

176. Premera remitted its risk corridors charges to the Government in good faith as it had agreed and attested to do.

177. The QHP Agreements with CMS obligate the Government to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions," but do not define standards for CMS's implementation of the function-supporting systems and processes.

178. Where, as here, an agreement affords CMS the power to make a discretionary decision without defined standards, the duty to act in good faith limits the Government's ability to act capriciously to contravene Premera's reasonable contractual expectations.

179. CMS is afforded discretion in determining the systems and processes that it will implement to support Premera's functions as a QHP.

180. Congress granted HHS rulemaking authority regarding the risk corridors program in Section 1342(a) of the ACA. HHS and CMS are permitted to establish charge remittance and payment deadlines that support QHP functions. HHS and CMS have an obligation to exercise the discretion afforded to them in good faith, and not arbitrarily, capriciously or in bad faith.

181. The United States breached the implied covenant of good faith and fair dealing by, among other things:

a. Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridor charges to the Government, but failing to apply a similar deadline to the Government's full payment of risk corridor payments to Premera, despite stating that QHPs and the Government should be subject to the same payment deadline (*see, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012);

b. Requiring Premera to fully remit risk corridor charges to the Government, but unilaterally deciding that the Government may make prorated risk corridor payments to QHPs;

c. Targeting and purportedly limiting funding sources for risk corridor payments through budget legislation after Premera had undertaken significant expense in performing its obligations as a QHP in the ACA Exchanges, based on the

reasonable expectation that the Government would make full and timely risk corridor payments if Premera experienced sufficient losses; and

d. Making statements regarding risk corridor payments upon which Premera relied when agreeing to become a QHP and participate in the ACA Exchanges, then depriving Premera of full and timely risk corridor payments after Premera had fulfilled its obligations as a QHP by participating in the ACA Exchanges and suffered losses which the Government had promised would be shared through mandatory risk corridor payments.

182. The Government has repeatedly acknowledged and affirmed that the full risk corridors amounts, including the payment amounts published in the CYs 2014 and 2015 Risk Corridors Reports, are owed by the Government to Premera.

183. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, Premera has been damaged in the amount of at least $117,360,904.

COUNT V
Taking Without Just Compensation

184. Premera realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

185. The Government's actions complained of herein constitute a deprivation and taking of Premera's property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

186. Premera has a vested interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridors payments. Premera had a reasonable expectation of receiving the full and timely risk corridors payments payable to it under the statutory and regulatory formula.

187. The Government interfered with and has deprived Premera of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments.

188. The Government's actions in withholding, with no legitimate governmental purpose, the full and timely risk corridors payments owed to Premera constitute a deprivation and taking of Premera's property interests, requiring payment to Premera of just compensation under the Fifth Amendment of the U.S. Constitution.

189. Premera is entitled to receive just compensation for the United States' taking of its property in the amount of at least $117,360,904.

190. The Government's actions complained of herein constitute a deprivation and taking of Premera's property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF:

WHEREFORE, Premera demands judgment against the Defendant, the United States of America, as follows:

1) An award of damages sustained by Premera, in the amount of at least $117,360,904 as a result of the Defendant's failure to make payments required by contract and common law, as a taking of a property interest without just compensation and/or as required by Section 1342(b)(l) of the ACA and 45 C.F.R. § 153.510(b) regarding the CY 2014, CY 2015 and CY 2016 risk corridors payments;
2) Awarding all available interest, including, but not limited to, post-judgment interest, to Premera;
3) Awarding all available attorneys' fees and costs to Premera; and

4) Awarding such other and further relief to Premera as the Court deems just and equitable.

PREMERA BLUE CROSS

Dated: August 25, 2017

By: _____
By Its Attorneys

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