IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
Oct 16 2017
U.S. COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, d/b/a L.A. CARE HEALTH PLAN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

17-1542 C

COMPLAINT

Plaintiff Local Initiative Health Authority for Los Angeles County, operating and doing business as L.A. Care Health Plan ("Plaintiff" or "L.A. Care"), by and through its undersigned counsel, brings this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and alleges the following:

INTRODUCTION

1. L.A. Care brings this action to recover damages owed by 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 L.A. Care, and Defendant's taking of Plaintiff's 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 Plaintiff, 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 Plaintiff – 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 L.A. Care for calendar years 2014 ("CY 2014") and 2015 ("CY 2015"), totaling $21,816,850.36, but Defendant has failed to pay the full amount due. Instead, the Government arbitrarily has paid Plaintiff only a small pro-rata share of the total amount due for CY 2014, and has not paid any of the total amount due for CY 2015, asserting that the Government's obligation to make full payment to L.A. Care is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in L.A. Care's contracts with the Government.

9. L.A. Care also recently complied with requirements to submit to CMS its CY 2016 risk corridors data, which shows that the Government owes Plaintiff risk corridors payments of $3,948,188 under the Section 1342 formula. The Government, however, has clearly repudiated its obligation to make full and timely payment of the CY 2016 risk corridors payments owed to Plaintiff, and L.A. Care seeks damages of at least $3,948,188 as a result of Defendant's recent confirmation that it will not pay L.A. Care any risk corridors amounts for CY 2016 in violation of Section 1342, which L.A. Care construes as a total anticipatory breach of the Government's contracts with L.A. Care.

10. This action seeks monetary damages from the Government of at least $25,765,038.36, less any prorated payments made by the Government, which represents the total amount of risk corridors payments owed to Plaintiff for CY 2014, CY 2015, and CY 2016.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because Plaintiff bring claims for monetary damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, an implied-in-fact contract with the United States, and a taking of Plaintiff's property in violation of the Fifth Amendment of the Constitution.

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

PARTIES

13. Plaintiff LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, operating and doing business as L.A. CARE HEALTH PLAN ("L.A. Care"), located in Los Angeles, California, is the nation's largest publicly operated health plan. It is an independent public agency authorized by the State of California and established by the Los Angeles County Board of Supervisors pursuant to California Welfare and Institutions Code sections 14087.96 through 14087.9725, and 14087.38. Its mission is to provide access to quality health care for Los Angeles County's vulnerable and low-income communities and residents, as well as to support the safety net required to achieve that purpose. L.A. Care was a QHP issuer on the California Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

14. 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

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

16. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S., and includes a series of interlocking reforms designed to expand coverage in the individual health insurance market.

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

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

19. Beginning on January 1, 2014, individuals and small businesses were first permitted to purchase private health insurance through competitive statewide marketplaces 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.

20. Plaintiff voluntarily participated and offered QHPs in the ACA Marketplace in California in CY 2014, CY 2015, and CY 2016. For each of those years, L.A. Care's premiums were submitted to and approved by the California insurance regulator in the spring and summer of the previous year (*e.g.*, spring and summer of 2013 for CY 2014).

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

The ACA's Premium-Stabilization Programs

22. To help protect health insurers against risk selection and market uncertainty, the ACA established three premium-stabilization programs, which began in 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."

23. 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 is a "Federally administered program." 77 FR 17219, 17221 (Mar. 23, 2012), attached hereto at Exhibit 01.

24. The temporary risk corridors program was designed to provide QHP issuers, like Plaintiff, with greater premium stability as ACA insurance reforms were implemented, and to limit the risk and uncertainty in setting rates in the ACA Marketplace by limiting the extent of QHP issuer losses and gains. *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.").

25. 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. 02 ("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)). If a health plan's

adjusted loss ratio was higher than its target level by a certain percentage, the Government committed to share the risk by making payments of a certain amount to the health plan, and if the adjusted loss ratio was lower than the target by the same percentage, then the health plan was obligated to pay the Government some of its profit.

26. 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.

27. The Government's unilateral decision, detailed below, to belatedly interpret its statutory 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's intent and design in passing the ACA.

28. Congress knew, when it mandated that the ACA's risk corridors program "shall be based on" Medicare Part D's risk corridors program, that Medicare Part D's risk corridors program was not budget neutral. 42 U.S.C. § 18062(a).

29. 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").

30. Congress also strived to provide certainty and protect against adverse selection in the health care market while stabilizing premiums in the individual and small group markets as the ACA's market reforms and Exchanges began in 2014.

31. 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.

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

33. Since 2014, L.A. Care has offered multiple plans on the ACA Exchange in California. In 2016, L.A. Care was the nation's largest publicly operated health plan with more than 2 million members.

34. L.A. Care 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, 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.

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

<u>The ACA's Risk Corridors Program</u>

36. Section 1342 of the ACA expressly requires the Secretary of HHS to establish a temporary risk corridors program that provides for the Government to share in QHPs' gains or losses resulting from inaccurate rate setting annually from CY 2014 through CY 2016 in the individual and small group markets. *See* 42 U.S.C. § 18062, attached hereto at <u>Exhibit 04</u>.

37. 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), <u>Ex. 04</u> (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").

38. Section 1342's reference to the Medicare Part D risk corridors program reflects Congress's intent for and approval of an ACA risk corridors program that, like in Medicare Part D, provides for annual payments that are not constrained by budget neutrality.

39. 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).

40. 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 05 ("CMS paid most of the funds owed to sponsors for 2006 by increasing these sponsors' monthly prospective payments for November and December 2007.").

41. 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 06 ("Part D plans each year have made net risk corridor payments to CMS.").

42. Congress was aware of HHS's 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 would be made annually and in full, the same as Medicare Part D risk corridors payments.

43. The risk corridors program applies only to participating plans, like L.A. Care, 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.

44. 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, 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.

45. 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. These provisions serve to protect against the uncertainty that health insurers, like L.A. Care, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the Government and issuers of QHPs in each of the first three years of the Marketplace.

Plaintiff was a QHP for CY 2014, CY 2015, and CY 2016

46. Based on Congress's 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, Plaintiff agreed to become a QHP, and to enter into QHP Agreements with the state-level operator of the ACA Exchange in California ("Covered California"), after Covered California had exercised its discretion to certify Plaintiff as a QHP in California. L.A. Care's QHP Agreements are attached to this Complaint at Exhibits 07 to 09.

47. L.A. Care executed a QHP Agreement with Covered California on July 26, 2013, *see* Exhibit 07, regarding its participation on the California ACA Exchange for CY 2014, which QHP Agreement is referred to herein as the "CY 2014 QHP Agreement."

48. On May 28, 2015, L.A. Care executed an amendment to its CY 2014 QHP Agreement with Covered California that extended the term of the agreement through CY 2015,

see Exhibit 08, confirming its participation on the California ACA Exchange for CY 2015, which QHP Agreement is referred to herein as the "CY 2015 QHP Agreement."

49. On March 24, 2016, L.A. Care executed an amendment to its CY 2014 QHP Agreement with Covered California that extended the term of the agreement through CY 2016, *see* Exhibit 09, confirming its participation on the California ACA Exchange for CY 2016, which QHP Agreement is referred to herein as the "CY 2016 QHP Agreement."

50. 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 10.

51. 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.

52. Before L.A. Care executed the CY 2014, CY 2015, and CY 2016 QHP Agreements, L.A. Care executed many attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges in California.

53. By executing and submitting its annual attestations, Plaintiff agreed to the many obligations and responsibilities imposed upon all QHPs that accept the Government's offer to

participate in the ACA Exchanges. Those obligations and responsibilities that Plaintiff undertook include, *inter alia*, licensing, reporting requirements, employment restrictions, marketing parameters, HHS oversight of the QHP's compliance plan, maintenance of an internal grievance process, benefit design standards, cost-sharing limits, rate requirements, enrollment parameters, premium payment process requirements, participating in financial management programs established under the ACA (including the risk corridors program), adhering to data standards, and establishing dedicated and secure server environments and data security procedures.

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

55. Had L.A. Care known that the Government would fail to fully and timely make the risk corridors payments owed to L.A. Care – reneging on Congress's mandate that "the Secretary shall pay" risk corridors payments to L.A. Care, 42 U.S.C. § 18062(b), and the Government's assurances that "[t]he risk corridors program … will protect against uncertainty in rates for [QHPs] by limiting the extent of issuer losses and gains," 77 FR 73118, 73119 (Dec. 7, 2012), Ex. 03 – then L.A. Care's annual premiums on the ACA Exchange on which it 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.

56. L.A. Care also would not have agreed to participate in the ACA Marketplace had it known that the Government would have breached its obligations regarding the risk corridors program.

The Risk Corridors Payment Methodology

57. Under the 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), Ex. 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, subject to certain adjustments for taxes, administrative expenses, the other 3Rs programs, and other costs and payments.

58. 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.

59. Congress, through Sections 1342(b)(1) and (2) of the ACA, established the specific payment methodology to determine the risk corridors charge amounts the QHPs must pay to the Secretary of HHS and the risk corridors payment amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

60. The statute 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.

61. 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). *See generally id.*

62. Neither Section 1342 nor its implementing regulations create an account or fund for the Government to receive annual risk corridors charges in from QHPs, or for the

Government to make annual risk corridors payments out to QHPs.

63. Section 1342 does not state or otherwise require the risk corridors program to be "budget neutral" – neither that term 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 11.

64. 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.

65. To determine whether a QHP in any year must pay into, or receive payments from, the Government under the risk corridors program, HHS compares 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.

66. The risk corridors payment that HHS owes an eligible QHP for a particular year thus depends 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 depend, to be paid annually.

67. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY 2016, QHPs with allowable costs that are less than 97 percent of the QHP's target amount are 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 will receive payments from HHS to offset a percentage of those losses. Again, payments are not contingent upon collections.

68. 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.

69. 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.

70. 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.

71. 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.

72. 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.

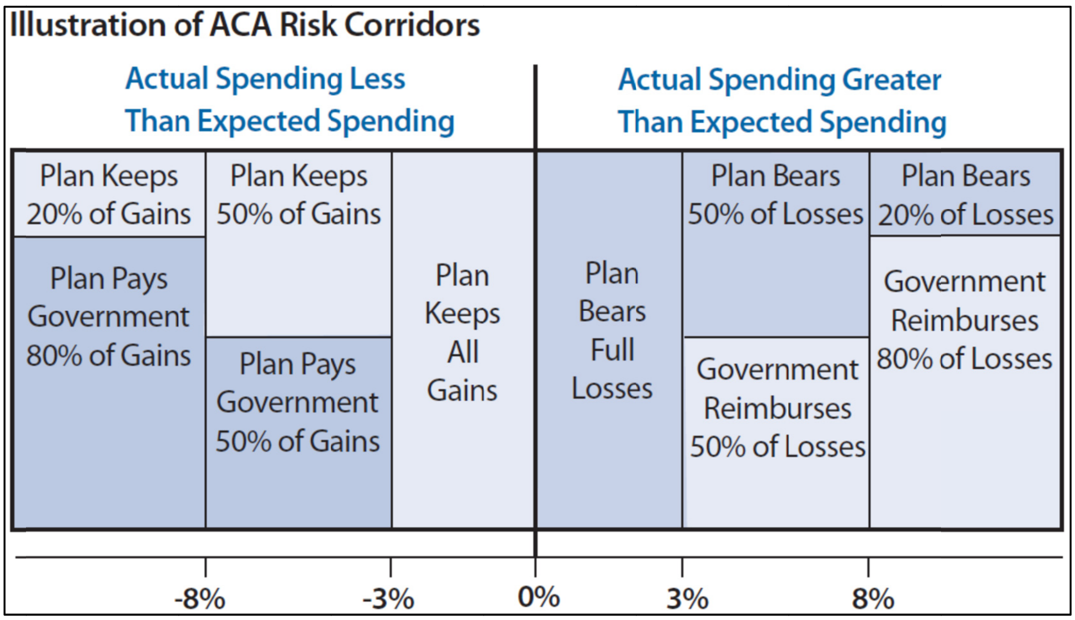
73. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

74. 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.

75. 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.

76. 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:



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 12.

77. As detailed below, in CY 2014, L.A. Care experienced allowable-cost losses of more than three percent of its target amount in the California ACA Individual Market, requiring the Government to make full mandatory risk corridors payments to L.A. Care under Section 1342 for CY 2014 by the end of CY 2015. The Government failed to do so.

78. Additionally, as detailed below, in CY 2015, L.A. Care experienced allowable-

cost losses of more than three percent of its target amount in the California ACA Individual Market, requiring the Government to make full mandatory risk corridors payments to L.A. Care under Section 1342 for CY 2015 by the end of CY 2016. The Government failed to do so.

79. Furthermore, as detailed below, mandatory CY 2016 data that L.A. Care submitted to CMS by the July 31, 2017 regulatory deadline shows that L.A. Care experienced allowable-cost losses of more than three percent of its target amount in the California ACA Individual Market for CY 2016. The Government is required to make full mandatory risk corridors payments to L.A. Care under Section 1342 for CY 2016 by the end of CY 2017. The Government, however, has clearly stated in writing that it will not satisfy its contractual obligation to make full CY 2016 payments to L.A. Care, which Plaintiff construes as a total anticipatory breach of the Government's contracts with L.A. Care.

80. L.A. Care did not experience allowable-cost gains of more than three percent of its target amount in either CY 2014, CY 2015, or CY 2016, and thus was not required to make any mandatory risk corridors charge remittances to the Government under Section 1342. Had L.A. Care been required to do so, it would have honored its statutory, regulatory, and contractual obligations to do so in full and on time.

81. Congress did not impose any financial limits or restraints on the Government's mandatory risk corridors payments to QHPs in either Section 1342 or any other section of the ACA.

82. 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.

83. 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.

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

85. 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.

86. 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 L.A. Care, for CY 2014, CY 2015, and CY 2016.

87. HHS and CMS thus lack statutory authority to pay anything less than 100% of the risk corridors payments due to Plaintiff for CY 2014, CY 2015, or CY 2016.

88. On March 11, 2013, HHS publicly affirmed – while health insurers, including L.A. Care, were contemplating whether to agree to participate in the new Exchanges that were opening on January 1, 2014 – that "[t]he risk corridors program is not statutorily required to be budget neutral." HHS further confirmed that, "[r]egardless 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. 11.

89. In deciding to apply to become a QHP, L.A. Care relied upon HHS's commitments to make full risk corridors payments annually to it 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.

90. The United States, however, has refused to make full and timely risk corridors payments to L.A. Care for CY 2014, CY 2015, and CY 2016, as required by Section 1342.

HHS's Risk Corridors Regulations

91. 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 13. 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.

92. 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 14.

93. 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.*

94. The implementing regulations, like Section 1342, do not require the risk corridors program to be "budget neutral."

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

96. 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.

97. 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.

98. 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.

99. 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.

100. 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.

101. 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).

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

103. 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.

104. 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. 11. 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.

105. 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.*

106. 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.

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

108. 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.

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

110. The United States should have paid L.A. Care the full CY 2014 risk corridors payments due by the end of CY 2015, but failed to do so.

111. Likewise, the United States should have paid L.A. Care the full CY 2015 risk corridors payments due by the end of CY 2016, but failed to do so.

112. Additionally, the Government has clearly indicated in writing that it will not pay L.A. Care the full CY 2016 risk corridors payments due by the end of CY 2017, which L.A. Care construes as a total breach of the Government's contractual payment obligation.

113. The United States has failed or refused to make full and timely risk corridors payments to L.A. Care for CY 2014, CY 2015, and CY 2016, as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

HHS's and CMS's Recognition of Risk Corridors Payment Obligations

114. Since Congress's enactment of the ACA in 2010, HHS and CMS have repeatedly publicly acknowledged and confirmed to L.A. Care and other QHPs their statutory and regulatory obligations to make full and timely risk corridors payments to qualifying QHPs.

115. These public statements by HHS and CMS were made or ratified by representatives of the Government who had actual authority to bind the United States.

116. L.A. Care relied on these public statements by HHS and CMS to assume and continue its QHP status in the California ACA Exchange each year from CY 2014 through CY 2016, and beyond.

117. 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 15.

118. 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.*

119. 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.

120. 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.

121. 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.

122. 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.

123. 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.*

124. 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 16.

125. In proposed rulemaking on December 7, 2012, HHS assured QHPs, like L.A. Care, 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.

126. 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.

127. 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.

128. 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. 11.

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

130. A March 2013 CMS written presentation regarding the final rule to health insurers – some of whom, including L.A. Care, were preparing to apply to become certified 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 17.

131. On July 26, 2013, in reliance on the Government's statutory, regulatory and

contractual obligations and inducements described above, Plaintiff executed its CY 2014 QHP Agreement and, upon approval and certification by Covered California, became a QHP in California. *See* Ex. 07.

132. 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 18. 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.

133. 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).

134. 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.

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

136. In a letter report to House Speaker Nancy Pelosi immediately prior to Congress's 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 19.

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

138. 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.

139. 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. 18.

140. 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 20. 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 21.

141. 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 22.

142. 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.

143. On January 1, 2014, L.A. Care began offering plans on the CY 2014 California ACA Exchange, pursuant to its commitments with and attestations to the Government.

144. 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 23; 79 FR 13743, 13829 (Mar. 11, 2014), attached hereto at Exhibit 24.

145. 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. 24.

146. 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.*

147. On April 11, 2014, CMS issued a bulletin regarding its recent budget neutrality decision, written in a question-and-answer format. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality," at 1 (Apr. 11, 2014), attached hereto at Exhibit 25. To the question of "[w]hat risk corridors payments will HHS make if risk corridors collections for a year are insufficient to fund risk corridors payments for the year, as calculated under the risk corridors formula?," CMS answered that "[w]e 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." *Id.*

148. The April 11, 2014 CMS bulletin stated the Government's intent that risk corridors payments would be made annually, and assured QHPs that the recent decision to implement the risk corridors program in a budget neutral manner would not impact QHPs for CY 2014 because "risk corridors collections will be sufficient to pay for all risk corridors payments." CMS also stated that "[w]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments over the life of the three-year program." *Id.* at 2.

149. 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 26.

150. 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.*

151. 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 27.

152. 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 28.

153. On November 7, 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements and assurances described above, Plaintiff executed its CY 2015 QHP Agreement, committing to the California ACA Exchange for CY 2015. *See* Ex. 08.

154. 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 29. 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.

155. On January 1, 2015, L.A. Care began offering plans on the CY 2015 California ACA Exchange, pursuant to its commitments with and attestations to the Government.

156. 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 30.

157. On April 14, 2015, CMS published a timeline for QHPs regarding "Key Dates in 2015," which stated that "Remittance of Risk Corridors Payments and Charges" would occur from "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 31.

158. 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 32.

159. On or about July 31, 2015, Plaintiff submitted its CY 2014 risk corridors data to

CMS per 45 C.F.R. § 153.530(d).

160. On October 1, 2015, HHS and CMS announced the severe shortfall in the CY 2014 risk corridors program, yet confirmed the Government's intention to make annual payments under the risk corridors program by stating that "HHS will begin collection of risk corridors charges in November, 2015, and will begin remitting risk corridors payments to issuers starting December, 2015." Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), attached hereto at Exhibit 33.

161. As detailed further below, HHS and CMS began their piecemeal CY 2014 risk corridors payments to L.A. Care in December 2015, continuing into 2016.

162. 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 34.

163. On January 1, 2016, Plaintiff began offering plans on the CY 2016 California ACA Exchange, pursuant to its commitments with and attestations to the Government.

164. On March 24, 2016, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiff executed its CY 2016 QHP Agreement, committing to the CY 2016 ACA Exchange in California for the final year of the risk corridors program. *See* Ex. 09.

165. CMS's written presentation to insurers on June 7, 2016 represented to L.A. Care 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 35.

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

167. 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 36. 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.*

168. 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 37.

169. 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 38.

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

171. HHS's and CMS's direct statements to L.A. Care have further unequivocally confirmed the agencies' position that full annual risk corridors payments are owed to Plaintiff and are a binding obligation of the United States.

172. In October or November 2015, L.A. Care, like other QHPs, received a letter from CMS stating, "I wish to reiterate to you that the Department of Health and Human Services (HHS) recognizes that the Affordable Care Act *requires* the Secretary to make *full payments* to issuers[.]" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to L.A. Care (Oct./Nov. 2015) (emphasis added). The letter further stated that "HHS is recording

those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States Government for which full payment is required." *Id.*

173. 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 39.

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

The United States' Failure to Honor its Obligations

175. Beginning in 2014, after L.A. Care (which had executed the CY 2014 QHP Agreement with CMS in September 2013) had already agreed to participate in and offer QHPs on the CY 2014 California ACA Exchange in reliance upon the Government's risk corridors payment obligations, the Government announced that the United States would not honor those payment obligations in the manner it had promised and represented that it would.

176. On March 11, 2014, HHS stated in a final rule in the Federal Register that "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 FR 13743,

13829 (Mar. 11, 2014), Ex. 24.

177. This announcement 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. 11.

178. 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 40.

179. HHS's "budget neutral" statement of March 11, 2014, was also contrary to Congress's intent for the Government to share risk with insurers, and Congress's 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 41; 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 42 ("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. 40, ("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.").

180. HHS's 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. 18.

181. 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.

182. 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 43; Alex Wayne, *Insurers' Obamacare Losses May Reach $5.5 Billion in 2015*, Bloomberg, Mar. 4, 2014, attached hereto at Exhibit 44.

183. 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.

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

185. 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), Ex. 25.

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

187. 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. 24.

188. Nevertheless, CMS's 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.

189. HHS's and CMS's 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 45. 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.

190. 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 46.

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

192. 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.

193. 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).

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

195. On December 16, 2014 – after L.A. Care 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.

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

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

128 Stat. 2491 (emphasis added), attached hereto at Exhibit 47.

197. 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.

198. Congress's failure to appropriate sufficient funds for risk corridors payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

199. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, and after receiving L.A. Care's and other QHPs' commitments to the CY 2016 ACA Exchanges, HHS and CMS announced that they intended to prorate the risk corridors payments owed to QHPs, including Plaintiff, for CY 2014, stating 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), Ex. 33.

200. 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.*

201. 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), Ex. 31.

202. 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 48.

203. HHS and CMS advised L.A. Care by letter in October or November 2015 that the Government would not know the total loss or gain for the risk corridors program until the fall of 2017. In the event of a shortfall for the 2016 program year, however, HHS informed L.A. Care that HHS would explore other sources of funding for risk corridors payments, subject to the availability of appropriations, including by working with Congress on the necessary funding for outstanding risk corridors payments still owed.

204. 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.

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

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

129 Stat. 2624 (emphasis added), attached hereto at Exhibit 49.

206. 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.

207. Congress's failure to appropriate sufficient funds for risk corridors payments due for CY 2014 and CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

208. On April 1, 2016, CMS reaffirmed in a letter to another QHP 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 50.

209. Further delay in the Government's full payment of the CY 2014 and CY 2015 risk corridors amounts owed to L.A. Care was announced on September 9, 2016, when CMS published a bulletin stating that "HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and … [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." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Ex. 36.

210. In an announcement of November 18, 2016, 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 L.A. Care. Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016), Ex. 37.

211. 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.

212. In total, for the first two years of the risk corridors program, the Government owes QHPs CY 2014 and CY 2015 risk corridors payments of approximately $8.69 billion, versus QHPs owing the Government CY 2014 and CY 2015 risk corridors collections of approximately $457 million, a shortfall of over $8 billion.

213. It is unrealistic to expect that CY 2016 risk corridors collections will exceed CY 2016 risk corridors payments by $8 billion, sufficient to make up the accumulated risk corridors shortfall. The Court has stated that, "barring a miracle," it "seems certain" that CY 2016 risk corridors collections will not cover the Government's "full outstanding obligations to insurers." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 457 (2017) (Wheeler, J.).

214. On May 23, 2017, HHS published its proposed budget for FY 2018, announcing that HHS expects a mere $103 million of risk corridors collections in each of FY 2017 and FY 2018. *See* HHS, *FY 2018 Budget in Brief* at 70 (May 23, 2017), attached hereto at Exhibit 51, *available at* https://www.hhs.gov/sites/default/files/Consolidated%20BIB_ONLINE_remediated.pdf. This amount is woefully insufficient to satisfy the current risk corridors payment shortfall of over $8 billion, let alone any increase in that shortfall for CY 2016 risk corridors payments owed to QHPs.

215. 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.*, Br. for Appellant, *Moda Health Plan, Inc. v. United States*, No. 17-1994, ECF No. 18 (Fed. Cir. July 10, 2017).

216. It is implausible to expect that Congress will appropriate additional funds toward risk corridors payments, particularly because 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 52.

217. 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.

218. The Government has thus left L.A. Care, and other QHPs owed past-due risk corridors payments, to guess when—if ever—the United States will make the full CY 2014, CY 2015, and CY 2016 risk corridors payments owed to Plaintiff.

219. HHS and CMS failed to provide Plaintiff with any statutory authority for their unilateral decision to make only partial, prorated risk corridors payments for CY 2014, 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 clearly write that they will not make full risk corridors payments for CY 2016 by the end of CY 2016.

220. Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, HHS and CMS acknowledged in a public bulletin on November 19, 2015, regarding CY 2014 risk corridors payments that:

> HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and 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), Ex. 34.

221. By stating that the remaining 87.4% of L.A. Care's 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.

222. Likewise, in the September 9, 2016 announcement that no CY 2015 risk corridors payments would be paid on time, HHS and CMS admitted that full payment for CY 2015 was due and owing in 2016 by stating 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), Ex. 36.

223. The Government's written acknowledgement of its risk corridors payment obligations for CY 2014 and CY 2015, however, is an insufficient substitute for full and timely payment of the amounts owed as required by statute, regulation, contract, and HHS's and CMS's previous statements.

L.A. Care's Risk Corridors Payment and Charge Amounts for CY 2014

224. In a report released on November 19, 2015, HHS and CMS publicly announced

QHPs' risk corridors charges and payments for CY 2014, and emphasized that "**Risk corridors charges payable to HHS are not prorated, and the full risk corridors charge amounts are noted in the chart below. Only risk corridors payment amounts are prorated.**" Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015) ("CY 2014 Risk Corridors Report"), attached hereto at Exhibit 53.

225. L.A. Care's losses in the ACA California Individual Market for CY 2014 resulted in the Government being required to pay L.A. Care a risk corridors payment of $13,561,651.72. *See* CY 2014 Risk Corridors Report at Table 5 – California, Ex. 55.

226. The Government announced, however, that it would pay L.A. Care a prorated amount of only $1,711,191.11 for L.A. Care's losses in the ACA California Individual Market for CY 2014. *See id.*

227. Unlike some other QHPs, L.A. Care did not have gains in the ACA Individual Market for CY 2014 that resulted in L.A. Care being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2014 Risk Corridors Report, Ex. 55.

228. Plaintiff's risk corridors payments, and the Government's announced prorated payment amounts, for CY 2014 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Prorated Amount	Percent Pro Rata
L.A. Care	CA / Individual	$13,561,651.72	$1,711,191.11	12.6%

229. In total, the Government is required to pay L.A. Care risk corridors payments for CY 2014 of $13,561,651.72, but the Government announced that it would only make prorated payments to L.A. Care equal to 12.6% of the amounts owed ($1,711,191.11).

230. Had L.A. Care been required to remit a risk corridors charge to the Secretary of HHS, then L.A. Care would have been required to pay the Government 100% of its CY 2014 California Individual Market risk corridors charges – not some unilaterally determined fraction

thereof – and to do so promptly before the close of calendar year 2015, as it had affirmatively attested it would do. L.A. Care was ready, willing, and able to satisfy this obligation to which it had attested, had L.A. Care been required to do so.

231. The Government made some prorated annual risk corridors payments to L.A. Care for CY 2014 on December 21, 2015, January 8, 2016, February 13, 2016, March 11, 2016, and October 6, 2016, totaling $1,691,411.22. This amount represents only approximately 12.47% of CY 2014 risk corridors payments that the Government owes to L.A. Care — even less than the 12.6% pro-rata amount that the Government stated it would pay L.A. Care for CY 2014 risk corridors payments.

232. The Government finally surpassed the 12.6% level on December 8, 2016, when L.A. Care received payment of $326,268.13 from the Government's pro-rata distribution of the CY 2015 risk corridors charge collection. Nevertheless, even with further partial payments on January 9, 2017, February 8, 2017, April 10, 2017, and August 12, 2017, the combined risk corridors payments from the Government to L.A. Care as of the date of this filing ($2,152,402.62) represents only 15.87% of CY 2014 risk corridors payments that the Government owes to Plaintiff.

233. The Government announced on November 18, 2016 that, based on CY 2015 risk corridors collections, it will pay L.A. Care a combined $450,495.26 in CY 2014 risk corridors payments owed. *See* Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016) at 3, Ex. 37. The Government's risk corridors payments to L.A. Care from December 8, 2016, to August 12, 2017, totaling $460,991.40, satisfies the prorated amount that the Government promised to pay L.A. Care for CY 2014 from CY 2015 risk corridors collections. It falls far short, however, of the full amount owed to L.A. Care.

234. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2014 risk corridors payments from QHPs such as L.A. Care.

L.A. Care's Risk Corridors Payment and Charge Amounts for CY 2015

235. In a report released on November 18, 2016, HHS and CMS publicly announced QHPs' risk corridors charges and payments for CY 2015, stating that "all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that "HHS intends to collect the full 2015 risk corridors charge amounts indicated in the tables" printed in the report. Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016) ("CY 2015 Risk Corridors Report"), Ex. 37.

236. L.A. Care's losses in the ACA California Individual Market for CY 2015 resulted in the Government being required to pay L.A. Care a risk corridors payment of $8,255,198.64. *See id*. at 3.

237. Unlike some other QHPs, L.A. Care did not have gains in the ACA Individual Market for CY 2015 that resulted in L.A. Care being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2015 Risk Corridors Report, Ex. 37.

238. Had L.A. Care been required to remit a risk corridors charge to the Secretary of HHS, then L.A. Care would have been required to remit 100% of the amount of the charge to HHS before the close of calendar year 2016, as it had affirmatively attested it would do.

239. Plaintiff's risk corridors payments and charges for CY 2015 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
L.A. Care	CA / Individual	$8,255,198.64	0%

240. In total, the Government is required to pay L.A. Care risk corridors payments for

CY 2015 of $8,255,198.64, but the Government announced that it will not make any payments to Plaintiff until the CY 2014 risk corridors shortfall – currently about $2.4 billion – has been corrected.

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

242. Combined, the United States has recognized and repeatedly admitted that it is obligated to make risk corridors payments to L.A. Care in the total amount of $21,816,850.36 for CY 2014 and CY 2015, but as of the date of this filing the Government has only made risk corridors payments to L.A. Care totaling $2,152,402.62, which is just 9.87% of the total amount owed to Plaintiff. L.A. Care demands full and immediate payment from the United States.

L.A. Care's Risk Corridors Payment and Charge Amounts for CY 2016

243. The Government has clearly stated that it will not make full and timely risk corridors payments to QHPs, including L.A. Care, for CY 2016 by the end of CY 2017, *see, e.g.*, HHS, *FY 2018 Budget in Brief* at 70 (May 23, 2017), Ex. 53 (announcing expected FY 2017 and FY 2018 risk corridors collections of $103 million in each fiscal year), breaching the Government's risk corridors obligations for payments owed under the statute, regulations and contract for CY 2016 as well.

244. According to L.A. Care's CY 2016 risk corridors data submitted to CMS on or before July 31, 2016, L.A. Care expects that the Government owes L.A. Care mandatory risk corridors payments in excess of $3,948,188 for CY 2016, based on the risk corridors formulas stated at Section 1342(b) of the ACA and 45 C.F.R. § 153.510(b).

245. In the 2017 Appropriations Act, Congress again specifically withheld appropriations from three large funding sources for the Government's CY 2016 risk corridors

payments. *See* 131 Stat. 135, Ex. 54.

246. HHS and CMS have repeatedly announced that, like CY 2015 risk corridors collections, CY 2016 collections will first be paid toward the CY 2014 risk corridors payments that remain due and owing to QHPs as a result of the Government's failure to provide full and timely CY 2014 risk corridors payments, then for the outstanding CY 2015 risk corridors payments – a combined total of over $8 billion. *See, e.g.*, Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 25; 79 FR 30239, 30260 (May 27, 2014), Ex. 26; Bulletin, CMS, "Risk Corridors Payments for 2015," Ex. 36 ("Collections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments ….").

247. According to CMS's recent presentation to insurers, the Government's official announcement regarding CY 2016 risk corridors payment and charge amounts is expected to be made in November 2017, after HHS and CMS have analyzed the relevant data recently collected from QHPs. *See* CMS, *Key Dates for Calendar Year 2017* at 3 (Apr. 13, 2017), attached hereto at Exhibit 54.

248. The same CMS presentation represented to L.A. Care and other QHPs that "Remittance of Risk Corridors Payments Begins" on "12/2017." *Id.* Full CY 2016 risk corridors payments are due by December 31, 2017.

L.A. Care's and Other QHPs' Efforts to Resolve Issues Out of Court

249. Since learning of HHS's and CMS's decision not to make the full risk corridors payments owed to Plaintiff in a timely manner, QHPs have made significant efforts to resolve the issue. Unfortunately, their efforts to persuade HHS and CMS to honor the Government's statutory, regulatory and contractual obligations to make full and timely risk corridors payments have been unsuccessful to date.

250. On March 17, 2016, another QHP that is owed risk corridors payments for CY 2014 sent a formal demand letter to HHS and CMS. *See* Letter from Highmark to HHS and CMS (March 17, 2016), attached hereto at Exhibit 55.

251. The Government responded to the QHP's March 17, 2016 demand letter on April 1, 2016, affirming that "2014 risk corridor payments … will be paid," but repeating the Government's plan to make such payments out of CY 2015 risk corridors collections, and if necessary, CY 2016 collections – a position that is without support in Section 1342 or its implementing regulations. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Highmark Health (Apr. 1, 2016) ("Response Letter"), Ex. 50.

252. Since becoming aware of its liability from the CY 2014 risk corridors shortfall, the Government has taken the extraordinary position that no risk corridors payments are due until some indeterminate date in 2017 or later, after the end of the risk corridors program, when, according to the Government, total risk corridors charges and payments for all three years can be tallied and any balances due can be reconciled. *See* Letter from Counihan, CMS, to L.A. Care (Oct./Nov. 2015) ("[W]e 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.").

253. In other words, the Government now contends that, despite the fact that the ACA indicates – and HHS's and CMS's guidance, communications and pronouncements to QHPs since its enactment substantiate – that risk corridors payment amounts mandated by Section 1342 are to be calculated and submitted to CMS annually, and paid to and received by QHPs annually, the United States is not obligated to make *any* risk corridors payments until some indeterminate time *after* all three years of the risk corridors program have expired.

254. There is no support for the Government's extraordinary position in Section 1342

of the ACA, 45 C.F.R. Part 153, the QHP Agreements, any other express or implied-in-fact agreements, or anywhere else in the ACA or its implementing regulations.

255. The Government's current position on when it is obligated to pay the risk corridors amounts due to QHPs for each year is contrary to the nature, purpose, intent, and language of Section 1342 and its implementing regulations, as well as the risk corridors program's role within the ACA as a temporary program designed to mitigate the potentially significant risks posed *each year* within the first three years of the ACA Exchanges and smooth out *annual* premiums.

256. HHS's and CMS's original and statutorily consistent position – not the Government's current, *post hoc* litigation interpretation – was that full risk corridors payments due would be made annually. This was Congress's intent.

257. Indeed, Section 1342(b)(1) provides that the Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "for any plan year" exceed the targeted amount by a certain threshold. 42 U.S.C. § 18062(b)(1), Ex. 04. Section 1342(a) also directs that this payment schedule must apply annually in "calendar years 2014, 2015, and 2016." 42 U.S.C. § 18062(a).

258. CMS's and HHS's guidance in the Federal Register in 2011 and 2012 stated that, just like the deadline for QHPs to remit risk corridors charges to the Government, HHS should make risk corridors payments to QHPs "within a 30-day period after HHS determines that a payment should be made to the QHP issuer." 76 FR 41929, 41943 (July 15, 2011), Ex. 02; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

259. Even CMS's April 11, 2014 Bulletin regarding "Risk Corridors and Budget Neutrality" acknowledged that risk corridors payments are due annually. *See* Bulletin, CMS,

"Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 25. The CBO's budget projections published both before and after the Government's politically motivated "budget neutral" announcement in March 2014 expressed an understanding that risk corridors payments would be made annually. *See* CBO, "The Budget and Economic Outlook: 2014 to 2024" at 109-110 (Feb. 2014), Ex. 18; CBO, "Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014" at 10, 18 (Apr. 2014), Ex. 45.

260. HHS asserted to the GAO in May 2014 that although "[t]o date, HHS has not made or received any payments under section 1342 of PPACA[,] HHS intends to begin collections and payments in fiscal year 2015." Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), Ex. 27.

261. In April 14, 2015, before any CY 2014 risk corridors payments were due, CMS provided QHPs with written timelines, such as CMS's "Key Dates in 2015" 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), Ex. 31.

262. In June 2015, CMS stated in presentations to insurers that in December 2015, "CMS will begin making RC [risk corridors] payments to issuers" for CY 2014. Presentation, CMS, "Completing the Risk Corridors Plan-Level Data Form 2014" (June 1, 2015), Ex. 48.

263. The Government then actually did make partial CY 2014 risk corridors payments at the end of CY 2015, in the first quarter of CY 2016, and in the last quarter of CY 2016, demonstrating that the Government understands and acknowledges that risk corridors payments are due and owing annually.

264. Even after asserting its *post hoc* litigation position that no risk corridors payments are owed until 2017 or later, CMS's statements to L.A. Care and other QHPs have undercut its stance.

265. CMS told QHPs in two presentations in June 2016 that "CMS will begin making RC [risk corridors] payments to insurers" for CY 2015 in "December 2016." CMS, *Completing the Risk Corridors Plan-Level Data Form for the 2015 Benefit Year* at 7 (June 7, 2016), Ex. 35.

266. CMS's September 9, 2016 Bulletin reaffirmed CMS's true belief that an annual payment schedule is required, stating that "remittance of risk corridors payments" for CY 2015 will be made "on the same schedule as last year." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Ex. 36.

267. CMS's November 18, 2016 announcement also confirmed the annual payment structure of the risk corridors program, stating 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), Ex. 37.

268. These inconsistencies from CMS's statements and conduct belie the *post hoc* nature of the Government's current litigation position.

269. Confirming that HHS and CMS interpreted their risk corridors payment obligation to be an annual one for *each* of the three years of the temporary program, CMS officially booked its CY 2014 risk corridors shortfall obligation amount as a FY 2015 obligation – not as an FY 2017 obligation. *See, e.g.*, Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Ex. 34 ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following

our 12.6% payment this winter as fiscal year 2015 obligation of the United States Government for which full payment is required.").

270. Additionally, CMS's September 9, 2016 Bulletin regarding CY 2015 risk corridors charges and payments states 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), Ex. 36.

271. The Government's Response Letter of April 1, 2016, states Defendant's final position regarding its refusal to fully and timely pay risk corridors payments owed for CY 2014 to QHPs, including L.A. Care. *See* Ex. 50.

COUNT I
Violation of Federal Statute and Regulation
(CY 2014 and CY 2015)

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

273. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridors payments to QHPs in accordance with the payment formula set forth in the statute.

274. The risk corridors payment amount is specifically prescribed by Section 1342's statutory formula, which mandates that the HHS Secretary "shall pay" to qualifying QHPs risk corridors payments based on their annual ACA exchange losses. *See* 42 U.S.C. § 18062(b), Ex. 04; 45 C.F.R. § 153.510, Ex. 14.

275. HHS's and CMS's 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.

276. 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).

277. HHS's and CMS's 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.

278. HHS's and CMS's 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.

279. Congress, through Section 1342 of the ACA, did not either expressly or implicitly grant the Secretary of HHS any discretion 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.

280. 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.

281. 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.*

282. 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).

283. 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 17220, 17221 (Mar. 23, 2012), Ex. 01 (emphasis added).

284. 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 17220, 17221 (Mar. 23, 2012), Ex. 01 (emphasis added). HHS further noted that the risk corridors and reinsurance programs "***begin in*** *2014*" and were "designed to provide issuers with greater payment stability ***as***

insurance market reforms ***are implemented***." *Id.* (emphasis added).

285. HHS similarly confirmed in its Final Rulemaking implementing Section 1342 that risk corridors payments "reduce the increased risk of financial loss that health insurance issuers might otherwise expect *to incur in 2014*." 77 FR 17220, 17244 (Mar. 23, 2012), Ex. 01 (emphasis added).

286. 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***." 77 FR 17220, 17243 (Mar. 23, 2012), Ex. 01 (emphasis added).

287. Congress, through Section 1342 of the ACA, prescribed the exact amount of annual ACA exchanges losses that the federal government agreed to mitigate for insurers that suffered losses in excess of their statutory target amounts and Congress did not authorize HHS to mitigate those losses in any lesser amount.

288. 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.

289. 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.,* 90.4%) of risk corridors payments it has acknowledged it owes for CY 2014 and CY 2015, sometime **after** the end of the risk corridors program, in 2017 or 2018—nearly five years after Plaintiff was induced to join the ACA exchanges—and *only if* there happens to be risk corridors collections from profitable QHPs or other specific appropriations sufficient to fund such obligations, which the Government now estimates to be approximately $8.3 billion in total.

290. 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 "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.

291. Plaintiff voluntarily applied to become, was certified by CMS as, committed itself to be, and in fact was, a QHP on the California ACA Exchange in CY 2014 and CY 2015, *see* Exs. 07 to 09, and was qualified for and entitled to receive mandated risk corridors payments from the Government for CY 2014 and CY 2015.

292. Plaintiff is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government for CY 2014 and CY 2015.

293. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 53.

294. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government concedes it owes L.A. Care for CY 2015. *See* Ex. 37.

295. The United States has failed to make full and timely risk corridors payments to L.A. Care for CY 2014 and CY 2015, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make full risk corridors payments.

296. Instead, the Government arbitrarily has paid L.A. Care only a pro-rata share of the total amount due for CY 2014, and has not paid any of the total amount due for CY 2015,

asserting that full payment to L.A. Care is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations.

297. Congress's failure to appropriate sufficient funds for risk corridors payments due for CY 2014 and CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff, that suffered annual losses on the ACA exchanges in excess of their statutory targets.

298. The Government's failure to make full and timely risk corridors payments to L.A. Care for CY 2014 and CY 2015 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).

299. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), L.A. Care has been damaged in the amount of at least $21,816,850.36, less any prorated payments made by the Government, 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
(CY 2014 and/or CY 2015)

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

301. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with Plaintiff regarding the Government's obligation to make full and timely risk corridors payments to Plaintiff for CY 2014 and/or CY 2015 in exchange for Plaintiff's respective voluntary agreements to become a QHP and participate in the California ACA

Exchange for CY 2014 and/or CY 2015.

302. Section 1342 of the ACA and HHS's implementing regulations (45 C.F.R. § 153.510), confirmed and ratified by HHS's and CMS's 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 Plaintiff, that agreed to participate as QHPs in the CY 2014 and/or CY 2015 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 Plaintiff.

303. The Government provided in Section 1342 a program that offered specified incentives in return for Plaintiff's 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.

304. Plaintiff accepted the Government's offer by developing a QHP that complied with the ACA's new requirements, agreeing to become a QHP, and by performing as a QHP on the new ACA Exchange in California, which posed uncertain risks that the Government agreed to share with Plaintiff by limiting the extent of L.A. Care's annual losses or profits based on a prescribed formula and targets.

305. By agreeing to become a QHP, Plaintiff agreed to provide services by offering health insurance on an Exchange established under the ACA, and to accept the 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*.

306. By agreeing to become a QHP, Plaintiff took on significant additional obligations

and subjected itself to new standards to which it was not previously bound. Plaintiff was not obligated to participate as a QHP, 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. Plaintiff's services benefitted the Government by providing affordable health insurance under the ACA to previously non-insured and/or under-insured populations in California.

307. Plaintiff certified its agreements by executing the QHP Agreements and the attestations required by the Government, including the attestations regarding risk corridors payments and charges. *See, e.g.*, Exs. 07 to 09 (CY 2014 and CY 2015 QHP Agreements).

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

309. The Government's agreement to make full and timely risk corridors payments was a significant factor material to Plaintiff's agreement to become a QHP and participate in the CY 2014 and CY 2015 ACA Exchange in California.

310. The existence of an implied-in-fact contract can be inferred from both the promissory "shall pay" and "will pay" language in 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.

311. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance and statements, including, but not limited to, Plaintiff's execution of 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. 11. The

Government's intent to contract can be inferred from these actions.

312. 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 the ACA and risk corridors program. 42 U.S.C. § 18062(a) & (b). The Secretary of HHS is explicitly authorized to make risk corridors payments in specific amounts under Section 1342 of the ACA. The Secretary is therefore authorized by law under the ACA to make risk corridors payments.

313. In addition, integral to the HHS Secretary's duties is administering and implementing the ACA, including the risk corridors program, giving the HHS Secretary express or implied authority to make risk corridors payments.

314. Each of the implied-in-fact contracts were 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.

315. The Government's financial risk-sharing through the risk corridors program, designed to expressly limit Plaintiff's annual ACA Exchange losses and protect against uncertain risk and new market instability, was a real benefit that significantly influenced Plaintiff's decision to agree to become a QHP and participate in the CY 2014 and CY 2015 ACA Exchange in California.

316. Plaintiff, in turn, provided a real benefit to the Government by agreeing to become a QHP, to offer insurance on, and to participate in the CY 2014 and CY 2015 ACA Exchange in California, despite the uncertain financial risk. Without sufficient health insurers

voluntarily agreeing to participate in the new ACA Exchanges, the ACA could not have been implemented as intended.

317. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the CY 2014 and CY 2015 ACA Exchange programs: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

318. The Government induced Plaintiff to participate in the CY 2014 and CY 2015 ACA Exchanges by including the risk corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health insurers financially against risk selection and market uncertainty.

319. The Government repeatedly acknowledged its commitments to share risk with QHPs and its obligations to make full and timely risk corridors payments to qualifying QHPs for CY 2014 and CY 2015 through its conduct and statements to the public and to Plaintiff and other similarly situated QHPs, made or ratified by representatives of the Government who had express or implied actual authority to bind the United States. *See, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01; Letter from Counihan, CMS, to L.A. Care (Oct./Nov. 2015); Response Letter (Apr. 1, 2016), Ex. 50.

320. The Government also induced QHPs, like Plaintiff, to commit to the CY 2015 and CY 2016 ACA Exchanges during and after HHS's and CMS's 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. 25 ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

321. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 53.

322. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government concedes it owes L.A. Care for CY 2015. *See* Ex. 37.

323. Congress's failure to appropriate sufficient funds for risk corridors payments due for CY 2014 and CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridors payments to Plaintiff.

324. The Government was obligated to make full risk corridors payments to Plaintiff for CY 2014 by the end of CY 2015, and for CY 2015 by the end of CY 2016. *See supra* ¶¶ 36-42, 66, 77-79, 97, 100-112, 133, 259-272. The Government's failure to make full and timely CY 2014 and CY 2015 risk corridors payments to Plaintiff is a material breach of the implied-in-fact contracts.

325. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with Plaintiff regarding the CY 2014 and CY 2015 ACA Exchanges, Plaintiff has been damaged in the amount of at least $21,816,850.36, less any prorated payments made by the Government, 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
Anticipatory Breach of Implied-in-Fact Contract
(CY 2016)

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

327. L.A. Care and the United States knowingly and voluntarily entered into valid implied-in-fact contracts for CY 2016 regarding the Government's obligation to make full and timely risk corridors payments to L.A. Care, in exchange for L.A. Care's agreement to continue participating as a QHP on the California ACA Exchanges (the "CY 2016 Agreements").

328. The CY 2016 Agreements were authorized or ratified by representatives of the Government who had actual authority to bind the United States (including, but not limited to, 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.

329. L.A. Care has fully performed its obligations under the CY 2016 Agreements.

330. In the course of performing its obligations as a QHP, L.A. Care experienced losses qualifying it to CY 2016 risk corridors payments of approximately $3,948,188, pursuant to the data that L.A. Care submitted to CMS on or before July 31, 2017.

331. The Government has clearly manifested its intent not to render performance under the CY 2016 Agreements, by stating in writing that the Government will not make full and timely risk corridors payments to L.A. Care for CY 2016 by the end of CY 2017.

332. HHS's proposed budget for FY 2018, announcing that HHS expects a mere $103 million of risk corridors collections in each of FY 2017 and FY 2018, makes it clear that the Government cannot satisfy the current risk corridors payment shortfall of over $8 billion for CY

2014 and CY 2015, let alone CY 2016 risk corridors payments owed to QHPs like L.A. Care. *See* HHS, *FY 2018 Budget in Brief* at 70 (May 23, 2017), Ex. 51.

333. Based on the Government's affirmative statement that CY 2016 risk corridors payments will not be made in full by December 31, 2017, *see id.*, L.A. Care treats the Government's repudiation of its risk corridors payment obligations under the CY 2016 Agreements as a total breach.

334. As a result of the United States' repudiation of its payment obligations under the CY 2016 Agreements, Plaintiff has been damaged in the amount of at least $3,948,188, 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
Breach of Implied Covenant of Good Faith and Fair Dealing
(CY 2014 and/or CY 2015 and/or CY 2016)

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

336. 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.

337. The implied-in-fact contracts entered into between the United States and Plaintiff regarding the CY 2014, CY 2015, and CY 2016 ACA Exchanges created the reasonable expectation for Plaintiff that full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments, which Plaintiff regarded as an important part of the contract consideration, would be

paid by the Government to QHPs, just as the Government expected that any CY 2014, CY 2015, and CY 2016 risk corridors remittance charges owed would be fully and timely paid by QHPs to the Government.

338. By failing to make full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments to Plaintiff, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

339. Despite the Government's failure to honor its contractual obligations, had L.A. Care been required to remit a risk corridors charge to the Government for CY 2014, CY 2015, or CY 2016, Plaintiff would have done so in good faith as it had agreed and attested to do.

340. 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.

341. 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 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 Plaintiff had undertaken significant expense in performing its obligations as a QHP in the California ACA Exchange based on Plaintiff's reasonable expectations that the Government would make full and timely risk corridors payments if Plaintiff experienced sufficient losses in, respectively, CY 2014, CY 2015, and CY 2016;

(e) Making statements regarding risk corridors payments upon which Plaintiff relied to agree to become a QHP and participate in the ACA Exchanges (*see, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 11 ("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 Plaintiff of full and timely risk corridors payments after Plaintiff had fulfilled its obligations as a QHP by participating in the California ACA Exchange and had suffered losses which the Government had promised would be shared through mandatory risk corridors payments (*see, e.g.*, 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 24 ("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. 40 ("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."));

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

(g) Despite repeatedly acknowledging in writing and in testimony before Congress that the Government is obligated to make full risk corridors payments to QHPs, including Plaintiff, 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.

342. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 53.

343. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government

concedes it owes L.A. Care for CY 2015. *See* Ex. 37.

344. Additionally, L.A. Care's data submitted to CMS on or before July 31, 2017, states that L.A. Care expects that the Government owes L.A. Care mandatory risk corridors payments in excess of $3,948,188 for CY 2016.

345. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, Plaintiff has been damaged in the amount of at least $25,765,038.36, less any prorated payments made by the Government, 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 V
Taking Without Just Compensation in Violation of the Fifth Amendment to the U.S. Constitution (CY 2014 and/or CY 2015 and/or CY 2016)

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

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

348. Plaintiff has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily mandated risk corridors payments for CY 2014, CY 2015, and CY 2016. Plaintiff had a reasonable investment-backed expectation of receiving the full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments payable to it under the statutory and regulatory formula, based on its implied-in-fact contracts with the Government, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

349. The Government expressly and deliberately interfered with and has deprived Plaintiff of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments for CY 2014, CY 2015, and CY 2016. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 24.

350. 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. 25.

351. 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 2014, CY 2015, and CY 2016 risk corridors payment obligations owed to a specific small group of insurers, including Plaintiff. *See* 128 Stat. 2491, Ex. 47; 129 Stat. 2624, Ex. 49; 131 Stat. 135, Ex. 52. HHS and CMS continue to refuse to make full and timely risk corridors payments to Plaintiff, and therefore the Government has deprived Plaintiff of the economic benefit and use of such payments.

352. In its November 18, 2016 announcement, CMS confirmed that no CY 2015 risk corridors payments would be made by the end of CY 2016, and that past-due CY 2014 risk corridors payments would not be paid in full by the end of CY 2016 – the one-year anniversary of when the CY 2014 risk corridors payments should have been fully and timely paid. As of the date of this filing, neither the CY 2014 nor the CY 2015 risk corridors payments have been paid

in full, and L.A. Care has received only 9.60% of the total risk corridors payments that the United States has repeatedly acknowledged it is obligated to make to Plaintiff.

353. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 53.

354. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government concedes it owes L.A. Care for CY 2015. *See* Ex. 37.

355. Additionally, L.A. Care's data submitted to CMS on or before July 31, 2017, states that L.A. Care expects that the Government owes L.A. Care mandatory risk corridors payments in excess of $3,948,188 for CY 2016.

356. The Government's action in withholding, with no legitimate governmental purpose, the full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments owed to L.A. Care constitutes a deprivation and taking of Plaintiff's property interests and requires payment to Plaintiff of just compensation under the Fifth Amendment of the U.S. Constitution.

357. L.A. Care is entitled to receive just compensation for the United States' taking of its property in the amount of at least $25,765,038.36, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

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

(1) For Count I, awarding damages sustained by Plaintiff, in the amount of at least

$21,816,850.36, subject to proof at trial, less any prorated risk corridors payments made by the Government, 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 2014 and CY 2015 risk corridors payments;

(2) For Count II, awarding damages sustained by Plaintiff, in the amount of at least $21,816,850.36, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contracts with Plaintiff regarding the CY 2014 and CY 2015 risk corridors payments;

(3) For Count III, awarding damages sustained by Plaintiff, in the amount of at least $3,948,188, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's total anticipatory breaches of the implied-in-fact contracts entered into between the United States and Plaintiff regarding the CY 2016 risk corridors payments;

(4) For Count IV, awarding damages sustained by Plaintiff, in the amount of at least $25,765,038.36, subject to proof at trial, less any prorated risk corridors payments made by the Government, 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 2014, CY 2015, and CY 2016 risk corridors payments;

(5) For Count V, awarding damages sustained by Plaintiff, in the amount of at least $25,765,038.36, subject to proof at trial, less any prorated risk corridors payments made by the Government, as a result of the Defendant's taking of Plaintiff's property without just

compensation in violation of the Fifth Amendment to the U.S. Constitution regarding the CY 2014, CY 2015, and CY 2016 risk corridors payments;

(6) Should the Court determine, under any Count, that the Government is liable to Plaintiff for monetary damages for failure to make full and timely risk corridors payments for CY 2014 and/or CY 2015, and thus enter judgment against the United States, Plaintiff further requests that the Court declare, as incidental to that monetary judgment, that based on the Court's legal determinations as to the Government's CY 2014 and/or CY 2015 risk corridors payment obligations, the Government must make full and timely CY 2016 risk corridors payments to Plaintiff if it experienced qualifying losses during that year;

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

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

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

Dated: October 16, 2017

Respectfully Submitted,

s/ Lawrence S. Sher
Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Counsel for Local Initiative Health Authority for Los Angeles County, d/b/a L.A. Care Health Plan

Of Counsel:

Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: kbahr@reedsmith.com
cshaffer@reedsmith.com