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U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF VERMONT, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	No. 18-241C

COMPLAINT

Plaintiff Blue Cross and Blue Shield of Vermont ("BCBSVT" or "Plaintiff"), by and through its undersigned counsel, brings this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and alleges the following:

INTRODUCTION

1. BCBSVT brings this Complaint to recover money damages owed by the Government for calendar years 2015 ("CY 2015") and 2016 ("CY 2016"), for violations of the mandatory risk corridors payment obligations Defendant owes to qualified health plan issuers ("QHPs"), such as BCBSVT, prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA") and its implementing federal regulations; the implied-in-fact contracts between Defendant and Plaintiff regarding risk corridors payments; the covenant of good faith and fair dealing implied in Defendant's risk corridors contracts with Plaintiff; and the protections against the Government's taking of BCBSVT's property without just compensation afforded to Plaintiff by the Fifth Amendment of the U.S. Constitution.

2. Congress' enactment in 2010 of the ACA marked a major reform in the United States health care market.

3. The market reform guaranteed availability of health care to all Americans, and prohibited health insurers from using factors such as health status, medical history, preexisting conditions, gender, and industry of employment to set premium rates or deny coverage.

4. The ACA introduced scores of previously uninsured or underinsured citizens into the health care marketplace, creating great uncertainty to health insurers, including BCBSVT, that had no previous experience or reliable data to meaningfully assess the risks and set the premiums for this new population of insureds under the ACA.

5. Congress, recognizing such uncertainty for health insurers and the potential increased premiums that would come with that uncertainty, included three premium-stabilization programs in the ACA – each of which Congress intended to be administered annually – to help protect health insurers against risk selection and market uncertainty, including the temporary federally administered risk corridors program, which mandated that the Government pay health insurers annual risk corridors payments based on a statutorily prescribed formula to provide health insurers with stability as insurance market reforms began.

6. Under the statutory parameters of the risk corridors program, the Government shared the risk with QHPs – such as BCBSVT– associated with the new marketplace's uncertainty for each of the temporary program's three years: 2014, 2015 and 2016. If the amount a QHP collected in premiums in any one of those years exceeded its medical expenses by a certain target amount, the QHP was required to make a payment to the Government. If annual premiums fell short of this target, however, Congress required the Government to make risk corridors payments to the QHP in an amount prescribed by a formula in Section 1342.

7. The temporary risk corridors program was designed to ease the transition between the old and new health insurance marketplaces and help stabilize premiums for consumers, and

was expressly modeled on a similar program in Medicare Part D signed into law by President George W. Bush, that provides for annual payments that are not restricted by the amount of collections.

8. The United States has specifically admitted in writing its obligations to pay the full amount of risk corridors payments owed to BCBSVT for CY 2015 and CY 2016, totaling at least $11,095,529.37, but Defendant has failed to pay any money toward the full amount due. Instead, Defendant has asserted that the Government's obligation to make full payment to Plaintiff is limited by available appropriations, and has arbitrarily implemented a policy to only pay such available appropriations toward CY 2014 risk corridors payments owed to QHPs, even though no such limits appear anywhere in the ACA or its implementing regulations or in Plaintiff's contracts with the Government.

9. Plaintiff, on the other hand, faithfully honored its obligation to remit its full and timely risk corridors collection charges to the Government for CY 2014.

10. Although the United States has repeatedly acknowledged its obligation to make full risk corridors payments to BCBSVT, it has failed to do so, in breach of its statutory, regulatory and contractual obligations. This Complaint seeks monetary damages from the Government of at least $11,095,529.37, the amount of risk corridors payments owed to BCBSVT for CY 2015 and CY 2016.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because BCBSVT brings claims for monetary damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an

executive department, an implied-in-fact contract with the United States, and a taking of Plaintiff's property in violation of the Fifth Amendment of the Constitution.

12. The actions and/or decisions of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") at issue in this lawsuit were conducted on behalf of the Defendant United States within the District of Columbia.

PARTIES

13. Plaintiff BLUE CROSS AND BLUE SHIELD OF VERMONT is an independent, local, not-for-profit Vermont company, governed and managed locally, with its principal place of business in Berlin, Vermont. BCBSVT has been a primary part of Vermont's health care system for more than 35 years, providing thousands of Vermonters with health benefits and services. BCBSVT was a QHP issuer on the Vermont Health Insurance Marketplace for the relevant years of CY 2014, CY 2015, and CY 2016. During these years, BCBSVT was only one of two health insurers that participated on Vermont's ACA Exchange.

14. Defendant is THE UNITED STATES OF AMERICA. HHS and CMS are agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

15. Congress' enactment in 2010 of the ACA, Public Law 111-148, 124 Stat. 119, marked a historic shift in the United States health care market.

16. Through the ACA, Congress aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S., and included a series of interlocking reforms designed to expand coverage in the individual and small group health insurance markets. The market reforms guaranteed availability of health care to all Americans,

and prohibited health insurers from using factors such as health status, medical history, preexisting conditions, gender, and industry of employment to set premium rates or deny coverage.

17. The ACA provides that "each health insurance issuer that offers health insurance coverage in the individual or [small] group market in a State must accept every employer and individual in the State that applies for such coverage." 42 U.S.C. § 300gg–1(a).

18. The ACA also generally bars insurers from charging higher premiums on the basis of a person's health. *See* 42 U.S.C. § 300gg.

19. Through the ACA, Congress created competitive statewide health insurance marketplaces – the ACA Exchanges – that offer health insurance options to consumers and small businesses. Section 1311 of the ACA establishes the framework for the Exchanges. *See* 42 U.S.C. § 18031.

20. BCBSVT voluntarily participated as a QHP on the ACA Exchange in Vermont, after satisfying the Government and/or the state-level operator of the Vermont ACA Exchange that it should be certified as a QHP for that state's Exchange, from January 1, 2014 (the first day of the ACA Exchanges) through the present, including the relevant period of CY 2014, CY 2015, and CY 2016. For each of the CY 2014 to CY 2016 calendar years, Plaintiff's premiums were submitted to and approved by the state of Vermont's insurance regulator in the spring and/or summer of the previous year (*e.g.*, spring and/or summer of 2013 for CY 2014).

21. Upon the Government's and/or the state-level operator's evaluation and certification of Plaintiff as a QHP, BCBSVT was required to provide a package of "essential health benefits" on the Vermont ACA Exchange on which it voluntarily participated. 42 U.S.C. § 18021(a)(1).

22. In deciding to become and continue as a QHP in Vermont each calendar year, BCBSVT understood and believed that, in exchange for complying with numerous obligations imposed on QHPs, the Government would comply with many reciprocal obligations imposed on it – including the obligations to make full and timely risk corridors payments to eligible QHPs, like BCBSVT. The Government, however, has unlawfully failed to do so, as detailed below.

The ACA's Premium-Stabilization Programs

23. The three premium-stabilization programs created by Congress in the ACA began in CY 2014: temporary reinsurance and risk corridors programs to give insurers payment stability as insurance market reforms began, and an ongoing risk adjustment program that makes payments to health insurance issuers that cover higher-risk populations (*e.g.*, those with chronic conditions) to more evenly spread the financial risk borne by issuers. These three premium-stabilization programs are known as the "3Rs."

24. Congress' overarching goal of the 3Rs premium-stabilization programs, along with other Exchange-related provisions and policies in the ACA, was to make affordable health insurance available to individuals who previously did not have access to such coverage, and to help ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty. *See, e.g.*, 42 U.S.C. § 18091(2)(I)-(J) (stating that one of the goals of the ACA was "creating effective health insurance markets").

25. Congress also strived to provide certainty and protect against adverse selection in the health care market (when a health insurance purchaser understands his or her own potential health risk better than the health insurance issuer does) while stabilizing premiums in the individual and small group markets as the ACA's market reforms and Exchanges began in 2014.

26. Of the 3Rs, this action addresses only the temporary, three-year risk corridors program, which began in CY 2014 and expired at the end of CY 2016, and was a "Federally administered program." 77 FR 17219, 17221 (Mar. 23, 2012), attached hereto at Exhibit 01.

27. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the ACA Exchanges during the first few years of Exchange operation, health insurers may not be able to predict their risk accurately, and that their premiums may reflect costs that are ultimately lower or higher than predicted. Congress intended the ACA's temporary risk corridors provision as an important safety valve for consumers and insurers, as millions of Americans would transition to new coverage in a brand new Marketplace. *See* 76 FR 41929, 41931 (July 15, 2011), attached hereto at Exhibit 02; 77 FR 73118, 73119 (Dec. 7, 2012), attached hereto at Exhibit 03 ("The risk corridors program … will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains.").

28. While the risk adjustment and reinsurance programs were designed to share risk *between* health plans, Congress designed the risk corridors program to share risk between insurers *and the Government*. *See* 77 FR 73118, 73121 (Dec. 7, 2012), Ex. 03 ("The temporary risk corridors program permits *the Federal government* and QHPs *to share* in profits or losses resulting from inaccurate rate setting from 2014 to 2016." (emphasis added)).

29. The risk corridors program applied only to participating plans, like BCBSVT, that agreed to participate on the ACA Exchanges, accepted all of the responsibilities and obligations of QHPs as set forth in the statute and implementing regulations, and were certified as QHPs at the discretion of CMS and/or the state-level operators of the ACA Exchanges in accordance with the ACA and HHS and CMS regulations. All insurers that elected to enter into agreements with

the Government to become QHPs were required by Section 1342(a) of the ACA to participate in the risk corridors program.

30. The financial protections that Congress provided in the 3Rs statutory premium-stabilization programs, including the mandatory annual risk corridors payments, provided QHPs with the security – backed by federal law and the full faith and credit of the United States – to become participating health insurers in their respective states' ACA markets, at considerable cost to the QHPs, despite the significant financial risks posed by the uncertainty in the new health care markets.

31. Since the ACA's rollout, BCBSVT has worked in partnership with the state and federal governments to make the ACA Exchange successful in Vermont by agreeing to participate as a QHP on the ACA Exchange in Vermont, rolling out competitive rates, and offering a broad spectrum of health insurance products.

32. BCBSVT has demonstrated its willingness to be a meaningful partner in the ACA program, and has done so in good faith by fulfilling all of its obligations, including the remittance of annual risk corridors charges to the Government, with the understanding that the United States would likewise honor its statutory, regulatory, and contractual commitments regarding, *inter alia*, the 3Rs, including the temporary risk corridors program.

33. The Government has failed to hold up its end of the bargain, necessitating the filing of this lawsuit.

The ACA's Risk Corridors Payment Methodology

34. Under the ACA's risk corridors program, the federal government shares risk with QHP health insurers annually in "calendar years 2014, 2015, and 2016," 42 U.S.C. § 18062(a), attached hereto at Exhibit 04, by collecting charges from a health insurer if the insurer's QHP

premiums exceed claims costs of QHP enrollees by a certain amount, and by making payments to the insurer if the insurer's QHP premiums fall short by a certain amount. *Id.* at § 18062(b).

35. In this manner, "[r]isk corridors create a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers." 76 FR 41929, 41942 (July 15, 2011), Ex. 02.

36. Through ACA Sections 1342(b)(1) and (2), Congress established the payment methodology and formula for the risk corridors "payments in" and "payments out."

37. The text of Section 1342(b) states:

> **(b) Payment methodology**
>
> **(1) Payments out**
>
> The Secretary shall provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
>
> **(2) Payments in**
>
> The Secretary shall provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and
>
> (B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

42 U.S.C. § 18062(b), Ex. 04.

38. To determine whether a QHP in any year must pay into, or receive payments from, the Government under the risk corridors program, HHS compared allowable costs (essentially, claims costs subject to adjustments for health care quality, health IT, annual risk adjustment payments and charges, and annual reinsurance payments) and the target amount – the difference between a QHP's earned premiums and allowable administrative costs.

39. The risk corridors payment that HHS owed an eligible QHP for a particular year thus depended upon the amount of annual reinsurance and risk adjustment payments that QHP received for the same year. Congress thus intended for the Government's risk corridors payments to QHPs, like the annual reinsurance and risk adjustment payments upon which they depended, to be paid annually.

40. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY 2016, QHPs with allowable costs that were less than 97 percent of the QHP's target amount were required to remit charges for a percentage of those cost savings to HHS, while QHPs with allowable costs greater than 103 percent of the QHP's target amount were to receive payments from HHS to offset a percentage of those losses. None of these payments were contingent upon collections.

41. The risk corridors program does not require the Government to reimburse insurers for 100 percent of their losses in a calendar year, or insurers to remit 100 percent of their gains to the Government in a calendar year.

42. Section 1342(b)(1) prescribes the specific payment formula from HHS to QHPs whose costs in a calendar year exceed their original target amounts by more than three percent.

43. Section 1342(b)(1)(A) requires that if a QHP's allowable costs in a calendar year are more than 103 percent, but not more than 108 percent, of the target amount, then "the

Secretary [of HHS] shall pay" to the QHP an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount.

44. Section 1342(b)(1)(B) further requires that if a QHP's allowable costs in a calendar year are more than 108 percent of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the allowable costs in excess of 108 percent of the target amount.

45. Alternatively, Section 1342(b)(2) sets forth the amount of the annual risk corridors charges that must be remitted to HHS by QHPs whose costs in a calendar year are more than three percent below their original target amounts.

46. Section 1342(b)(2)(A) requires that if a QHP's allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs.

47. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" 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.

48. Through this risk corridors payment methodology, QHPs keep all gains and bear all losses that they experience within three percent of their target amount for a calendar year, and the Government does not share in the risk. For example, a QHP that has a target amount of $10 million in a given calendar year will not pay a risk corridors charge or receive a risk corridors payment if its allowable charges range between $9.7 million and $10.3 million for that calendar year.

49. HHS and CMS provided specific examples of risk corridors payment and charge calculations beyond the three percent threshold – published in the Federal Register dated July 15, 2011, at 76 FR 41929, 41943 – which illustrate risk corridors payments the Government must pay under different allowable cost, target amount, and gain and loss scenarios. *See* 76 FR 41929, 41943 (July 15, 2011), Ex. 02.

50. The American Academy of Actuaries provided an approximate illustration of the risk corridors payment methodology – excluding the charge or payment of 2.5 percent of the target amount for gains or losses greater than eight percent – as follows:

Illustration of ACA Risk Corridors

Actual Spending Less Than Expected Spending

Actual Spending Greater Than Expected Spending

Plan Keeps 20% of Gains

Plan Pays Government 80% of Gains

Plan Keeps 50% of Gains

Plan Pays Government 50% of Gains

Plan Keeps All Gains

Plan Bears Full Losses

Plan Bears 50% of Losses

Government Reimburses 50% of Losses

Plan Bears 20% of Losses

Government Reimburses 80% of Losses

-8% -3% 0% 3% 8%

Source: American Academy of Actuaries, *Fact Sheet: ACA Risk-Sharing Mechanisms* (2013), *available at* http://actuary.org/files/ACA_Risk_Share_Fact_Sheet_FINAL120413.pdf, attached hereto at Exhibit 05.

51. Congress, through Section 1342 of the ACA, did not either expressly or implicitly grant the Secretary of HHS any discretion to pay QHPs that qualified for risk corridors payments any amount less than the full risk corridors payment amount prescribed in Section 1342(b)(1) and (2).

52. Congress also did not limit in any way the Secretary of HHS' obligation to make full risk corridors payments owed to QHPs, due to appropriations, restriction on the use of funds, or otherwise in Section 1342 or anywhere else in the ACA.

53. Congress did not establish any particular fund or account in Section 1342 to receive risk corridors charges or payments, nor did Congress prescribe in Section 1342 the use or collection of "user fees" regarding the risk corridors program.

54. Section 1342 does not state or otherwise require that risk corridors payments by the Government out to QHPs are constrained by the amount of risk corridors charges collected by the Government from QHPs. *See* 42 U.S.C. § 18062. Neither the term "budget neutral" nor the concept of "budget neutrality" appear anywhere in Section 1342 or its implementing regulations. HHS and CMS recognized this in March 2013, when in final rulemaking (following a notice-and-comment period), the agencies stated in the Federal Register:

> 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.

78 FR 15409, 15473 (Mar. 11, 2013), attached hereto at Exhibit 06.

55. The Government's unilateral decision, detailed below, to belatedly interpret its statutory ACA risk corridors obligation as requiring "budget neutrality" – *i.e.*, that Government risk corridors payments to qualifying insurers cannot exceed the amount of risk corridors charges the Government collects from insurers – is found *nowhere* in the text or purpose of the ACA and forces insurers to share the risk amongst themselves, instead of *the Government* sharing in the risk, in contravention of Congress' intent and design in passing the ACA.

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

57. Congress has not repealed Section 1342, and all prior attempts to repeal Section 1342 have failed. *See* S. 1726, Obamacare Taxpayer Bailout Prevention Act, *available at*

https://www.congress.gov/bill/113th-congress/senate-bill/1726.

58. Any potential future repeal of Section 1342 could not apply retroactively to negate the United States' obligation to make full risk corridors payments to QHPs, including Plaintiff, for CY 2014, CY 2015, and CY 2016.

59. The Government thus lacks statutory authority to pay anything less than 100% of the risk corridors payments due to BCBSVT for CY 2015 and/or CY 2016.

60. In deciding to apply to become a QHP, Plaintiff relied upon HHS' commitments to make full risk corridors payments annually to QHPs as required in Section 1342 of the ACA regardless of whether risk corridors payments to QHPs are actually greater than risk corridors charges collected from QHPs for a particular calendar year.

61. As detailed below, in CY 2015 and CY 2016, Plaintiff experienced allowable-cost losses of more than three percent of target amounts in the Vermont ACA Individual and Small Group Markets, requiring the Government to make full mandatory risk corridors payments to Plaintiff under Section 1342 for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017. The Government failed to make *any* risk corridors payments for those years.

62. By contrast, for BCBSVT's allowable-cost gains of more than three percent of its target amounts in the CY 2014 Vermont ACA Individual and Small Group Markets, Plaintiff promptly made its full mandatory risk corridors charge remittances to the Government under Section 1342.

The ACA's Risk Corridors Program and Medicare Part D

63. Congress required the ACA risk corridors program established in Section 1342 to be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program that was signed into law by President George W. Bush. *See* 42 U.S.C.

§ 18062(a), Ex. 04 (mandating that the risk corridors "program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act").

64. In the statute creating the Medicare Part D risk corridors program, Congress directed HHS to establish a risk corridor for each prescription drug plan for each plan year. *See* 42 U.S.C. § 1395w-115(e)(3)(A). The regulations implementing the Medicare Part D risk corridors program provided that "CMS makes payments after a coverage year" after receipt of all cost data information, and that "CMS at its discretion makes either lump-sum payments or adjusts monthly payments *in the following payment year*." 42 C.F.R. § 423.336(c) (2009) (emphasis added).

65. For example, in the first year of the Medicare Part D risk corridors program – 2006 – HHS paid funds owed to eligible plan sponsors in November and December 2007. *See* Office of Inspector Gen., Dep't of Health & Human Servs., *Medicare Part D Reconciliation Payments for 2006-2007*, at 14 (2009) , attached hereto at Exhibit 07 ("CMS paid most of the funds owed to sponsors for 2006 by increasing these sponsors' monthly prospective payments for November and December 2007.").

66. The amount of Medicare Part D risk corridors payments for 2007 did not equal the amount of collections – payments and receipts were not budget neutral. *See id.* at 11 tbl. 2 (showing that sponsors owed Medicare $795 million while Medicare owed $195 million to sponsors, netting $600 million for Medicare); *see also* Suzanne M. Kirchhoff, Cong. Research Serv., R40611, *Medicare Part D Prescription Drug Benefit* at 40 (Oct. 27, 2016), attached hereto at Exhibit 08 ("Part D plans each year have made net risk corridor payments to CMS.").

67. Congress was aware of HHS' regulation and payment scheme for the Medicare

Part D risk corridors program when Congress enacted the ACA – including Section 1342 – in March 2010. By directing HHS to base the ACA risk corridors program on the Medicare Part D risk corridors program, *see* 42 U.S.C. § 18062(a) ("shall be based on"), Ex. 04, Congress intended that ACA risk corridors payments, like in Medicare Part D, would be made annually and in full, and would not be constrained by budget neutrality.

HHS' Risk Corridors Regulations

68. Congress directed HHS to administer the risk corridors program enacted in Section 1342. *See* 42 U.S.C. § 18062(a), Ex. 04. The HHS Secretary formally delegated authority over the Section 1342 risk corridors program to the CMS Administrator on August 30, 2011. *See* 76 FR 53903, 53903-04 (Aug. 30, 2011), attached hereto at Exhibit 09. That delegation recognized that the ACA risk corridors program was statutorily required to be "based on" the Medicare Part D risk corridors program. *Id.* By authority of this delegation from the HHS Secretary, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation "for calendar years 2014, 2015, and 2016," 45 C.F.R. § 153.510(a), that is mathematically identical to the statutory formulation in Section 1342 of the ACA, using the identical thresholds and risk-sharing levels specified in the statute. *See* 45 C.F.R. § 153.510, attached hereto at Exhibit 10.

69. The implementing regulations, just like the controlling statute, do not limit the amount of the Government's required annual risk corridors payments out to insurers by the charge amounts the Government collects from insurers. *See id*. The implementing regulations, like Section 1342, do not require the risk corridors program to be "budget neutral."

70. Nothing in 45 C.F.R. §§ 153.500 to .540 prescribes the use of "user fees" regarding the risk corridors program.

71. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk corridors payment amounts that QHPs "will receive":

> (b) *HHS payments to health insurance issuers*. QHP issuers will receive payment from HHS in the following amounts, under the following circumstances:
>
> > (1) When a QHP's allowable costs for any benefit year are more than 103 percent but not more than 108 percent of the target amount, HHS will pay the QHP issuer an amount equal to 50 percent of the allowable costs in excess of 103 percent of the target amount; and
> >
> > (2) When a QHP's allowable costs for any benefit year are more than 108 percent of the target amount, HHS will pay to the QHP issuer an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

72. Nowhere does 45 C.F.R. § 153.510 make payments contingent upon collections.

73. By this regulation, the Government intended that HHS "will pay" and QHPs "will receive" risk corridors payments in "an amount equal to" the risk corridors calculation "[w]hen" it is determined that a QHP qualifies for risk corridors payments – not some fraction of that amount at some indeterminate future date, or never at all.

74. Furthermore, 45 C.F.R. § 153.510(c) prescribes the circumstances under which QHPs "must remit" charges to HHS, as well as the means by which HHS will determine those charge amounts:

> (c) *Health insurance issuers' remittance of charges*. QHP issuers must remit charges to HHS in the following amounts, under the following circumstances:
>
> > (1) If a QHP's allowable costs for any benefit year are less than 97 percent but not less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to 50 percent of the difference between 97 percent of the target amount and the allowable costs; and

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

75. The payment methodology provisions at 45 C.F.R. § 153.510(a) to (c) were adopted by HHS in final rulemaking on March 23, 2012, after a notice-and-comment period. *See* 77 FR 17219, 17251 (Mar. 23, 2012), Ex. 01.

76. In the preceding July 15, 2011 proposed rule, CMS and HHS stated regarding risk corridors payment deadlines that:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that the payment deadlines should be the same for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011), Ex. 02.

77. In the final rulemaking of March 23, 2012, HHS responded to comments received supporting the 30-day payment deadline to QHPs, and stated that it "plan[ned] to address the risk corridors payment deadline in the HHS notice of benefit and payment parameters." 77 FR 17219, 17239 (Mar. 23, 2012), Ex. 01. HHS reiterated, however, that:

> While we did not propose 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.***

Id. (emphasis added).

78. This was HHS' final administrative construction and interpretation regarding the deadline for HHS' risk corridors payments to QHPs; it never "address[ed] the risk corridors payment deadline in the HHS notice of benefit and payment parameters." *Id.*

79. Subsequently, in a proposed rule of December 7, 2012, HHS "specified the annual schedule for the risk corridors program, including dates for claims run-out, data submission, and notification of risk corridors payments and charges." 77 FR 73118, 73200 (Dec. 7, 2012), Ex. 03.

80. Following a notice-and-comment period, CMS published a final rule on March 11, 2013, adopting, among other things, the 30-day deadline for a QHP to remit risk corridors charges to the Government. 78 FR 15409, 15531 (Mar. 11, 2013), Ex. 06. This resulted in 45 C.F.R. § 153.510 being amended by adding the following subsection:

> (d) *Charge submission deadline.* A QHP issuer must remit charges to HHS within 30 days after notification of such charges.

81. HHS also adopted a final rule on March 11, 2013, amending 45 C.F.R. § 153.530 by adding subsection (d), imposing the annual requirement that "[f]or each benefit year, a QHP issuer must submit all information required under this section by July 31 of the year following the benefit year." *Id.*

82. While CMS never imposed in the implementing regulations a specific deadline for HHS to tender full risk corridors payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount, the Government also never contravened its earlier public statements that the deadline for the Government's payment of risk corridors payments to QHPs should be identical to the deadline for a QHP's remittance of charges to the Government. *See* 76 FR 41929, 41943 (July 15, 2011), Ex. 02; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

83. BCBSVT relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become, and continue to act as, a QHP in Vermont and accept the obligations and responsibilities of a QHP, believing that the Government would pay the full risk

corridors payments owed to it within 30 days, or shortly thereafter, following a determination that Plaintiff experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

84. Considered together, (i) the requirement of separate calculations for each year, (ii) the reference to a preexisting program (Medicare Part D) in which annual payments are made, (iii) the purpose of the 3Rs premium stabilization programs, and (iv) the interplay among the 3Rs premium stabilization programs, make it apparent that Congress intended in Section 1342 of the ACA to require the Government to make annual risk corridors payments to eligible QHPs, and HHS interpreted Section 1342 as requiring annual risk corridors payments.

85. Nothing in Section 1342 or 45 C.F.R. Part 153 limits the Government's obligation to pay QHPs the full amount of risk corridors payments due based on appropriations, restrictions on the use of funds, or otherwise.

86. The United States should have paid BCBSVT the full CY 2015 and CY 2016 risk corridors payments due by the end of, respectively, CY 2016 and CY 2017, but failed to do so as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

BCBSVT was a QHP in CY 2014, CY 2015, and CY 2016

87. 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 on the Government's statements and conduct regarding its risk corridors obligations, BCBSVT agreed to become a QHP, and to enter into QHP Agreements with the State of Vermont's Department of Vermont Health Access ("State"), which operated the ACA Exchange in Vermont ("Vermont Health Connect"), after the State had exercised its discretion to certify Plaintiff as a QHP in Vermont pursuant to the ACA and HHS and CMS regulations. BCBSVT's QHP Agreements for

CY 2014, CY 2015, and CY 2016 are attached to this Complaint at Exhibits 11 to 13.

88. BCBSVT executed a QHP Agreement with the State on September 3, 2013, regarding its participation in Vermont Health Connect for CY 2014 (the "CY 2014 QHP Agreement"). *See* Exhibit 11. The CY 2014 QHP Agreement was effective from August 30, 2013 to December 31, 2014, the last day of CY 2014. *See id.* at § 4.

89. On December 8, 2014, BCBSVT executed an amendment to its CY 2014 QHP Agreement with the State that extended the term of the agreement through CY 2015, confirming its participation in Vermont Health Connect for CY 2015 (the "CY 2015 QHP Agreement"). *See* Exhibit 12.

90. On February 29, 2016, BCBSVT executed an amendment to its CY 2014 QHP Agreement with the State that extended the term of the agreement through CY 2016, confirming its participation in Vermont Health Connect for CY 2016 (the "CY 2016 QHP Agreement"). *See* Exhibit 13.

91. Guidance from HHS and CMS to Issuers on Federally-Facilitated Exchanges ("FFE") and State Partnership Exchanges on April 5, 2013, stated 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." Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 20 (Apr. 5, 2013), attached hereto at Exhibit 14.

92. Before BCBSVT executed the CY 2014, CY 2015 and CY 2016 QHP Agreements, Plaintiff executed dozens of attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP in Vermont

Health Connect.

93. BCBSVT submitted its attestations for, respectfully, CY 2014 on April 17, 2013 ("CY 2014 Attestations"), attached hereto at Exhibit 15, CY 2015 on July 16, 2014 ("CY 2015 Attestations"), attached hereto at Exhibit 16, and CY 2016 on July 22, 2015 ("CY 2016 Attestations"), attached hereto at Exhibit 17.

94. By executing and submitting its annual attestations on CMS' forms, BCBSVT 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 Plaintiff 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.

95. Through these annual attestations, BCBSVT 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).

96. The federal Government's risk-sharing that Congress mandated through the risk corridors program was a significant factor in BCBSVT's decision to agree to become a QHP and

undertake the many responsibilities and obligations required for Plaintiff to participate in Vermont Health Connect, the Vermont ACA Exchange.

97. Congress mandated that "the Secretary shall pay" risk corridors payments to eligible QHPs, like BCBSVT, under 42 U.S.C. § 18062(b). Had BCBSVT known that the Government would fail to fully and timely make the risk corridors payments owed to BCBSVT – reneging on the Government's assurances that "[t]he risk corridors program … will protect against uncertainty in rates for [QHPs] by limiting the extent of issuer losses and gains," 77 FR 73118, 73119 (Dec. 7, 2012), Ex. 03 – then its annual premiums on the Vermont ACA Exchange would necessarily have been higher than actually charged, as a result of the increased risks in the Marketplace.

HHS' and CMS' Interpretation of
The Government's Section 1342 Risk Corridors Payment Obligations

98. Between Congress' enactment of the ACA in 2010 and the 2013 commitment of QHPs, including BCBSVT, to the ACA Exchanges, HHS and CMS repeatedly publicly acknowledged and confirmed to Plaintiff and other QHPs the Government's statutory and regulatory obligations to make full and timely risk corridors payments to eligible QHPs.

99. HHS and CMS continued making statements recognizing the Government's full and annual risk corridors payment obligations through September 2016.

100. These repeated public statements by HHS and CMS were made or ratified by representatives of the Government who had actual authority to bind the United States, including, but not limited to, the HHS Secretary and Kevin J. Counihan, the CMS official designated as the Chief Executive Officer of the ACA Health Insurance Marketplaces and Director of CMS's Center for Consumer Information and Insurance Oversight ("CCIIO"), which regulates health insurance at the federal level. *See* CMS Leadership, Center for Consumer Information and

Insurance Oversight, Kevin Counihan, https://www.cms.gov/About-CMS/Leadership/cciio/ Kevin-Counihan.html (last visited Jan. 12, 2017), attached hereto at Exhibit 18 (Mr. Counihan's job description).

101. BCBSVT relied on these repeated public statements by HHS and CMS to assume and continue its QHP status, including its continued participation in the Vermont ACA Exchange each year from CY 2014 through CY 2016, and beyond.

102. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov stating that under the risk corridors program, "[f]rom 2014 through 2016" – not at some indeterminate future date – "qualified health plan 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), attached hereto at Exhibit 19.

103. In the same July 11, 2011 fact sheet, HHS stated that "[r]isk corridors create a mechanism for sharing risk for allowable costs between the Federal government and qualified health plan issuers." *Id.*

104. Additionally, in the July 11, 2011 fact sheet, HHS stated that proposed rulemaking would "aim[] to align the data and payment policies for this temporary [risk corridors] program with other [3Rs] programs to promote simplicity and efficiency." *Id.* The other 3Rs programs require annual payments.

105. On July 15, 2011, in a proposed rule, HHS noted that although the proposed regulations did not contain any deadlines for QHPs to remit charges to HHS or for HHS to make risk corridors payments to QHPs, such deadlines were under consideration, with HHS stating that:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that ***the payment deadlines should be the same*** for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011) (emphasis added), Ex. 02.

106. Also in the July 15, 2011 proposed rule, HHS confirmed that the risk corridors program was designed to share risk between the Government and QHPs, stating that "[r]isk corridors create a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers." *Id.* at 41942.

107. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (77 FR 17219). Although HHS recognized that it did not propose deadlines for making risk corridors payments, HHS re-stated that "***QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.***" 77 FR 17219, 17238 (Mar. 23, 2012) (emphasis added), Ex. 01.

108. In the same March 23, 2012 final rule, HHS also reconfirmed that the Government was sharing the risk with QHPs under the risk corridors program. *See id.*

109. In a March 2012 written presentation to health insurers regarding the final rule, CMS explained that risk corridors is a "Federal program under the statute," and that the risk corridors program "[p]rotects against inaccurate rate-setting by sharing risk (gains and losses) on allowable costs between HHS and qualified health plans to help ensure stable health insurance premiums." Presentation, CMS, *Reinsurance, Risk Corridors, and Risk Adjustment Final Rule*, at 11 (Mar. 2012), attached hereto at Exhibit 20.

110. In proposed rulemaking on December 7, 2012, HHS assured QHPs, like

BCBSVT, that "[t]he risk corridors program, which is a Federally administered program, will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains." 77 FR 73118, 73119 (Dec. 7, 2012), Ex. 03.

111. Also in the December 7, 2012 proposed rule, HHS reconfirmed the Government-QHP risk-sharing aspect of risk corridors, stating that "[t]he temporary risk corridors program permits the Federal government and QHPs to share in the profits or losses resulting from inaccurate rate setting from 2014 to 2016." *Id.* at 73121.

112. Additionally, in the December 7, 2012 proposed rule, HHS stated its intent that the risk corridors program would be administered on an annual basis, proposing "the annual schedule for the risk corridors program, including dates for claims run-out, data submission, and notification of risk corridors payments and charges." *Id.* at 73200.

113. When HHS implemented a final rule on March 11, 2013, regarding HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15409), HHS confirmed that

> ***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.***

78 FR 15409, 15473 (Mar. 11, 2013) (emphasis added), Ex. 06.

114. The March 11, 2013 final rule also "specifie[d] the annual schedule for the risk corridors program." *Id.* at 15520.

115. A March 2013 CMS written presentation regarding the final rule to health insurers – some of whom, including BCBSVT, were preparing to apply to become certified as QHPs for the upcoming CY 2014 ACA Marketplace – contained the same affirmations of Government-to-QHP risk-sharing as in the March 2012 presentation discussed above. *See* Presentation, CMS, *HHS Notice of Benefit and Payment Parameters for 2014*, at 18 & 19 (Mar. 2013), attached

hereto at Exhibit 21.

116. In April 2013, BCBSVT executed and submitted its CY 2014 Attestations regarding, *inter alia*, its adherence to the risk corridors program for CY 2014.

117. In September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSVT executed its CY 2014 QHP Agreement and became a QHP in Vermont.

118. On January 1, 2014, BCBSVT began offering plans on the CY 2014 Vermont ACA Exchange, pursuant to its commitments with and attestations to the Government.

119. In February 2014, the Congressional Budget Office ("CBO") published projections stating that, in contrast to the 3Rs' risk adjustment and reinsurance programs having "no net budgetary effect," the "payments and collections under the risk corridor program will not necessarily equal one another." CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 (Feb. 2014), attached hereto at Exhibit 22. The CBO's Table B-3 accordingly projected that in FY 2015, the difference between annual risk corridors payments and collections would net the Government $1 billion in positive revenue. *Id.* at 109. The table further projected positive annual revenue for the United States from the risk corridors program of $2 billion and $4 billion for, respectively, FY 2016 and FY 2017. *Id.* The CBO projected that "over the 2015-2024 period, risk corridor payments from the federal government to health insurers will total $8 billion and the corresponding collections from insurers will amount to $16 billion, yielding net savings for the federal government of $8 billion." *Id.* at 110.

120. The CBO's February 2014 analysis clearly contemplated that risk corridors payments would be made annually and in full, instead of payments being withheld until sometime after the end of the risk corridors program in 2017 or later. *Id.* at 109-110. The CBO

stated that "[c]ollections and payments for the … risk corridor programs will occur after the close of a benefit year. Therefore, collections and payments for insurance provided in 2014 will occur in 2015, and so forth." *Id.* at 110 n.6. Additionally, CBO stated that "[t]o inform its projections, CBO analyzed recent data from the Medicare drug benefit (Part D)," and that "[u]nder Part D's risk corridors, collections from insurers have exceeded payments to insurers, yielding net collections that have averaged about $1 billion *per year*." *Id.* at 115 (emphasis added).

121. The CBO stated that its February 2014 figures reflected "new estimates of payments and collections for the risk corridor program, which had previously been projected to have no net budgetary effect." *Id.* at 112. CBO explained that "in its baseline projections published in May 2013, [CBO] estimated that payments and collections for risk corridors would roughly offset one another." *Id.* at 114.

122. On information and belief, CBO's May 2013 baseline projections were the first CBO projections to include the risk corridors program.

123. In a letter report to House Speaker Nancy Pelosi immediately prior to Congress' enactment of the ACA, the CBO did not include any reference to the risk corridors program in its budget projections. *See generally* Letter, CBO to Hon. Nancy Pelosi (Mar. 20, 2010), attached hereto at Exhibit 23.

124. CBO provided no reasons explaining why it failed to mention the risk corridors in its March 20, 2010 budget projections. Plaintiff has found no publicly available documentary evidence stating why CBO was silent regarding risk corridors in its many reports to Congress leading up to the enactment of the ACA, from May 2009 to March 2010.

125. On information and belief, HHS engaged in speculation by stating in both July 15,

2011 and March 23, 2012 that the reason "CBO did not score the impact" of the risk corridors program in March 2010 was because CBO "assumed collections would equal payments to plans in the aggregate." 76 FR 41929, 41942 (July 15, 2011), Ex. 02; 77 FR 17219, 17244 (Mar. 23, 2012), Ex. 01.

126. Even if CBO, prior to the May 2013 baseline projection, had determined that risk corridors would "have no net budgetary effect," that does not mean that CBO believed that risk corridors payments owed to QHPs under Section 1342 were *required* to be budget neutral based on the statute. CBO's February 2014 report confirmed this by stating that the "payments and collections under the risk corridor program will not necessarily equal one another." CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 (Feb. 2014), Ex. 22.

127. The Senate Finance Committee's "Chairman's Mark" of the "America's Healthy Future Act of 2009," a precursor bill to the ACA, included risk corridors language nearly identical to what became ACA Section 1342. *See* Sen. Comm. on Fin., Chairman's Mark, America's Healthy Future Act of 2009, at 9 (Sept. 16, 2009), attached hereto at Exhibit 24. The Chairman's Mark, including the risk corridors provision, was approved by the Committee. *See* S. 1796, 111th Cong. § 2214 (2009), attached hereto at Exhibit 25.

128. The CBO contemporaneously described the Chairman's Mark's risk-corridors proposal:

> The risk corridors would be modeled on those specified in the 2003 Medicare Modernization Act and would be in effect for 3 years. In that period, if plans incur costs (net of their reinsurance payments) that differ from their premium bids by more than 3 percent, the federal government would bear an increasing share of any losses or be paid the same increasing share of any gains.

CBO, *A Summary of the Specifications for Health Insurance Coverage Provided by the Staff of the Senate Finance Committee*, at 5, attachment to Letter, CBO to Hon. Max Baucus (Sept. 16,

2009), attached hereto at Exhibit 26.

129. Neither the Chairman's Mark or its CBO scoring, nor the text of S. 1796 or its accompanying Senate Report – *see* S. Rep. No. 111-89, at 15-16 (2009) (describing risk corridors); *id.* at 13-14 (describing Part D's risk-corridors program) – evidenced any intent or understanding that risk-corridors payments would be budget-neutral, or that payments and collections would not be made annually.

130. In a proposed rule of December 2, 2013, and a final rule of March 11, 2014, HHS reiterated that the risk corridors program creates "a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers," and that "[t]he risk corridors program will help protect against inaccurate rate setting in the early years of the Exchanges by limiting the extent of issuer losses and gains" 78 FR 72322, 72379 (Dec. 2, 2013), attached hereto at Exhibit 27; 79 FR 13743, 13829 (Mar. 11, 2014), attached hereto at Exhibit 28.

131. In the March 11, 2014 final rule, HHS confirmed that risk corridors payments would be made annually, stating that "we believe that the risk corridors program as a whole will be budget neutral or, will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28.

The Government Breaches its Risk Corridors Payment Obligations

132. Also in the March 11, 2014 final rule, HHS announced for the first time, without prior notice in the December 2, 2013 proposed rule or anywhere else, that "HHS intends to implement this [risk corridors] program in a budget neutral manner." *Id.*

133. This statement was directly contrary to HHS' prior statement – made exactly one year earlier in the Federal Register, March 11, 2013 – which 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." 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 06.

134. The Government's announcement that the United States would not honor its risk corridors obligations in the manner it had promised and represented that it would came after BCBSVT (which had executed the CY 2014 QHP Agreement in September 2013) had already begun to participate in the CY 2014 Vermont ACA Exchange in reliance upon the Government's risk corridors payment obligations.

135. The American Academy of Actuaries stated in April 2014 that the proposed "new budget neutrality policy … would change the basic nature of the risk corridor program retroactively" and "changes the nature of the risk corridor program from one that shares risk between issuers and CMS to one that shares risk between competing issuers." Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 3 (Apr. 21, 2014), attached hereto at Exhibit 29.

136. HHS' "budget neutral" statement of March 11, 2014, was also contrary to Congress' intent for the Government to share risk with insurers, and Congress' direction to model the ACA risk corridors program on the Medicare Part D program, which is not required to be budget neutral. *See* 42 C.F.R. § 423.336, attached hereto at Exhibit 30; U.S. Gov't Accountability Office Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 (2015), attached hereto at Exhibit 31 ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 2 (Apr. 21, 2014), Ex. 29, ("The Part D risk

corridor program is not budget neutral and has resulted in net payments to the Centers for Medicare and Medicaid Services (CMS). Similarly, the design of the ACA risk corridor program does not guarantee budget neutrality.").

137. HHS' statement was also contrary to the CBO's February 2014 published projections that the risk corridors program would net the Government $8 billion in positive revenue. *See* CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 n. 6 (Feb. 2014), Ex. 22.

138. The fundamental change in position by HHS and CMS to declare that the risk corridors program would be "budget neutral" apparently was motivated by political considerations, not statutory or regulatory ones.

139. After the President released his Proposed Budget for FY 2015 on March 4, 2014, it was publicly reported that approximately $5.5 billion had been requested to cover expenses related to the risk corridors program. *See, e.g.*, Brianna Ehley, *$5.5 Billion for Obama's Contested Risk Corridors*, The Fiscal Times, Mar. 4, 2014, attached hereto at Exhibit 32; Alex Wayne, *Insurers' Obamacare Losses May Reach $5.5 Billion in 2015*, Bloomberg, Mar. 4, 2014, attached hereto at Exhibit 33.

140. A week later, on March 11, 2014, HHS and CMS published the final rule announcing their about-face on the budget-neutrality requirements for the risk corridors program.

141. The lack of reasoned decision-making by the agencies regarding budget neutrality is further exposed by the proposed rule of December 2, 2013, which did not contain any proposal by HHS or CMS to implement the risk corridors program in a budget neutral manner. *See generally* 78 FR 72322, 72379 (Dec. 2, 2013), Ex. 27. Therefore, the budget neutrality position adopted in the March 11, 2014 final rule was not the product of notice-and-comment rulemaking.

142. A month later, on April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," stating that:

> ***We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall.*** Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014) (emphasis added), attached hereto at Exhibit 34.

143. The April 11, 2014 Bulletin was the first instance in which HHS and CMS publicly suggested that risk corridors charges collected from QHPs might be less than the Government's full mandatory risk corridors payment obligations owed to QHPs.

144. Only one month earlier, on March 11, 2014, HHS and CMS had publicly announced that "we believe that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28.

145. Indeed, in the April 11, 2014 Bulletin, HHS and CMS assured QHPs that "[w]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments." Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), Ex. 34.

146. CMS' April 11, 2014 Bulletin also recognized that risk corridors payments are due annually, and lacked any express or implied statement that risk corridors payments for any

year would not be due until sometime after the end of the risk corridors program in 2017. *See id.*

147. HHS' and CMS' change in position to call for "budget neutrality" in the risk corridors program caused the CBO to update its projections for risk corridors payments and charges in April 2014. *See* CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014* (Apr. 2014), attached hereto at Exhibit 35. CBO stated that it "believes that the Administration has sufficient flexibility to ensure that payments to insurers will approximately equal payments from insurers to the federal government, and thus that the program will have no net budgetary effect over the three years of its operation. (Previously, CBO had estimated that the risk corridor program would yield net budgetary savings of $8 billion.)" *Id.* at 18. Despite this revision, CBO's Table 3 continued to project that risk corridors payments would be made annually, rather than sometime after the end of the program in 2017. *See id.* at 10.

148. In a final rule of May 27, 2014, HHS summarized its statements from the April 11, 2014 bulletin, providing that "we intend to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually," but reiterated that payments would be made annually by stating that "if risk corridors collections in the first or second year are insufficient to make risk corridors payments as prescribed by the regulations, 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 remaining funds will then be used to fund current year payments." 79 FR 30239, 30260 (May 27, 2014), attached hereto at Exhibit 36.

149. In the May 27, 2014 final rule, HHS also repeated that "we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments," and reassured

QHPs that "a shortfall for the 2015 program year" would be an "unlikely event" – but should such an unlikely event occur, "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." *Id.*

150. In HHS' response letter to the U.S. Government Accountability Office ("GAO") dated May 20, 2014, HHS again admitted that "Section 1342(b)(1) … establishes … the formula to determine … the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met." Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), attached hereto at Exhibit 37.

151. 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] plans 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. Senator Jeff Sessions (June 18, 2014), attached hereto at Exhibit 38.

152. In July 2014, BCBSVT executed and submitted its CY 2015 Attestations regarding, *inter alia*, its adherence to the risk corridors program for CY 2015.

153. On September 30, 2014, the GAO published a written opinion concluding that:

> Section 1342 of PPACA directs the Secretary of HHS to collect from and make payments to qualified health plans. The CMS PM [Program Management] appropriation for FY 2014 would have been available to CMS to make the payments specified in section 1342(b)(1). The CMS PM appropriation for FY 2014 also would have appropriated to CMS user fees collected pursuant to section 1342(b)(2) in FY 2014. HHS stated that it intends to begin collections and payments under section 1342 in FY 2015. However, as discussed above, for funds to be available for this purpose in FY 2015, the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014.

GAO, *Department of Health and Human Services—Risk Corridors Program*, B-325630, at 7

(Sept. 30, 2014), attached hereto at Exhibit 39.

154. The CMS PM appropriation for FY 2014 was thus available to make risk corridors payments when Plaintiff committed as a QHP to the ACA Exchanges.

155. Not included in the GAO's opinion was an additional appropriation passed in March 2010, contemporaneously with the enactment of the ACA. The Health Insurance Reform Implementation Fund, enacted at Section 1005 of the Health Care and Education Reconciliation Act of 2010 amending the ACA, was appropriated by the same Congress that passed the ACA expressly "to carry out the [ACA]," and Congress appropriated "$1,000,000,000" – *i.e.*, $1 billion – "for Federal administrative expenses to carry out" the ACA. 42 U.S.C. § 18122.

156. In Section 1342 of the ACA, Congress directed HHS to "establish *and administer*" the ACA's risk corridors program. 42 U.S.C. § 18062(a) (emphasis added).

157. Appropriations for risk corridors payments were thus available when Congress enacted the ACA in 2010.

158. In proposed rulemaking on November 26, 2014, HHS repeated to QHPs that "a shortfall in the 2016 benefit year" is an "unlikely event." 79 FR 70673, 70676 (Nov. 26, 2014), attached hereto at Exhibit 40. HHS also repeated that "we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments," and that "***HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.***" *Id.* at 70700 (emphasis added). So confident was HHS about the collections potential for the risk corridors program, that in its November 26, 2014 proposed rulemaking, HHS discussed its "propos[al] that if, for the 2016 benefit year, cumulative risk corridors collections exceed cumulative risk corridors payment requests, we would [adjust certain parameters] to pay out all collections to QHP issuers." *Id.* No detailed plan was expressed for a scenario in which

collections were insufficient to satisfy all payment requests.

159. On December 8, 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements and assurances described above, BCBSVT executed the CY 2015 QHP Agreement, committing to the Vermont ACA Exchange for CY 2015.

160. On December 16, 2014 – after BCBSVT had committed to the CY 2015 ACA Exchanges and after the Government's obligation for CY 2014 risk corridors payments had matured – Congress enacted the Cromnibus appropriations bill for fiscal year 2015, the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). Pub. L. 113-235.

161. In the 2015 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiff, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 227 of the 2015 Appropriations Act:

> 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. 2491, attached hereto at Exhibit 41.

162. Section 1342(b)(1) of Public Law 111-148 – referenced immediately above – is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

163. Congress did not repeal, amend or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

164. On January 1, 2015, Plaintiff began offering plans on the CY 2015 Vermont ACA Exchange, pursuant to its commitments with and attestations to the Government.

165. On February 27, 2015, HHS' implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), finalized the proposed policy that HHS planned to implement if cumulative risk corridors collections exceed cumulative payment obligations by CY 2016, and further confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In the unlikely event that risk corridors collections, including any potential carryover from the prior years, are insufficient to make risk corridors payments for the 2016 program year, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." 80 FR 10749, 10779 (Feb. 27, 2015), attached hereto at Exhibit 42.

166. CMS' letter to state insurance commissioners on July 21, 2015, stated in boldface text that "**CMS remains committed to the risk corridor program.**" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), attached hereto at Exhibit 43.

167. On July 22, 2015, BCBSVT executed and submitted its CY 2016 Attestations regarding, *inter alia*, its adherence to the risk corridors program for CY 2016.

168. On or about July 31, 2015, BCBSVT submitted its CY 2014 risk corridors data to CMS per 45 C.F.R. § 153.530(d).

169. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, and after receiving QHPs' commitments to the CY 2016 ACA Exchanges, HHS and CMS announced a severe shortfall in the CY 2014 risk corridors program and that they intended to prorate the risk corridors payments owed to QHPs for CY 2014. HHS and CMS stated that:

> Based on current data from QHP issuers' risk corridors submissions, issuers will pay $362 million in risk corridors charges, and have submitted for $2.87 billion in risk corridors payments for 2014. **At this time, assuming full collections of risk corridors charges, this will result in a proration rate of 12.6 percent.**

Bulletin, CMS, *Risk Corridors Payment Proration Rate for 2014* (Oct. 1, 2015), attached hereto at Exhibit 44.

170. HHS and CMS further announced on October 1, 2015, that they would be collecting full risk corridors charges from QHPs, including Plaintiff in November 2015, and would begin making the prorated risk corridors payments to QHPs starting in December 2015. *See id.*

171. As detailed further below, BCBSVT made its CY 2014 risk corridors charge remittances in November 2015, pursuant to Plaintiff's obligations. On information and belief, beginning in and continuing after December 2015, HHS and CMS made their piecemeal CY 2014 risk corridors payments to QHPs.

172. This December 2015 risk corridors payment schedule was consistent with an earlier payment schedule that CMS had provided to QHPs on April 14, 2015, before any CY 2014 risk corridors payments were due, specifically stating that the Government's "Remittance of Risk Corridors Payments and Charges" would be made on "9/2015 – 12/2015." Bulletin, CMS, *Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors* (Apr. 14, 2015), attached hereto at Exhibit 45.

173. The risk corridors payment schedule that CMS announced was also consistent with its June 2015 presentations to insurers stating that in December 2015, "CMS will begin making RC [risk corridor] payments to issuers" for CY 2014. Presentation, CMS, *Completing the Risk Corridors Plan-Level Data Form 2014* (June 1, 2015), attached hereto at Exhibit 46.

174. On or about October 2015 or November 2015, QHPs received a letter from CMS stating, "I wish to reiterate to you that the Department of Health and Human Services (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 (Oct./Nov. 2015) (emphasis added). The letter further stated that "HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States Government for which full payment is required." *Id.*

175. CMS also stated in an email transmitting Mr. Counihan's letter to QHPs that the "letter from CMS reiterat[es] that ***risk corridors payments are an obligation of the U.S. Government.***" Email from Counihan, CMS (Oct./Nov. 2015) (emphasis added).

176. HHS's and CMS's direct statements to QHPs have unequivocally confirmed the agencies' position and interpretation that full annual risk corridors payments were owed to Plaintiff for CY 2015 and CY 2016, and were a binding obligation of the United States.

177. On November 19, 2015, CMS issued a public announcement further confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make *full payments* to issuers," and adding that "HHS *is recording those amounts that remain unpaid* following our 12.6% payment this winter *as fiscal year 2015 obligation* [sic] of the United States Government for which *full payment is required*." Bulletin, CMS, *Risk Corridors Payments for the 2014 Benefit Year* (Nov. 19, 2015) (emphasis added), attached hereto at Exhibit 47.

178. By stating that the remaining 87.4% of QHPs' risk corridors payments for CY 2014 would be recorded "as fiscal year 2015 obligation[s] of the United States Government for which full payment is required," HHS and CMS admitted that full payment for CY 2014 was due and owing in 2015 – not at some future indeterminate date after CY 2016.

179. On December 18, 2015, after the Government's obligation for CY 2015 risk corridors payments had matured, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

180. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiff, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 225 of the 2016 Appropriations Act:

> 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).

129 Stat. 2624, attached hereto at Exhibit 48.

181. Again, Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

182. Congress did not repeal, amend or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including BCBSVT.

183. On January 1, 2016, BCBSVT began offering plans on the CY 2016 Vermont ACA Exchange, pursuant to its commitments with and attestations to the Government.

184. In February 2016, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSVT executed the CY 2016 QHP Agreement, committing to the CY 2016 ACA Exchange in Vermont for the final year of the risk

corridors program. *See* Ex. 13.

185. On or about July 31, 2016, BCBSVT submitted its CY 2015 risk corridors data to CMS per 45 C.F.R. § 153.530(d).

186. On September 9, 2016 – after several lawsuits had been filed by other QHPs in the U.S. Court of Federal Claims that, like this lawsuit, seek monetary relief from the United States for breaches of the Government's risk corridors payment obligations – CMS publicly confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and that "HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required." Bulletin, CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), attached hereto at Exhibit 49. CMS confirmed its full risk corridors obligation to QHPs, despite revealing that "based on our preliminary analysis, HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments," and that "[c]ollections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments, then for 2015 benefit year risk corridors payments, then for 2016 benefit year risk corridors payments." *Id.*

187. The Government's written acknowledgement of its risk corridors payment obligations for CY 2015 and CY 2016, however, was an insufficient substitute for full and timely payment of the amounts owed to BCBSVT for CY 2015 and CY 2016 of the risk corridors program, as required by statute, regulation, contract, and HHS' and CMS' previous statements.

188. In its November 18, 2016 announcement of the severe risk corridors shortfall for CY 2015, CMS again confirmed the annual payment structure of the risk corridors program, stating that "if risk corridors collections for a particular year are insufficient to make full risk

corridors *payments for that year*, risk corridors *payments for the year* will be reduced pro rata to the extent of any shortfall," and also that "HHS is collecting 2015 risk corridor charges in November 2016, and will begin remitting risk corridors payments to issuers in December 2016, as collections are received." Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016) (emphasis added), attached hereto at Exhibit 50. In the announcement, CMS confirmed "that all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that no timely CY 2015 risk corridors payments would be made to QHPs like BCBSVT. *Id.*

189. The December 2016 payment schedule was consistent with CMS' written presentation to insurers on June 7, 2016, which represented to BCBSVT and other QHPs that "CMS will begin making [CY 2015] RC [risk corridor] payments to issuers" in "December 2016," supporting HHS' and CMS' continued intention and representation to make annual risk corridors payments by the end of the year. CMS, *Completing the Risk Corridors Plan-Level Data Form for the 2015 Benefit Year* at 7 (June 7, 2016), attached hereto at Exhibit 51.

190. Although the November 18, 2016 announcement did not specify the total amount of CY 2015 risk corridors collections versus payments nationwide amongst all QHPs, by calculating the data provided in the announcement's tables, it appears that QHPs requested CY 2015 risk corridors payments of $5,821,439,995.74 from the Government versus CY 2015 risk corridors collections of $95,315,092.84. This increased the total risk corridors shortfall for CY 2014 and CY 2015 to over $8 billion owed to QHPs by the Government.

191. On May 5, 2017, after the Government's obligation for CY 2016 risk corridors payments had matured, Congress enacted the Omnibus appropriations bill for fiscal year 2017, the "Consolidated Appropriations Act, 2017" (the "2017 Appropriations Act"), which once again

specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including BCBSVT, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 223 of the 2017 Appropriations Act:

> 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).

Pub. L. 115-31, § 223, 131 Stat. 135 (May 5, 2017), attached hereto at Exhibit 52.

192. Again, Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

193. On May 9, 2017, CMS issued a bulletin to insurers regarding reporting of CY 2016 risk corridors, confirming the agency's understanding – even in light of the Government's contrary litigation position that the statute creates no payment obligation – that "[u]nder Section 1342 of the [ACA], issuers of qualified health plans (QHPs) must participate in the risk corridors program and pay charges ***or receive payments from HHS based on the ratio of the issuer's allowable costs to the target amount***," and not limited by collections or the availability of appropriations. Bulletin, CMS, *Announcement of Medical Loss Ratio and Risk Corridors Annual Reporting Procedures for the 2016 MLR Reporting Year*, at 1 (May 9, 2017) (emphasis added), attached hereto at Exhibit 53.

194. On or about July 31, 2017, BCBSVT submitted its CY 2016 risk corridors data to CMS per 45 C.F.R. § 153.530(d).

195. On November 13, 2017, HHS and CMS announced the CY 2016 collection and payment amounts for the final year of the risk corridors program. *See* Bulletin, CMS, *Risk*

Corridors Payment and Charge Amounts for the 2015 Benefit Year (Nov. 18, 2016), Ex. 50. The data HHS and CMS provided in the November 13, 2017 announcement indicated that the Government owes QHPs $3,978,220,798.38 in CY 2016 risk corridors payments and QHPs owe the Government $27,090,317.25 in CY 2016 risk corridors collections.

196. In total, for all three years of the risk corridors program, the Government owes QHPs CY 2014, CY 2015 and CY 2016 risk corridors payments of approximately $12.76 billion, versus QHPs owing the Government CY 2014, CY 2015 and CY 2016 risk corridors collections of approximately $484.5 million, a shortfall of approximately $12.28 billion.

197. Defendant's current litigation position is that the Government has no legal obligation to make risk corridors payments beyond risk corridors collections, unless Congress appropriates additional funds toward risk corridors payments. *See, e.g.*, United States' Reply in Support of Its Cross-Motion to Dismiss, *Molina Healthcare of California, Inc., et al. v. United States*, No. 17-97C, ECF No. 16, at 1 (Fed. Cl. June 16, 2017) ("The scope of the United States' obligation to make risk corridors payments … extends only to the aggregate amount of collections.").

198. The Government has thus left BCBSVT, and other QHPs owed past-due risk corridors payments, to guess when—if ever—the United States will make the full CY 2015 and CY 2016 risk corridors payments that the Government has acknowledged are owed to BCBSVT.

199. The Government failed to provide Plaintiff with any statutory authority for its unilateral decision to make no risk corridors payments for CY 2015 and CY 2016 by the end of CY 2016 and CY 2017, respectively, while BCBSVT was obligated to fully remit its CY 2014 risk corridors collection charges to the Government before the end of CY 2015.

BCBSVT's Risk Corridors Charge Amounts for CY 2014

200. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridors charges and payments for CY 2014, and emphasized 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." Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015) ("CY 2014 Risk Corridors Report"), attached hereto at Exhibit 54.

201. The amount of BCBSVT's gains in the ACA Vermont Individual Market for CY 2014 resulted in Plaintiff being required to remit a risk corridors charge to the Secretary of HHS in the amount of $30,650.56. *See id.* at Table 46 – Vermont.

202. Furthermore, the amount of BCBSVT's gains in the ACA Vermont Small Group Market for CY 2014 resulted in BCBSVT being required to remit a risk corridors charge to the Secretary of HHS in the amount of $36,128.73. *See id.*

203. BCBSVT's risk corridors charges for CY 2014 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
BCBSVT	VT / Individual	($30,650.56)	100%
BCBSVT	VT / Small Group	($36,128.73)	100%

204. BCBSVT was required to pay the Government 100% of its CY 2014 risk corridors charges ($66,779.29) – not 0% of them – and to do so promptly. BCBSVT made its full and timely remittance of CY 2014 risk corridors charges to the Government on November 20, 2015. *See* November 2015 Financial Transaction Report for BCBSVT, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 55 (showing "RCCHG" – Risk Corridors Charge – of $66,779.29 paid on EFT date of 11/20/2015).

BCBSVT's Risk Corridors Payment Amounts for CY 2015

205. In a report released on November 18, 2016, HHS and CMS publicly announced QHPs' risk corridors charges and payments for CY 2015, stating that "all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that "HHS intends to collect the full 2015 risk corridors charge amounts indicated in the tables" printed in the report. Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016) ("CY 2015 Risk Corridors Report"), Ex. 50.

206. BCBSVT's losses in the ACA Vermont Individual Market for CY 2015 resulted in the Government being required to pay BCBSVT a risk corridors payment of $2,096,136.84. *See id.* at 13.

207. Furthermore, BCBSVT's losses in the ACA Vermont Small Group Market for CY 2015 resulted in the Government being required to pay BCBSVT a risk corridors payment of $2,661,673.15. *See id.*

208. BCBSVT's risk corridors payments for CY 2015 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
BCBSVT	VT / Individual	$2,096,136.84	0%
BCBSVT	VT / Small Group	$2,661,673.15	0%

209. In total, the Government is required to pay BCBSVT risk corridors payments for CY 2015 of $4,757,809.99, but the Government has not made any payments for CY 2015 risk corridors owed to BCBSVT.

210. Unlike some other QHPs, BCBSVT did not have gains in the ACA Individual or Small Group Markets for CY 2015 that resulted in BCBSVT being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2015 Risk Corridors Report,

Ex. 50. Had BCBSVT been required to remit a risk corridors charge to the Secretary of HHS, then BCBSVT would have been required to remit 100% of the amount of the charge to HHS before the close of CY 2016, as it had affirmatively attested it would do. Just as Plaintiff had done in CY 2014, BCBSVT was ready, willing, and able to satisfy this obligation to which it had attested for CY 2015, had Plaintiff been required to do so.

211. The Government lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2015 risk corridors payments from QHPs such as BCBSVT.

212. BCBSVT is entitled to receive full and immediate payment from the United States.

BCBSVT's Risk Corridors Payment Amounts for CY 2016

213. In a report released on November 13, 2017, HHS and CMS publicly announced the amount of risk corridors payments the Government owes to QHPs, and the amount of risk corridors charges the Government will collect from QHPs, for the CY 2016 plan year. CMS announced that "HHS will use 2016 benefit year risk corridors collection to make additional payments toward 2014 benefit year balances," indicating that the Government will not make any payments to QHPs, including BCBSVT, toward the Government's CY 2015 or CY 2016 risk corridors amounts still owed. Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year* at 1 (Nov. 13, 2017) ("CY 2016 Risk Corridors Report"), attached hereto at Exhibit 56.

214. Additionally, CMS announced that "HHS intends to collect the full 2016 risk corridors charge amounts indicated in the tables" printed in the report, and that HHS "is collecting 2016 risk corridor charges in November 2017." *Id.* at 1-2.

215. Contrary to recent guidance by CMS, which had represented to BCBSVT and other QHPs that "Remittance of Risk Corridors Payments Begins" on "12/2017," *see* CMS, *Key Dates for Calendar Year 2017* at 3 (Apr. 13, 2017), attached hereto at Exhibit 57, HHS and CMS announced on November 13, 2017 that "HHS … will begin remitting risk corridors payments to issuers in January 2018, as collections are received." CY 2016 Risk Corridors Report at 2, Ex. 56.

216. BCBSVT's losses in the ACA Vermont Individual Market for CY 2016 resulted in the Government being required to pay BCBSVT a risk corridors payment of $2,552,850.56. *See id.* at 19.

217. Furthermore, BCBSVT's losses in the ACA Vermont Small Group Market for CY 2016 resulted in the Government being required to pay BCBSVT a risk corridors payment of $3,784,868.82. *See id.*

218. BCBSVT's risk corridors payments for CY 2016 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
BCBSVT	VT / Individual	$2,552,850.56	0%
BCBSVT	VT / Small Group	$3,784,868.82	0%

219. In total, the Government is required to pay BCBSVT risk corridors payments for CY 2016 of $6,337,719.38, but the Government has stated that it will not make any payments to Plaintiff for CY 2016. *See, e.g.*, CY 2016 Risk Corridors Report at 1-2, Ex. 56.

220. Unlike some other QHPs, BCBSVT did not have gains in the ACA Individual or Small Group Markets for CY 2016 that resulted in BCBSVT being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2015 Risk Corridors Report, Ex. 50. Had BCBSVT been required to remit a risk corridors charge to the Secretary of HHS, then BCBSVT would have been required to remit 100% of the amount of the charge to HHS

before the close of CY 2017, as it had affirmatively attested it would do. Just as Plaintiff had done in CY 2014, BCBSVT was ready, willing, and able to satisfy this obligation to which it had attested for CY 2016, had Plaintiff been required to do so.

221. The Government lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2016 risk corridors payments from QHPs such as BCBSVT.

222. BCBSVT is entitled to receive full and immediate payment from the United States.

223. Combined, the United States has recognized and repeatedly admitted that it is obligated to make risk corridors payments to BCBSVT in the total amount of $11,095,529.37 for CY 2015 and CY 2016, but as of the date of this filing the Government has not made any payments for CY 2015 or CY 2016 risk corridors amounts owed to BCBSVT. Plaintiff is entitled to receive, and demands, full and immediate payment from the United States.

COUNT I
Violation of Federal Statute and Regulation

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

225. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridors payments to eligible QHPs based on their annual ACA exchange losses, in accordance with the payment formula set forth in the statute. *See* 42 U.S.C. § 18062(b), Ex. 04; 45 C.F.R. § 153.510, Ex. 10.

226. HHS' and CMS' implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that "when" QHPs' allowable costs exceed the 3 percent risk corridors threshold, HHS "will pay" risk corridors payments to QHPs in accordance

with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

227. Congress, through Section 1342 of the ACA, did not either expressly or implicitly grant the Secretary of HHS any discretion to pay QHPs that qualified for risk corridors payments any amount less than the full risk corridors payment amount prescribed by the statutory formula in Section 1342(b)(1) and (2), or to pay the risk corridors amounts due pursuant to the statutory formula over the course of, or after the end of, the three-year risk corridors program.

228. HHS' and CMS' regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit risk corridors charges it owes to HHS within 30 days after notification of such charges. In CY 2014, BCBSVT timely and fully complied with this requirement.

229. HHS' and CMS' statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridors "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011), Ex. 02; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

230. As the Supreme Court confirmed in *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015), "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them." Congress must have intended the ACA's risk corridors program to be consistent with, and not antithetical to, this purpose.

231. As early as July 15, 2011, HHS identified the purpose of the risk corridors program: "The temporary Federally-administered risk corridor program serves to protect against rate-setting uncertainty in the Exchange by limiting the extent of issuer losses (and gains)." *See* 76 FR 41929, 41948 (July 15, 2011), Ex. 02. HHS further explained that "[i]nsurers charge premiums for expected costs plus a risk premium, in order to build up reserve funds in case

medical costs are higher than expected. Reinsurance, risk adjustment and risk corridors payments reduce the risk to the issuer and the issuer can pass on a reduced risk premium to beneficiaries." *Id.*

232. HHS confirmed the purpose of Section 1342 in its March 23, 2012 Final Rulemaking implementing the statute stating that the "temporary Federally administered risk corridors program serves to protect against uncertainty in rate setting by qualified health plans ***sharing risk in losses and gains with the Federal government.***" 77 FR 17219, 17220 (Mar. 23, 2012), Ex. 01 (emphasis added). Nine months later in December 2012, HHS confirmed that "[t]he temporary risk corridors program permits ***the Federal government*** and QHPs ***to share*** in profits or losses resulting from inaccurate rate setting from 2014 to 2016." 77 FR 73118, 73121 (Dec. 7, 2012), Ex. 03 (emphasis added).

233. Therefore, HHS assured prospective ACA QHPs in its Final Rulemaking implementing Section 1342 that "[t]he risk corridors program, which is a Federally administered program, ***will protect*** against uncertainty in rates for QHPs ***by limiting the extent of issuer losses*** (and gains)." 77 FR 17219, 17221 (Mar. 23, 2012), Ex. 01 (emphasis added).

234. With respect to *when* risk corridors payments were intended to be made to further the purposes of the risk corridors program, HHS confirmed in its March 23, 2012 Final Rulemaking that, along with the other two "Rs," the ACA established the "temporary risk corridors program" to "further minimize the negative effects of adverse selection and foster a stable marketplace ***from year one*** *of implementation*[.]" 77 FR 17219, 17221 (Mar. 23, 2012), Ex. 01 (emphasis added). HHS confirmed in the same Final Rulemaking that the risk corridors program "***will mitigate*** *the impacts* of potential adverse selection and stabilize the individual and small group markets ***as*** *insurance reforms and the Exchanges* ***are implemented, starting in***

2014." *Id.* at 17243 (emphasis added). Nowhere in Section 1342, its implementing regulations, or the March 23, 2012 Final Rulemaking, does Congress or HHS state or imply that risk corridors payments to QHPs would come at some undetermined time *after* the program's end in 2017.

235. The undisputed fundamental purposes of the risk corridors program, and the ACA generally, are not furthered, and have been subverted, by the Government's plan to pay the vast majority of risk corridors payments it has acknowledged it owes for CY 2014, CY 2015 and CY 2016, sometime **after** the end of the risk corridors program, in 2018 or later—nearly five years after Plaintiff was induced to join the ACA exchanges—and *only if* there happens to be risk corridors collections from profitable QHPs or other specific appropriations sufficient to fund such obligations, which the Government now estimates to be approximately $12.28 billion in total after the Government's final risk corridors collections.

236. That full, annual risk corridors payments must be made is also consistent with the Medicare Part D risk corridors program that Congress expressly stated Section 1342's risk corridors program "shall be based upon." 42 U.S.C. § 18062(a). Congress knew when it passed the ACA that full, annual risk corridors payments were required and had consistently been made by the Government under Medicare Part D's risk corridors program.

237. BCBSVT voluntarily applied to become, was certified as, committed itself to be, and in fact was, a QHP on the Vermont ACA Exchange in CY 2014, CY 2015 and CY 2016, *see* Exs. 11 to 13, and was qualified for and entitled to receive mandated risk corridors payments from the Government for CY 2015 and CY 2016.

238. BCBSVT is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government

for CY 2015 and CY 2016.

239. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,757,809.99, that the Government concedes it owes BCBSVT for CY 2015. *See* Ex. 50.

240. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $6,337,719.38, that the Government concedes it owes BCBSVT for CY 2016. *See* Ex. 56.

241. The Government was obligated to make full risk corridors payments promptly to BCBSVT for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017.

242. The United States has failed to make full and timely risk corridors payments to BCBSVT for CY 2015 and CY 2016, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make full risk corridors payments.

243. Instead, the Government arbitrarily has not paid any of the total amounts due for CY 2015 or CY 2016, asserting that full payment to BCBSVT is limited by available appropriations, even though no such limits appear anywhere in the ACA, the money-mandating Section 1342, or the money-mandating implementing regulations.

244. Congress did not repeal, amend or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including BCBSVT, that suffered annual losses on the ACA Exchanges in excess of their statutory targets.

245. The Government's failure to make full and timely risk corridors payments to BCBSVT for CY 2015 and CY 2016 constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R.

§ 153.510(b).

246. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), BCBSVT has been damaged in the amount of at least $11,095,529.37 for CY 2015 and CY 2016, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II
Breach of Implied-In-Fact Contract

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

248. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with BCBSVT regarding the Government's obligation to make full and timely risk corridors payments to BCBSVT for CY 2014 and/or CY 2015 and/or CY 2016 in exchange for Plaintiff's respective voluntary agreement to become a QHP and participate in the Vermont ACA Exchange for CY 2014 and/or CY 2015 and/or CY 2016, including Plaintiff's obligation to remit full and timely risk corridors collection charges to the Government if Plaintiff was required to do so.

249. The existence of an implied-in-fact contract can be inferred from both the promissory "shall pay" and "will pay" language in, respectively, Section 1342 and its implementing regulations, as well as from the parties' conduct and the totality of the circumstances surrounding the enactment and implementation of the ACA and the risk corridors program, by which Congress, HHS, and CMS committed the Government to help protect QHPs financially against risk selection and market uncertainty.

250. Section 1342 of the ACA and HHS' implementing regulations (45 C.F.R. § 153.510), confirmed and ratified by HHS' and CMS' repeated assurances admitting the

Government's obligation to make full risk corridors payments, constituted a clear and unambiguous offer by the Government to make full and timely risk corridors payments to health insurers, including BCBSVT, that agreed to participate as QHPs in the CY 2014 and/or CY 2015 and/or CY 2016 ACA Exchanges and were approved as certified QHPs at the Government's discretion. This offer evidences a clear intent by the Government to contract with BCBSVT.

251. Congress provided in Section 1342 a program that offered specified incentives in return for BCBSVT's voluntary performance in the form of an actual undertaking and gave HHS no discretion to make less than the specific amount of risk corridors payments prescribed by the statutory formula from the Government to eligible QHPs, like BCBSVT, that agreed to participate in the ACA Exchanges.

252. BCBSVT accepted the Government's offer by developing health insurance plans that complied with the ACA's new requirements, agreeing to become a QHP, and by performing as a QHP on the new Vermont ACA Exchange, which posed uncertain risks that the Government agreed to share with BCBSVT by limiting the extent of Plaintiff's annual losses or profits based on a prescribed formula and targets.

253. By agreeing to become a QHP, BCBSVT agreed to provide services by offering health insurance on an Exchange established under the ACA, and to accept the new obligations, responsibilities and conditions the Government imposed on QHPs – 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*.

254. BCBSVT was not obligated to participate as a QHP, to incur Exchange-related costs and losses, and to provide healthcare benefits to numerous enrollees who had not previously been insured at premiums that were lower than they would have been without the

Government's promised risk-sharing.

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

256. The Government also induced QHPs, like BCBSVT, to commit to the CY 2015 and CY 2016 ACA Exchanges during and after HHS' and CMS' announcement in 2014 of their intention to implement the risk corridors program in a budget neutral manner by repeatedly giving assurances to QHPs that "full" risk corridors payments were owed and that risk corridors collections would be sufficient to cover all of the Government's risk corridors payments for a calendar year. *See, e.g.*, Bulletin, CMS, *Risk Corridors and Budget Neutrality*, at 1 (Apr. 11, 2014), Ex. 34 ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

257. BCBSVT, in turn, provided a real benefit to the Government by agreeing to become a QHP and, despite the uncertain financial risk, to offer affordable health insurance on and to participate in the CY 2014, CY 2015 and CY 2016 ACA Exchanges in Vermont. Without sufficient health insurers voluntarily agreeing to participate in the new ACA Exchanges, the ACA could not have been implemented as intended. BCBSVT, for example, was one of only two health insurers to agree to participate as a QHP in Vermont's ACA Exchange during CY 2014, CY 2015 and CY 2016.

258. BCBSVT satisfied and complied with its obligations and/or conditions which existed under the implied-in-fact contract with the Government, including, but not limited to, remitting full and timely risk corridors charges owed to the Government for CY 2014.

259. The parties' mutual intent to contract is further confirmed by the parties' conduct,

performance and statements, including, but not limited to, BCBSVT's execution of QHP Agreements and attestations, including the attestations regarding risk corridors payments and charges, and the Government's repeated assurances that full and timely risk corridors payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 06.

260. Section 1342 states that the HHS Secretary "shall establish" the ACA risk corridors program and "shall pay" risk corridors payments, and the Secretary is responsible for administering and implementing the ACA and risk corridors program. 42 U.S.C. § 18062(a) & (b). The Secretary of HHS was explicitly authorized to make the Government's risk corridors payments in specific amounts under Section 1342 of the ACA. The Secretary was therefore authorized by law under the ACA to make the Government's risk corridors payments.

261. Each of the implied-in-fact contracts were furthermore authorized and/or ratified by representatives of the Government who had express or implied actual authority to bind the United States (including, but not limited to, the Secretary of HHS and/or Kevin J. Counihan), were clearly founded upon a meeting of the minds between the parties and entered into with mutual assent, and were supported by consideration.

262. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,757,809.99, that the Government concedes it owes BCBSVT for CY 2015. *See* Ex. 50.

263. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $6,337,719.38, that the Government concedes it owes BCBSVT for CY 2016. *See* Ex. 56.

264. Congress did not vitiate the United States' contractual obligation to make full and

timely risk corridors payments to the Plaintiff.

265. BCBSVT honored its obligation to remit full risk corridors collections charges promptly to the Government for CY 2014 by the end of CY 2015.

266. The Government was obligated to make full risk corridors payments promptly to BCBSVT for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017. The Government's failure to make full and timely CY 2015 and CY 2016 risk corridors payments to Plaintiff is a material breach of the implied-in-fact contracts.

267. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with BCBSVT regarding the CY 2015 and/or CY 2016 ACA Exchanges, BCBSVT has been damaged in the amount of at least $11,095,529.37, together with any losses actually sustained as a result of the Government's breaches, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

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

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

269. 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.

270. The implied-in-fact contracts entered into between the United States and BCBSVT regarding the CY 2014 and/or CY 2015 and/or CY 2016 ACA Exchanges created the reasonable expectation for Plaintiff that full and timely CY 2014 and/or CY 2015 and/or

CY 2016 risk corridors payments, which BCBSVT regarded as an important part of the contract consideration, would be paid by the Government to QHPs, just as the Government expected that any CY 2014, CY 2015 or CY 2016 risk corridors remittance charges owed would be fully and timely paid by QHPs to the Government.

271. By failing to make full and timely CY 2015 and CY 2016 risk corridors payments to BCBSVT, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

272. In contrast to the Government's failure to honor its contractual obligations, BCBSVT, in good faith conformance with its implied-in-fact contractual obligations, submitted its full and timely CY 2014 risk corridors remittance charges owed to the Government.

273. Congress granted HHS with rulemaking authority regarding the risk corridors program in Section 1342(a) of the ACA, subject to the limitations on the agency's discretion expressly mandated in Section 1342. *See, e.g.*, 42 U.S.C. § 18062(b) ("[T]he Secretary shall pay ...."). HHS and CMS were permitted to establish charge remittance and payment deadlines, and had an obligation to exercise the discretion afforded to them in good faith, and not arbitrarily, capriciously or in bad faith.

274. 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 corridors charges to the Government, but failing to create a similar deadline in the regulations for the Government's full payment of risk corridors payments to QHPs, 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), Ex. 01);

(b) Requiring QHPs to fully remit risk corridors charges to the Government, but unilaterally deciding that the Government may make prorated or no risk corridors payments to QHPs, despite earlier stating that QHPs and the Government should be subject to the same payment deadline (*see, e.g.*, *id.*);

(c) In, respectively, Section 227 of the 2015 Appropriations Act, Section 225 of the 2016 Appropriations Act, and Section 223 of the 2017 Appropriations Act, legislatively targeting the Government's risk corridors payment obligations to a small group of QHPs in an attempt to save the Government money by limiting funding sources for, respectively, CY 2014, CY 2015, and CY 2016 risk corridors payments, after BCBSVT had undertaken significant expense in performing its obligations as a QHP in Vermont's ACA Exchange based on Plaintiff's reasonable expectations that the Government would make full and timely risk corridors payments if BCBSVT experienced sufficient losses in, respectively, CY 2015 and/or CY 2016;

(d) Making statements regarding risk corridors payments upon which BCBSVT relied to agree to become a QHP and participate in the Vermont ACA Exchange (*see, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 06 ("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.")), then depriving BCBSVT of full and timely risk corridors payments after Plaintiff had fulfilled its obligations as a QHP

by participating in Vermont's ACA Exchange and had suffered losses which the Government had promised would be shared through mandatory risk corridors payments (*see, e.g.*, 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28 ("HHS intends to implement this [risk corridors] program in a budget neutral manner."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 3 (Apr. 21, 2014), Ex. 29 ("The new budget neutrality policy … would change the basic nature of the risk corridor program retroactively" and "changes the nature of the risk corridor program from one that shares risk between issuers and CMS to one that shares risk between competing issuers."));

(e) One year later, beginning in March 2014, adopting an about-face position regarding budget neutrality without any rulemaking process and without providing QHPs, including BCBSVT, any explanation or the opportunity for notice and comment; and

(f) Despite repeatedly acknowledging in writing that the Government is obligated to make full risk corridors payments to QHPs, including BCBSVT, taking a contrary position before this Court asserting that the Government has no obligation to pay any risk corridors amounts unless it has sufficient risk corridors collections from QHPs or unless Congress makes new specific appropriations for such purposes.

275. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,757,809.99, that the Government concedes it owes BCBSVT for CY 2015. *See* Ex. 50.

276. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $6,337,719.38, that the Government concedes it owes BCBSVT for CY 2016. *See* Ex. 56.

277. The Government was obligated to make full risk corridors payments promptly to BCBSVT for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017, but failed to do so.

278. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, BCBSVT has been damaged in the amount of at least $11,095,529.37 in CY 2015 and CY 2016, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT IV
Taking Without Just Compensation
in Violation of the Fifth Amendment to the U.S. Constitution

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

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

281. BCBSVT has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridors payments for CY 2015 and CY 2016. Plaintiff had a reasonable investment-backed expectation of receiving the full and timely CY 2015 and CY 2016 risk corridors payments payable to it under the statutory and regulatory formula, based on its implied-in-fact contracts with the Government, Section 1342 of

the ACA, HHS' implementing regulations (45 C.F.R. § 153.510), and HHS' and CMS' direct public statements.

282. The Government expressly and deliberately interfered with and has deprived BCBSVT of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments for CY 2015 and CY 2016. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28.

283. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 risk corridors payments would be reduced pro rata to the extent of any shortfall in risk corridors collections. *See* Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), Ex. 34.

284. Further, in Section 227 of the 2015 Appropriations Act, Section 225 of the 2016 Appropriations Act, and Section 223 of the 2017 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations under Section 1342 of the ACA, expressly limiting the source of funding for the United States' CY 2015 and CY 2016 risk corridors payment obligations owed to a specific small group of insurers, including BCBSVT. *See* 128 Stat. 2491, Ex. 41; 129 Stat. 2624, Ex. 48; 131 Stat. 135, Ex. 52. HHS and CMS continue to refuse to make full and timely risk corridors payments to Plaintiff, and therefore the Government has deprived BCBSVT of the economic benefit and use of such payments.

285. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,757,809.99, that the Government concedes it owes BCBSVT for CY 2015. *See* Ex. 50.

286. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $6,337,719.38, that the Government concedes it owes BCBSVT for CY 2016. *See* Ex. 56.

287. The Government was obligated to make full risk corridors payments promptly to BCBSVT for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017, but failed to do so.

288. The Government's action in withholding, with no legitimate governmental purpose, the full and timely CY 2015 and CY 2016 risk corridors payments owed to BCBSVT constitutes a deprivation and taking of Plaintiff's property interests and requires payment to BCBSVT of just compensation under the Fifth Amendment of the U.S. Constitution.

289. BCBSVT is entitled to receive just compensation for the United States' taking of its property in the amount of at least $11,095,529.37 for CY 2015 and CY 2016, together with interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

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

(1) For Count I, awarding damages sustained by Plaintiff, in the amount of at least $11,095,529.37, subject to proof at trial, as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the CY 2015 and/or CY 2016 risk corridors payments;

(2) For Count II, awarding damages sustained by Plaintiff, in the amount of at least $11,095,529.37, subject to proof at trial, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its

implied-in-fact contracts with Plaintiff regarding the CY 2015 and/or CY 2016 risk corridors payments;

(3) For Count III, awarding damages sustained by Plaintiff, in the amount of at least $11,095,529.37, subject to proof at trial, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the implied covenant of good faith and fair dealing that exists in the implied-in-fact contracts regarding the CY 2015 and/or CY 2016 risk corridors payments;

(4) For Count IV, awarding damages sustained by Plaintiff, in the amount of at least $11,095,529.37, subject to proof at trial, as a result of the Defendant's taking of Plaintiff's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution regarding the CY 2015 and/or CY 2016 risk corridors payments;

(5) Awarding all available interest, including, but not limited to, post-judgment interest, to Plaintiff;

(6) Awarding all available attorneys' fees and costs to Plaintiff; and

(7) Awarding such other and further relief to Plaintiff as the Court deems just and equitable.

Dated: February 15, 2018

Respectfully Submitted,

s/ Lawrence S. Sher
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