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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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U.S. COURT OF
FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. f/k/a HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY d/b/a HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., and HIGHMARK SELECT RESOURCES INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 18-96 C

Related Case: No. 16-587C

COMPLAINT

Plaintiffs First Priority Life Insurance Company, Inc., Highmark Inc. f/k/a Highmark Health Services, HM Health Insurance Company d/b/a Highmark Health Insurance Company, Highmark BCBSD Inc., Highmark West Virginia Inc., and Highmark Select Resources Inc. (collectively, "Plaintiffs" or "Highmark"), by and through their undersigned counsel, bring this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and allege the following:

INTRODUCTION

1. Plaintiffs bring this Complaint to recover money damages owed for calendar years 2015 and 2016 from Defendant for violations of the mandatory risk corridors payment obligations prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing federal regulations, as well as Defendant's breaches of its risk corridors payment obligations under implied-in-fact contracts, Defendant's breaches of the

covenant of good faith and fair dealing implied in Defendant's contracts with Plaintiffs, and Defendant's taking of Plaintiffs' property without just compensation in violation of the Fifth Amendment of the U.S. Constitution.

2. Congress's 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 Plaintiffs, 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 Qualified Health Plans ("QHPs") – such as Plaintiffs – 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 these 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 Plaintiffs for calendar years 2014 ("CY 2014"), 2015 ("CY 2015"), and 2016 ("CY 2016"), totaling $608,806,370.63, but Defendant has failed to pay the full amount due. Instead, the Government arbitrarily has paid Plaintiffs only a small pro-rata share of the total amount due for CY 2014,[1] and has not paid any of the total amount due for CY 2015 or CY 2016, asserting that the Government's obligation to make full payment to Plaintiffs is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in Plaintiffs' contracts with the Government.

9. Although the United States has repeatedly acknowledged its obligation to make full risk corridors payments to Plaintiffs, it has failed to do so, despite Plaintiffs' repeated requests that the Government honor its statutory, regulatory and contractual obligations. This Complaint seeks monetary damages from the Government of at least $385,866,388.90, the

[1] Plaintiffs have sought relief for the Government's failure to make full CY 2014 risk corridors payments in a related action, *First Priority Life Ins. Co., Inc., et al. v. United States*, COFC No. 16-587C (Wolski, J.).

amount of risk corridors payments owed to Plaintiffs for CY 2015 and CY 2016.

JURISDICTION AND VENUE

10. 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 Plaintiffs bring claims for 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 Plaintiffs' property in violation of the Fifth Amendment of the Constitution.

11. 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

12. Plaintiff FIRST PRIORITY LIFE INSURANCE COMPANY, INC. ("First Priority") is a Pennsylvania stock insurance company with its principal place of business in Wilkes-Barre, Pennsylvania. First Priority was a QHP issuer on the Pennsylvania Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

13. Plaintiff HIGHMARK INC. f/k/a HIGHMARK HEALTH SERVICES ("Highmark Inc.") is a health insurer and Pennsylvania nonprofit corporation with its principal place of business in Pittsburgh, Pennsylvania. Highmark Inc., an independent licensee of the Blue Cross Blue Shield Association, does business as Highmark Blue Cross Blue Shield or Highmark Blue Shield in the Commonwealth of Pennsylvania. Highmark Health Services was a QHP issuer on the Pennsylvania Health Insurance Marketplace for CY 2014, and Highmark Inc. was a QHP issuer on the Pennsylvania Health Insurance Marketplace for CY 2015 and CY 2016.

14. Plaintiff HM HEALTH INSURANCE COMPANY d/b/a HIGHMARK HEALTH INSURANCE COMPANY ("HHIC") is a Pennsylvania stock insurance company with its principal place of business in Pittsburgh, Pennsylvania. It is a wholly owned subsidiary of Highmark Inc. HHIC was a QHP issuer on the Pennsylvania Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

15. Plaintiff HIGHMARK BCBSD INC. ("Highmark Delaware") is a health insurer and Delaware nonprofit corporation with its principal place of business in Wilmington, Delaware. Highmark Delaware does business in Delaware as Highmark Blue Cross Blue Shield Delaware, an independent licensee of the Blue Cross Blue Shield Association. Highmark Delaware was a QHP issuer on the Delaware Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

16. Plaintiff HIGHMARK WEST VIRGINIA INC. ("Highmark West Virginia") is a health insurer and West Virginia nonprofit corporation with its principal place of business in Parkersburg, West Virginia. Highmark West Virginia does business in West Virginia as Highmark Blue Cross Blue Shield West Virginia, an independent licensee of the Blue Cross Blue Shield Association. Highmark West Virginia was a QHP issuer on the West Virginia Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

17. Plaintiff HIGHMARK SELECT RESOURCES INC. ("HSR") is a health insurer and Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania. It is a wholly owned subsidiary of Highmark Inc. HSR was a QHP issuer on the Pennsylvania Health Insurance Marketplace for CY 2016.

18. Defendant is THE UNITED STATES OF AMERICA. The Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") are

agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

19. In 2010, Congress enacted the ACA, Public Law 111-148, 124 Stat. 119.

20. 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.

21. 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).

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

23. Beginning on January 1, 2014, individuals and small businesses were first permitted to purchase private health insurance through competitive statewide marketplaces that Congress created called Affordable Insurance Exchanges, Health Benefit Exchanges, "Exchanges," or "Marketplaces." ACA Section 1311 establishes the framework for the Exchanges. *See* 42 U.S.C. § 18031.

24. Collectively, Plaintiffs voluntarily participated and offered QHPs in the state Marketplaces in Pennsylvania, Delaware, and West Virginia in CY 2014, CY 2015, and CY 2016. For each of those years, the Plaintiffs' premiums were submitted to and approved by each respective state's insurance regulator in the spring and summer of the previous year (*e.g.*, spring and summer of 2013 for CY 2014).

25. Upon CMS's evaluation and certification of Plaintiffs as QHPs, Plaintiffs were required to provide a package of "essential health benefits" on the ACA Exchanges on which they voluntarily participated. 42 U.S.C. § 18021(a)(1).

<u>The ACA's Premium-Stabilization Programs</u>

26. Congress, recognizing the risk selection and market uncertainty facing health insurers on the new ACA Exchanges and the potential increased premiums that would come with that uncertainty, included in the ACA three premium-stabilization programs, which began in CY 2014: the 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."

27. Congress's overarching goal of the 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 to 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").

28. 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.

29. This action only addresses 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.

30. 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.").

31. 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)).

32. The risk corridors program applied only to participating plans, like Plaintiffs, 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 or the state-level operators of the ACA Exchanges in accordance with 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.

33. The financial protections that Congress provided in the 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.

34. Since the ACA's rollout, Highmark has worked in partnership with the state and federal governments to make the ACA Exchanges successful in Highmark's markets: agreeing to participate as a QHP on Exchanges in each of Highmark's markets, rolling out competitive rates, and offering a broad spectrum of health insurance products.

35. Highmark 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.

36. 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

37. 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.

38. 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.

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

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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).

55. Congress also did not limit in any way the Secretary of HHS's 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.

56. 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.

57. 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.

58. 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 would force 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.

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

60. 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.

61. 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 Plaintiffs, for CY 2014, CY 2015, and CY 2016.

62. HHS and CMS thus lack statutory authority to pay anything less than 100% of the risk corridors payments due to Plaintiffs for CY 2015 and/or CY 2016.

63. In deciding to apply to become QHPs, Plaintiffs relied upon HHS's 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.

64. As detailed below, in CY 2015 and CY 2016, Plaintiffs experienced allowable-cost losses of more than three percent of target amounts in the Delaware, Pennsylvania and West Virginia ACA Individual Markets and in the Pennsylvania ACA Small Group Market, requiring the Government to make full mandatory risk corridors payments to Plaintiffs 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.

65. By contrast, for HHIC's allowable-cost gains of more than three percent of its target amounts in the CY 2016 Pennsylvania ACA Small Group Market, HHIC promptly made its full mandatory risk corridors charge remittance to the Government under Section 1342.

<u>The ACA's Risk Corridors Program and Medicare Part D</u>

66. 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").

67. 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).

68. 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.").

69. 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.").

70. 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's Risk Corridors Regulations

71. 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.

72. 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."

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

74. 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.

75. 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.

76. 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.

77. 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.

78. 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.

79. 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).

80. This was HHS' final administrative construction and interpretation regarding the deadline for HHS' risk corridors payments to QHPs.

81. 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.

82. 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.

83. 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.*

84. 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.

85. Plaintiffs relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become QHPs in their respective states and accept the obligations and responsibilities of QHPs, believing that the Government would pay the full risk corridors payments owed to them within 30 days, or shortly thereafter, following a determination that Plaintiffs experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

86. 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 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.

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

88. The United States should have paid Plaintiffs 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.

Plaintiffs were QHPs

89. 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, each of the Plaintiffs agreed to become QHPs, and to enter into QHP Agreements with CMS, a federal agency within HHS,

which QHP Agreements for CY 2015 and CY 2016 are attached to this Complaint at Exhibits 11 to 21.

90. Facts regarding Plaintiffs' collective CY 2014 QHP Agreements are detailed in Highmark's previous complaint, *see* Complaint, *First Priority Life Ins. Co., Inc., et al. v. United States*, COFC No. 16-587C, ¶¶ 40-43 & Exs. 02-06 (May 17, 2016) (ECF No. 1), and are incorporated by reference herein.

91. First Priority and Highmark West Virginia executed QHP Agreements with the Government on October 20, 2014, Highmark Inc. and HHIC executed QHP Agreements with the Government on October 21, 2014, and Highmark Delaware executed a QHP Agreement with the Government on October 22, 2014. These five QHP Agreements are collectively referred to herein as the "CY 2015 QHP Agreements." *See* Exhibits 11 to 15. Per Section IV.a. of the CY 2015 QHP Agreements, the CY 2015 QHP Agreements had effective dates from the date of execution by the last of the two parties until December 31, 2015, the last day of CY 2015.

92. First Priority, Highmark Delaware, Highmark West Virginia and HSR executed QHP Agreements with the Government on September 22, 2015, and Highmark Inc. and HHIC executed QHP Agreements with the Government on September 23, 2015. These six QHP Agreements are collectively referred to herein as the "CY 2016 QHP Agreements." *See* Exhibits 16 to 21. Per Section IV.a. of the CY 2016 QHP Agreements, the CY 2016 QHP Agreements had effective dates from the date of execution by the last of the two parties until December 31, 2016, the last day of CY 2016.

93. Guidance from HHS and CMS to Issuers on Federally-Facilitated Exchanges ("FFE") and State Partnership Exchanges on April 5, 2013, stated that, "A signed QHP Agreement with CMS will complete the certification process in an FFE or State Partnership

Exchange. The Agreement will highlight and memorialize many of the QHP issuer's statutory and regulatory requirements and will serve as an important reminder of the relationship between the QHP issuer and CMS." Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 23 (Apr. 5, 2013), attached hereto at Exhibit 22.

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

95. Before Plaintiffs executed the CY 2015 and CY 2016 QHP Agreements, Plaintiffs executed dozens of attestations certifying their compliance with the obligations they were undertaking by agreeing to become, or continuing to act as, QHPs on the ACA Exchanges in all of the states in which Plaintiffs voluntarily participated.

96. By executing and submitting their annual attestations on CMS' forms, Plaintiffs 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 Plaintiffs 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.

97. Through these annual attestations, Plaintiffs affirmatively attested that they 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).

98. The federal Government's risk-sharing that Congress mandated through the risk corridors program was a significant factor in Plaintiffs' decision to agree to become QHPs and undertake the many responsibilities and obligations required for Plaintiffs to participate in the ACA Exchanges.

99. Congress mandated that "the Secretary shall pay" risk corridors payments to eligible QHPs like Plaintiffs under 42 U.S.C. § 18062(b). The Government further assured Plaintiffs before they agreed to participate in the ACA Exchanges 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. Had Plaintiffs known that the Government would fail to fully and timely make the risk corridors payments owed to them, then their annual premiums on those ACA Exchanges on which they voluntarily participated would necessarily have been higher than actually charged, as a result of the increased risks in the Marketplace that the risk corridors program was designed to mitigate.

HHS' and CMS' Interpretation of Their Section 1342 Risk Corridors Payment Obligations

100. Between Congress's enactment of the ACA in 2010 and the September 2013 commitment of QHPs, including Plaintiffs, to the ACA Exchanges, HHS and CMS repeatedly

publicly acknowledged and confirmed to the Plaintiffs and other QHPs their statutory and regulatory obligations to make full and timely risk corridors payments to eligible QHPs.

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

102. 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.

103. Plaintiffs relied on these repeated public statements by HHS and CMS to assume and continue their QHP status, including their continued participation in the ACA Exchanges in their respective states each year from CY 2014 through CY 2016, and beyond.

104. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," 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 23.

105. 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.*

106. 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.

107. 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), Ex. 02.

108. 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.

109. 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.

110. 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.*

111. 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 24.

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

113. 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.

114. 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.

115. 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, "*[t]he 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.

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

117. A March 2013 CMS written presentation regarding the final rule to health insurers – some of whom, including Plaintiffs, were preparing to apply to become certified by CMS as QHPs for the upcoming CY 2014 ACA Marketplace – contained the same affirmations of Government-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 25.

118. In September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, First Priority, Highmark West Virginia, Highmark Health Services, HHIC, and Highmark Delaware executed their CY 2014 QHP Agreements and became QHPs. Before executing their CY 2014 QHP Agreements, Plaintiffs executed and submitted their CY 2014 Attestations regarding, *inter alia*, their adherence to the risk corridors program for CY 2014.

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 26. 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 27.

124. CBO provided no reasons explaining why it failed to mention the risk corridors in its March 20, 2010 budget projections. Plaintiffs have 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. 26.

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 28. 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 29.

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 30.

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. On January 1, 2014, Plaintiffs began offering plans on the CY 2014 Delaware, Pennsylvania and West Virginia ACA Exchanges, pursuant to their commitments with and attestations to the Government.

131. 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 31; 79 FR 13743, 13829 (Mar. 11, 2014), attached hereto at Exhibit 32.

132. 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. 32.

The Government Breaches its Risk Corridors Payment Obligations

133. 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.*

134. This statement was directly contrary to HHS's 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.

135. 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 Plaintiffs (which had executed the CY 2014 QHP Agreements in September 2013) had already begun to participate in their respective states' CY 2014 ACA Exchanges in reliance upon the Government's risk corridors payment obligations.

136. 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 33.

137. 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 34; 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 35 ("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. 33, ("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.").

138. 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. 26.

139. 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.

140. 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 36; Alex

Wayne, *Insurers' Obamacare Losses May Reach $5.5 Billion in 2015*, Bloomberg, Mar. 4, 2014, attached hereto at Exhibit 37.

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

142. 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. 31. Therefore, the budget neutrality position adopted in the March 11, 2014 final rule was not the product of notice-and-comment rulemaking.

143. 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 38.

144. 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.

145. 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. 32.

146. Nevertheless, CMS' April 11, 2014 Bulletin 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.

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 39. 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 40.

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's 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 41.

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 42.

152. 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 43.

153. The CMS PM appropriation for FY 2014 was thus available to make risk corridors payments when Plaintiffs committed as QHPs to the ACA Exchanges.

154. 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.

155. 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).

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

157. In October 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements and assurances described above, First Priority, Highmark West Virginia, Highmark Inc., HHIC, and Highmark Delaware executed the CY 2015 QHP Agreements, committing to the ACA Exchanges in their respective states for CY 2015. *See* Exs. 11 to 15. Before executing their CY 2015 QHP Agreements, Plaintiffs executed and

submitted their CY 2015 Attestations regarding, *inter alia*, their adherence to the risk corridors program for CY 2015.

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 44. 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. 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 16, 2014 – after Plaintiffs 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.

160. In the 2015 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiffs, 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 (emphasis added), attached hereto at Exhibit 45.

161. 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.

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

163. On January 1, 2015, Plaintiffs began offering plans on the CY 2015 Delaware, Pennsylvania, and West Virginia ACA Exchanges, pursuant to their commitments with and attestations to the Government.

164. On February 27, 2015, HHS's 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 46.

165. CMS's 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 47.

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

167. In September 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, First Priority, Highmark West Virginia, Highmark Delaware, HSR, Highmark Inc., and HHIC executed the CY 2016 QHP Agreements. *See* Exs. 16 to 21. Before executing their CY 2016 QHP Agreements, Plaintiffs executed and submitted their CY 2016 Attestations regarding, *inter alia*, their adherence to the risk corridors program for CY 2016.

168. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, and after receiving Plaintiffs' and other 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, including Plaintiffs, 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) (emphasis in original), attached hereto at Exhibit 48.

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

170. As detailed further below, Highmark Delaware made its CY 2014 risk corridors charge remittances in November 2015, and HHS and CMS began their piecemeal CY 2014 risk corridors payments to Plaintiffs in December 2015, continuing into 2016.

171. 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 49.

172. 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 50.

173. Simultaneously on October 1, 2015, HHS and CMS sent to Highmark's President and Chief Executive Officer, David Holmberg, a letter stating that "The remaining 2014 risk corridors claims [owed to Plaintiffs] will be paid out of 2015 risk corridors collections, and if necessary, 2016 collections." Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to David L. Holmberg, President and CEO, Highmark Health (Oct. 1, 2015), attached hereto at Exhibit 51.

174. The October 1, 2015, letter from HHS and CMS to Mr. Holmberg further stated:

> Since this is a three year program, we will not know the total loss or gain for the program until the fall of 2017 when the data from all three years of the program can be analyzed and verified. In the event of a shortfall for the 2016 program year, HHS will explore other sources of funding for risk

> corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments.

Id.

175. CMS's letter to Plaintiffs on October 8, 2015 stated, "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, to David L. Holmberg, President and CEO, Highmark Health (Oct. 8, 2015) (emphasis added), attached hereto at Exhibit 52. 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.*

176. The CMS official who signed the letter, Kevin Counihan, listed his title as "Chief Executive Officer, Health Insurance Marketplaces," and "Director, Center for Consumer Information & Insurance Oversight." *Id.* More specifically, CMS's job description for Mr. Counihan stated that "[i]n his role as Marketplace CEO, Kevin is responsible and accountable for leading the federal Marketplace, managing relationships with state marketplaces, and running the Center for Consumer Information and Insurance Oversight (CCIIO), which regulates health insurance at the federal level." 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 53.

177. CMS also stated in an email transmitting Mr. Counihan's letter to Plaintiffs that the "letter from CMS reiterat[es] that risk corridors payments *are an obligation of the U.S.*

Government." Email from Counihan, CMS, to David L. Holmberg, President and CEO, Highmark Health (Oct. 8, 2015) (emphasis added), attached hereto at Exhibit 54.

178. HHS and CMS's direct statements to Plaintiffs have unequivocally confirmed the agencies' position and interpretation that full annual risk corridors payments were owed to Plaintiffs and were a binding obligation of the United States.

179. 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 55.

180. By stating that the remaining 87.4% of Plaintiffs' 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.

181. 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.

182. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiffs, 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 (emphasis added), attached hereto at Exhibit 56.

183. 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.

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

185. On January 1, 2016, Plaintiffs began offering plans on the CY 2016 Delaware, Pennsylvania, and West Virginia ACA Exchanges, pursuant to their commitments with and attestations to the Government.

186. On April 1, 2016, CMS reaffirmed in a letter to Plaintiffs that – although "remaining risk corridor claims will be paid" – the amounts owed would be delayed and contingent upon the Government's receipt of sufficient risk corridors charges/collections for CY 2015 and/or CY 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Highmark Health (Apr. 1, 2016), attached hereto at Exhibit 57.

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

188. 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 58. 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.*

189. 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 for CY 2015 and CY 2016 of the risk corridors program, as required by statute, regulation, contract, and HHS' and CMS' previous statements.

190. 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 59. 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 Plaintiffs. *Id.*

191. The December 2016 payment schedule was consistent with CMS' written presentation to insurers on June 7, 2016, which represented to Plaintiffs and other QHPs that "CMS will begin making [CY 2015] RC [risk corridor] payments to issuers" in "December 2016," supporting HHS and CMS's 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 60.

192. 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 by the Government to QHPs.

193. 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 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 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) (emphasis added), attached hereto at Exhibit 61.

194. 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.

195. 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 62.

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

197. 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. 59. 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.

198. 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 almost $12.28 billion owed by the Government to QHPs.

199. 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.").

200. The Government has thus left Plaintiffs, 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 Plaintiffs.

201. HHS and CMS failed to provide Plaintiffs with any statutory authority for their unilateral decision to make only partial, prorated risk corridors payments for CY 2014,[2] to withhold delivery of full risk corridors payments for CY 2014 beyond CY 2015, to make no risk corridors payments for CY 2015 by the end of CY 2016, and to make no risk corridors payments for CY 2016 by the end of CY 2017.

<u>Plaintiffs' Risk Corridors Payment and Charge Amounts for CY 2015</u>

202. In a report released on November 18, 2016, HHS and CMS publicly announced

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[2] The remaining CY 2014 risk corridors payments owed by the Government to Plaintiffs are the subject of an existing related action, *First Priority Life Ins. Co., Inc., et al. v. United States*, COFC No. 16-587C (Wolski, J.).

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. 59.

203. First Priority's losses in the ACA Pennsylvania Individual Market for CY 2015 resulted in the Government being required to pay First Priority a risk corridors payment of $40,107,921.26. *See id.* at 12.

204. First Priority's losses in the ACA Pennsylvania Small Group Market for CY 2015 resulted in the Government being required to pay First Priority a risk corridors payment of $263,953.76. *See id.* at 12.

205. Highmark Health Service – which was referred to by HHS and CMS in the CY 2015 Risk Corridors Report as "Highmark Inc." (hereinafter referred to as "Highmark Inc.") – experienced losses in the ACA Pennsylvania Individual Market for CY 2015 that resulted in the Government being required to pay Highmark Inc. a risk corridors payment $168,580,028.14. *See id.*

206. Highmark Inc.'s losses in the ACA Pennsylvania Small Group Market for CY 2015 that resulted in the Government being required to pay Highmark Inc. a risk corridors payment $5,879,605.39. *See id.*

207. HHIC's losses in the ACA Pennsylvania Individual Market for CY 2015 resulted in the Government being required to pay HHIC a risk corridors payment of $38,670,122.39. *See id.*

208. HHIC's losses in the ACA Pennsylvania Small Group Market for CY 2015 resulted in the Government being required to pay HHIC a risk corridors payment of $406,775.20. *See id.*

209. Highmark West Virginia's losses in the ACA West Virginia Individual Market for CY 2015 resulted in the Government being required to pay Highmark West Virginia a risk corridors payment of $14,385,457.00. *See id*. at 14.

210. Highmark Delaware's losses in the ACA Delaware Individual Market for CY 2015 resulted in the Government being required to pay Highmark Delaware a risk corridors payment of $21,566,965.70. *See id*. at 5.

211. Subsequently, on January 19, 2017, Highmark Delaware received a notice from CMS correcting the amount of Highmark Delaware's CY 2015 Individual Market risk corridors amount to $24, 604,198.50. Email from Jeffrey Grant, Director, Payment Policy and Financial Management Group, CMS, to Maura Gribble, Highmark Delaware (Jan. 19, 2017), attached hereto at Exhibit 63.

212. Plaintiffs' risk corridors payments and charges for CY 2015 are summarized as follows:

Plaintiff	State / Market	Risk Corridor Amount	Percent To Be Timely Paid
First Priority	PA / Individual	$40,107,921.26	0%
First Priority	PA / Small Group	$263,953.76	0%
Highmark Inc.	PA / Individual	$168,580,028.14	0%
Highmark Inc.	PA / Small Group	$5,879,605.39	0%
HHIC	PA / Individual	$38,670,122.39	0%
HHIC	PA / Small Group	$406,775.20	0%
Highmark West Virginia	WV / Individual	$17,059,483.59	0%
Highmark Delaware	DE / Individual	$24,604,198.50	0%

213. In total, the Government is required to pay Plaintiffs risk corridors payments for CY 2015 of $295,572,088.23, but the Government has not made any payments for CY 2015 risk

corridors owed to Plaintiffs.

214. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2015 risk corridors payments from QHPs such as the Plaintiffs.

215. Unlike some other QHPs, Plaintiffs did not have gains in the ACA markets for CY 2015 that resulted in Plaintiffs being required to remit risk corridors charges to the Secretary of HHS. *See generally id.* Had Plaintiffs been required to remit any risk corridors charges to the Secretary of HHS, then Plaintiffs would have been required to pay the Government 100% of its CY 2015 risk corridor charges – not some unilaterally determined fraction thereof – and to do so promptly, before the close of CY 2016. Plaintiffs were ready, willing, and able to satisfy this obligation to which it had attested, had Plaintiffs been required to do so.

216. Plaintiffs are entitled to receive full and immediate payment from the United States.

Plaintiffs' Risk Corridors Payment and Charge Amounts for CY 2016

217. 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 Plaintiffs, 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 64.

218. 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.

219. Contrary to recent guidance by CMS, which had represented to Highmark 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 65, 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. 64.

220. First Priority's losses in the ACA Pennsylvania Individual Market for CY 2016 resulted in the Government being required to pay First Priority a risk corridors payment of $15,373,532.92. *See id.* at 16.

221. Highmark Inc.'s losses in the ACA Pennsylvania Individual Market for CY 2016 that resulted in the Government being required to pay Highmark Inc. a risk corridors payment $13,432,627.24. *See id.*

222. Highmark Inc.'s losses in the ACA Pennsylvania Small Group Market for CY 2016 that resulted in the Government being required to pay Highmark Inc. a risk corridors payment $1,567,070.49. *See id.*

223. HHIC's losses in the ACA Pennsylvania Individual Market for CY 2016 resulted in the Government being required to pay HHIC a risk corridors payment of $13,156,877.36. *See id.*

224. The amount of HHIC's gains in the ACA Pennsylvania Small Group Market for CY 2016 resulted in the HHIC being required to remit a risk corridors charge to the Secretary of HHS in the amount of $406,467.62. *See id.*

225. HSR's losses in the ACA Pennsylvania Individual Market for CY 2016 that resulted in the Government being required to pay HSR a risk corridors payment $7,665,319.69. *See id.*

226. Highmark West Virginia's losses in the ACA West Virginia Individual Market for CY 2016 resulted in the Government being required to pay Highmark West Virginia a risk corridors payment of $23,939,268.98. *See id*. at 21.

227. Highmark Delaware's losses in the ACA Delaware Individual Market for CY 2016 resulted in the Government being required to pay Highmark Delaware a risk corridors payment of $15,159,604.02. *See id*. at 5.

228. Plaintiffs' risk corridors payments and charges for CY 2016 are summarized as follows:

Plaintiff	State / Market	Risk Corridor Amount	Percent To Be Timely Paid
First Priority	PA / Individual	$15,373,532.92	0%
Highmark Inc.	PA / Individual	$13,432,627.24	0%
Highmark Inc.	PA / Small Group	$1,567,070.49	0%
HHIC	PA / Individual	$13,156,877.36	0%
HHIC	PA / Small Group	($406,467.62)	100%
HSR	PA / Individual	$7,665,319.69	0%
Highmark West Virginia	WV / Individual	$23,939,268.98	0%
Highmark Delaware	DE / Individual	$15,159,604.02	0%

229. In total, the Government is required to pay Plaintiffs risk corridors payments for CY 2016 of $90,294,300.70, but the Government has stated that it will not make any payments to Plaintiffs for CY 2016. *See, e.g.*, CY 2016 Risk Corridors Report at 1-2, Ex. 64.

230. HHIC is required to pay the Government 100% of its CY 2016 risk corridors charges ($406,467.62) – not 0% of it – and to do so promptly. HHIC made its full and timely remittance of CY 2016 risk corridors charges to the Government in November 2017.

231. HHS lacks the authority, under statute, regulation or contract, to unilaterally

withhold full and timely CY 2016 risk corridors payments from QHPs such as Plaintiffs.

232. Plaintiffs are entitled to receive full and immediate payment from the United States.

233. Combined, the United States has recognized and repeatedly admitted that it is obligated to make risk corridors payments to the Plaintiffs in the total amount of $385,866,388.90 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 the Plaintiffs. Plaintiffs are entitled to, and demand, full and immediate payment from the United States.

COUNT I
Violation of Federal Statute and Regulation

234. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

235. 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.

236. 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.

237. 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.

238. 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.

239. 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.

240. 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.

241. 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.*

242. 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).

243. 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).

244. 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 end of the program in 2017 or 2018.

245. 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 (*i.e.,* 94%) 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 Plaintiffs were 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 $12.25 billion in total after the Government's final risk corridors collections.

246. 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 HHS under Medicare Part D's risk corridors program.

247. Plaintiffs voluntarily applied to become, were certified by CMS as, committed themselves to be, and in fact were, QHPs on, respectively, the Delaware, Pennsylvania, and West Virginia ACA Exchanges in CY 2015 and CY 2016, *see* Exs. 11 to 21, and were qualified for and entitled to receive mandated risk corridors payments from the Government for CY 2015 and CY 2016.

248. Plaintiffs are 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.

249. In the CY 2015 Risk Corridors Report and subsequent January 19, 2017 correction notice emailed to Highmark Delaware, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $295,572,088.23, that the Government concedes it owes Plaintiffs for CY 2015. *See* Exs. 59 & 63.

250. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $90,294,300.70, that the Government concedes it owes Plaintiffs for CY 2016. *See* Ex. 64.

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

252. The United States has failed to make full and timely risk corridors payments to Plaintiffs 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.

253. Instead, the Government arbitrarily has not paid any of the total amounts due for CY 2015 or CY 2016, asserting that full payment to Plaintiffs 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.

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

255. The Government's failure to make full and timely risk corridors payments to Plaintiffs 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).

256. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), Plaintiffs have been damaged in the amount of at least $385,866,388.90 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

257. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

258. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with Plaintiffs regarding the Government's obligation to make full and timely risk corridors payments to Plaintiffs for CY 2015 and CY 2016 in exchange for Plaintiffs' respective voluntary agreements to become QHPs and participate in their respective states' ACA Exchanges for CY 2015 and CY 2016.

259. 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 to help protect health insurers financially against risk selection and market uncertainty.

260. 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 their 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 Plaintiffs, that agreed to participate as QHPs in the CY 2015 and CY 2016 ACA Exchanges and were approved as certified QHPs by the Government at the Government's discretion. This offer evidences a clear intent by the Government to contract with Plaintiffs.

261. The Government provided in Section 1342 a program that offered specified incentives in return for Plaintiffs' voluntary performance in the form of an actual undertaking

and gave HHS no discretion to decide whether or not to pay eligible QHPs who agreed to participate the specific amount of risk corridors amounts specified by the statutory formula.

262. Plaintiffs accepted the Government's offer by developing QHPs that complied with the ACA's new requirements, agreeing to become QHPs, and by performing as QHPs on the new ACA Exchanges, which posed uncertain risks that the Government agreed to share with Plaintiffs by limiting the extent of their annual losses or profits based on a prescribed formula and targets.

263. By agreeing to become QHPs, Plaintiffs agreed to provide services by offering health insurance on particular Exchanges 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*.

264. Plaintiffs were not obligated to participate as QHPs, to incur Marketplace-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.

265. The Government's agreement to make full and timely risk corridors payments was a significant factor material to Plaintiffs' respective agreements to become QHPs and participate in the CY 2015 and CY 2016 ACA Exchanges.

266. The Government also induced QHPs, like Plaintiffs, 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. 38 ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

267. Plaintiffs, in turn, provided a real benefit to the Government by agreeing to become QHPs 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 their respective states. Without sufficient health insurers voluntarily agreeing to participate in the new ACA Exchanges, the ACA could not have been implemented as intended. Highmark West Virginia, for example, was the only health insurer to agree to participate as a QHP in West Virginia's ACA Exchange during CY 2014 and CY 2015.

268. Plaintiffs satisfied and complied with their obligations and/or conditions which existed under the implied-in fact contracts, including, but not limited to, remitting full and timely risk corridors charges owed to the Government for CY 2016.

269. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance and statements, including, but not limited to, Plaintiffs' 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.

270. 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 risk corridors payments in specific amounts under Section 1342 of the ACA. The Secretary was therefore authorized by law under the ACA to make risk corridors payments.

271. 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.

272. In the CY 2015 Risk Corridors Report and subsequent January 19, 2017 correction notice emailed to Highmark Delaware, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $295,572,088.23, that the Government concedes it owes Plaintiffs for CY 2015. *See* Exs. 59 & 63.

273. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $90,294,300.70, that the Government concedes it owes Plaintiffs for CY 2016. *See* Ex. 64.

274. Congress did not vitiate the United States' contractual obligation to make full and timely risk corridors payments to the Plaintiffs.

275. The Government was obligated to make full risk corridors payments promptly to Plaintiffs 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 Plaintiffs is a material breach of the implied-in-fact contracts.

276. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with Plaintiffs regarding ACA risk corridors payments for CY 2015 and CY

2016, the Plaintiffs have been damaged in the amount of at least $385,866,388.90, 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 III
Breach of Implied Covenant of Good Faith and Fair Dealing

277. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

278. 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.

279. The implied-in-fact contracts entered into between the United States and the Plaintiffs regarding the CY 2015 and CY 2016 ACA Exchanges created the reasonable expectations for Plaintiffs that full and timely CY 2015 and CY 2016 risk corridors payments, which Plaintiffs each 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 2015 and CY 2016 risk corridors remittance charges owed would be fully and timely paid by QHPs to the Government.

280. By failing to make full and timely CY 2015 and CY 2016 risk corridors payments to Plaintiffs, the United States has destroyed Plaintiffs' 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.

281. Despite the Government's failure to honor its contractual obligations, HHIC, in

good faith conformance with its implied-in-fact contractual obligations, has submitted its full and timely CY 2016 risk corridors remittance charge owed to the Government.

282. 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.

283. 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 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 to save the Government money by limiting funding sources for, respectively, CY 2014, CY 2015, and CY 2016 risk corridors payments, after Plaintiffs had undertaken significant expense in performing their obligations as QHPs in their respective states' ACA Exchanges based on Plaintiffs' reasonable expectations that the Government would make full and timely risk corridors payments if Plaintiffs experienced sufficient losses in, respectively, CY 2015 and CY 2016;

(d) Making statements regarding risk corridors payments upon which Plaintiffs relied to agree to become QHPs and participate in the ACA Exchanges, (*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 Plaintiffs of full and timely risk corridors payments after Plaintiffs had fulfilled their obligations as QHPs by participating in their respective states' ACA Exchanges 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. 32 ("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. 33 ("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 Plaintiffs, 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 Plaintiffs, 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.

284. In the CY 2015 Risk Corridors Report and subsequent January 19, 2017 correction notice emailed to Highmark Delaware, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $295,572,088.23, that the Government concedes it owes Plaintiffs for CY 2015. *See* Exs. 59 & 63.

285. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $90,294,300.70, that the Government concedes it owes Plaintiffs for CY 2016. *See* Ex. 64.

286. The Government was obligated to make full risk corridors payments promptly to

Plaintiffs for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017, but failed to do so.

287. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, Plaintiffs have been damaged in the amount of at least $385,866,388.90 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

288. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

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

290. Plaintiffs have vested property interests in their contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridors payments for CY 2015 and CY 2016. Plaintiffs had a reasonable investment-backed expectation of receiving the full and timely CY 2015 and CY 2016 risk corridors payments payable to them under the statutory and regulatory formula, based on their implied-in-fact contracts with the Government, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

291. The Government expressly and deliberately interfered with and has deprived Plaintiffs of property interests and their reasonable investment-backed expectations to receive

full and timely CY 2015 and CY 2016 risk corridors payments. 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. 32.

292. 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. 38.

293. 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 Plaintiffs. *See* 128 Stat. 2491, Ex. 45; 129 Stat. 2624, Ex. 56; 131 Stat. 135, Ex. 61. HHS and CMS continue to refuse to make full and timely risk corridors payments to Plaintiffs, and therefore the Government has deprived Plaintiffs of the economic benefit and use of such payments.

294. In the CY 2015 Risk Corridors Report and subsequent January 19, 2017 correction notice emailed to Highmark Delaware, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $295,572,088.23, that the Government concedes it owes Plaintiffs for CY 2015. *See* Exs. 59 & 63.

295. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $90,294,300.70, that the Government concedes it owes Plaintiffs for CY 2016. *See* Ex. 64.

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

297. 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 Plaintiffs constitutes a deprivation and taking of Plaintiffs' property interests and requires payment to Plaintiffs of just compensation under the Fifth Amendment of the U.S. Constitution.

298. Plaintiffs are entitled to receive just compensation for the United States' taking of their property in the amount of at least $385,866,388.90 in 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, Plaintiffs demand judgment against the Defendant, the United States of America, as follows:

(1) For Count I, awarding damages sustained by Plaintiffs, in the amount of at least $385,866,388.90, 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 Plaintiffs, in the amount of at least $385,866,388.90, 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 Plaintiffs regarding the CY 2015 and/or CY 2016 risk corridors payments;

(3) For Count III, awarding damages sustained by Plaintiffs, in the amount of at least

$385,866,388.90, 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 Plaintiffs, in the amount of at least $385,866,388.90, subject to proof at trial, as a result of the Defendant's taking of the Plaintiffs' 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 Plaintiffs;

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

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

Dated: January 19, 2018

Respectfully Submitted,

s/ Lawrence S. Sher
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