Receipt number AUSFCC-5796201

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS OF CALIFORNIA, HMO COLORADO, INC., dba HMO NEVADA, ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD, ANTHEM HEALTH PLANS, INC., BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC., ANTHEM INSURANCE COMPANIES, INC., ANTHEM HEALTH PLANS OF KY, INC., HEALTHY ALLIANCE LIFE COMPANY, EMPIRE HEALTHCHOICE HMO, INC., COMMUNITY INSURANCE COMPANY, and COMPCARE HEALTH SERVICES INSURANCE COMPANY,	)	No. 19-1770C
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

COMPLAINT

Plaintiffs Blue Cross of California; HMO Colorado, Inc., dba HMO Nevada; Rocky Mountain Hospital and Medical Service, Inc., dba Anthem Blue Cross and Blue Shield; Anthem Health Plans, Inc.; Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.; Anthem Insurance Companies, Inc.; Anthem Health Plans of KY, Inc.; Healthy Alliance Life Company; Empire HealthChoice HMO, Inc.; Community Insurance Company; and Compcare Health Services Insurance Company (collectively "Plaintiffs" or "Anthem"), by and through their undersigned counsel, bring this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and allege the following:

INTRODUCTION

1. Anthem brings this Complaint to recover money damages owed by the Government for calendar years 2014 ("CY 2014"), 2015 ("CY 2015") and 2016 ("CY 2016"), for violations of the mandatory risk corridors payment obligations Defendant owes to Anthem's qualified health plan issuers ("QHPs"), prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA") and its implementing federal regulations; and for breach of the implied-in-fact contracts between Defendant and Plaintiffs regarding such risk corridors payments.

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

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

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

5. Congress, recognizing such uncertainty for health insurers and the potential increased premiums that would come with that uncertainty, included three premium-stabilization programs in the ACA to help protect health insurers against risk selection and market uncertainty, including the temporary federally administered risk corridors program, which mandated that the Government pay health insurers annual risk corridors payments based on a

statutorily prescribed formula to provide health insurers with stability as insurance market reforms began.

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

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

8. The United States has admitted in writing its obligations to pay the full amount of risk corridors payments owed to Anthem for CY 2014, CY 2015, and CY 2016, totaling at least $108,230,902.19, but Defendant has failed to pay the full amount due. Instead, the Government arbitrarily has paid Plaintiffs only a small pro-rata share of the total amount due for CY 2014, and has not paid any of the total amount due for CY 2015 or CY 2016, asserting that the Government's obligation to make full payment to Anthem is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in Anthem's contracts with the Government.

9. Anthem, on the other hand, faithfully honored its obligation to remit its full and timely risk corridors collection charges to the Government annually for CY 2014, CY 2015, and CY 2016.

10. Although the United States has repeatedly acknowledged its obligation to make full risk corridors payments to Anthem, it has failed to do so in breach of its statutory, regulatory and contractual obligations. This Complaint seeks monetary damages from the Government of at least $108,230,902.19, less any prorated payments made by the Government, which represents the amount of risk corridors payments Defendant has admitted is owed to Plaintiffs 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 Plaintiffs 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 Plaintiffs' property in violation of the Fifth Amendment of the Constitution.

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

PARTIES

13. Plaintiff BLUE CROSS OF CALIFORNIA ("Anthem CA") is a California managed care company located in Woodland Hills, California. Anthem CA was a QHP issuer on the California Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

14. Plaintiff HMO COLORADO, INC., dba HMO NEVADA ("Anthem CO" or "Anthem NV") is a Colorado-domiciled health maintenance organization, duly authorized to issue health insurance coverage in the states of Colorado and Nevada. Anthem CO was a QHP

issuer on the Colorado Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016. Anthem NV was a QHP issuer on the Nevada Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

15. Plaintiff ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD ("Rocky Mt. CO" or "Rocky Mt. NV") is a Colorado-domiciled licensed insurer, duly authorized to issue health insurance coverage in the states of Colorado and Nevada. Rocky Mt. CO was a QHP issuer on the Colorado Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016. Rocky Mt. NV was a QHP issuer on the Nevada Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

16. Plaintiff ANTHEM HEALTH PLANS, INC. ("Anthem CT") is a Connecticut health insurance company located in Wallingford, Connecticut. Anthem CT was a QHP issuer on the Connecticut Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

17. Plaintiff BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC. ("Anthem GA") is a Georgia managed care corporation located in Atlanta, Georgia. Anthem GA was a QHP issuer on the Georgia Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

18. Plaintiff ANTHEM INSURANCE COMPANIES, INC. ("Anthem IN") is an Indiana health insurer located in Indianapolis, Indiana. Anthem IN was a QHP issuer on the Indiana Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

19. Plaintiff ANTHEM HEALTH PLANS OF KY, INC. ("Anthem KY") is a Kentucky health insurance company located in Louisville, Kentucky. Anthem KY was a QHP issuer on the Kentucky Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

20. Plaintiff HEALTHY ALLIANCE LIFE COMPANY ("Anthem MO") is a Missouri health insurance company located in St. Louis, Missouri. Anthem MO was a QHP issuer on the Missouri Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

21. Plaintiff EMPIRE HEALTHCHOICE HMO, INC. ("Anthem NY") is a New York health maintenance organization located in New York, New York. Anthem NY was a QHP issuer on the New York Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

22. Plaintiff COMMUNITY INSURANCE COMPANY ("Anthem OH") is an Ohio health insurance company located in Mason, Ohio. Anthem OH was a QHP issuer on the Ohio Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

23. Plaintiff COMPCARE HEALTH SERVICES INSURANCE COMPANY ("Anthem WI") is a Wisconsin health insurance corporation located in Waukesha, Wisconsin. Anthem WI was a QHP issuer on the Wisconsin Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

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

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

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

26. Through the ACA, Congress aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S., and included a series of interlocking reforms designed to expand coverage in the individual and small group health insurance markets. The market reforms guaranteed availability of health care to all Americans, and prohibited health insurers from using factors such as health status, medical history,

preexisting conditions, gender, or industry of employment to set premium rates or deny coverage.

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

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

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

30. Collectively, Plaintiffs voluntarily participated and offered QHPs in the ACA Marketplaces in 14 states – California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia, and Wisconsin – after satisfying the Government and/or the state-level operator of those ACA Exchanges that they should be certified as QHPs, from January 1, 2014 (the first day of the ACA Exchanges) through CY 2014, CY 2015, and CY 2016. For each of those years, Anthem's premiums were submitted to and approved by each respective state's insurance regulator in the spring and/or summer of the previous year (*e.g.*, spring and/or summer of 2013 for CY 2014).

31. Upon the Government's and/or the state-level operator's evaluation and certification of Plaintiffs as QHPs, Plaintiffs were required to provide a package of "essential health benefits" on the ACA Exchanges on which they voluntarily participated. 42 U.S.C. § 18021(a)(1).

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

The ACA's Premium-Stabilization Programs

33. The three premium-stabilization programs created by Congress in the ACA - 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 – began in CY 2014. These three premium-stabilization programs are known as the "3Rs."

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

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

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

37. By enacting the risk corridors program through Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the ACA Exchanges during the first few years of Exchange operation, health insurers would not be able to predict their risk accurately, and that their premiums may reflect costs that are ultimately lower or higher than predicted. *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.").

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

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

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

41. Since the ACA's rollout, Anthem has worked in partnership with the state and federal governments to make the ACA Exchanges successful in Anthem's markets by agreeing to participate as a QHP on the ACA Exchanges in the 14 states listed above, rolling out competitive rates, and offering a broad spectrum of health insurance products.

42. Since the launch of the ACA Exchanges in 2014, Anthem has agreed to participate as a QHP maintaining its commitment to help ensure consumers have access to health plans that offer greater affordability and access to quality healthcare. Anthem continues to participate on the ACA Exchanges today serving over 470,936 members across 14 states.

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

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

The ACA's Risk Corridors Payment Methodology

45. Under the ACA's risk corridors program, the federal government shares risk with QHP health insurers annually in "calendar years 2014, 2015, and 2016," 42 U.S.C. § 18062(a),

attached hereto at Exhibit 04, by collecting charges from a health insurer if the insurer's QHP premiums exceed claims costs of QHP enrollees by a certain amount, and by making payments to the insurer if the insurer's QHP premiums fall short by a certain amount. *Id.* at §18062(b).

46. 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.

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

48. 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.

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

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

51. The risk corridors program did not require the Government to reimburse insurers for 100 percent of their losses in a calendar year, nor did the program require insurers to remit 100 percent of their gains to the Government in a calendar year.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

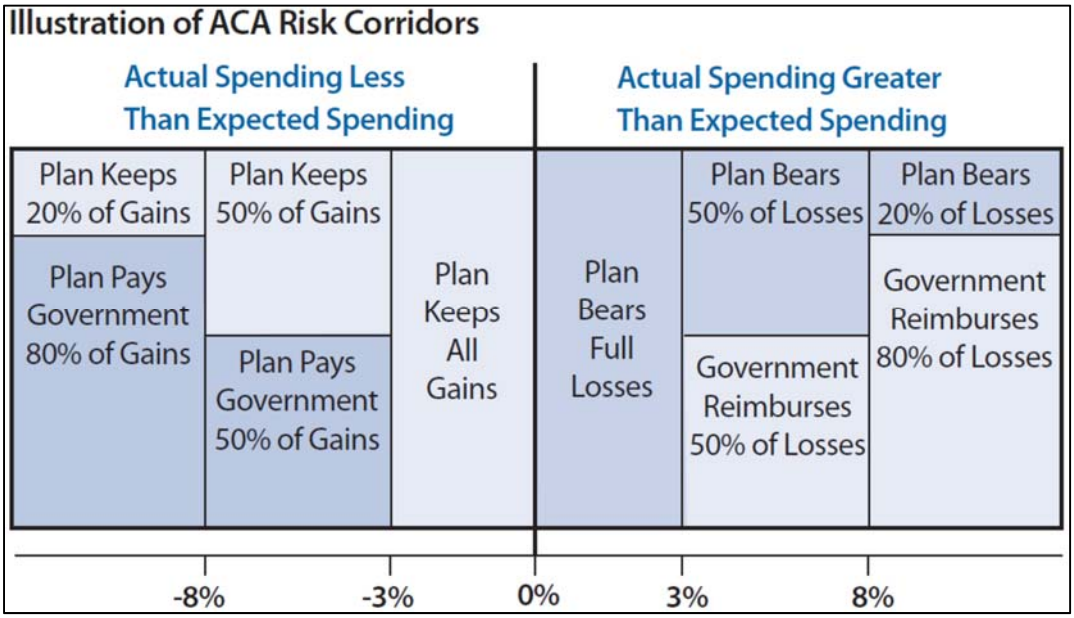
57. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target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

58. 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.

59. 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.

60. 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 05.

Anthem Decides to Become a QHP on The ACA Exchanges

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

62. Anthem made its full mandatory risk corridors charge remittances to the Government under Section 1342 for CY 2014 before the end of CY 2015, for Plaintiffs' allowable-cost gains of more than three percent of their target amounts in the California, Connecticut, Georgia, Kentucky, Nevada, and Ohio ACA Individual Markets, and in the Colorado, Connecticut, Georgia, Indiana, Kentucky, and ACA Small Group Markets.

63. Anthem also made its full mandatory risk corridors charge remittances to the Government under Section 1342 for CY 2015 before the end of CY 2016, for Plaintiffs' allowable-cost gains of more than three percent of their target amounts in the California, Connecticut, Indiana, Missouri, New York, Ohio and Wisconsin ACA Individual Markets, and in the Indiana ACA Small Group Markets.

64. Anthem also made its full mandatory risk corridors charge remittances to the Government under Section 1342 for CY 2016 before the end of CY 2017, for Plaintiffs' allowable-cost gains of more than three percent of their target amounts in the Kentucky and Nevada Small Group Markets.

65. In contrast, despite the fact that Anthem experienced significant allowable cost losses in several of its ACA markets in CY 2014, CY 2015 and in CY 2016, requiring the Government to make full annual risk corridors payments to Anthem for each of those years, the Government failed to do so and paid Anthem only a small fractional share for CY 2014, and no risk corridors payments at all for CY 2015 and CY 2016.

HHS' Risk Corridors Regulations

66. 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 06. 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.

67. 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 07.

68. 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.

69. 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.

70. 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.

71. Nowhere does 45 C.F.R. § 153.510 make payments to QHPs contingent upon collections received.

72. 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.

73. 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.

74. 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).

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

76. 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), attached hereto at Exhibit 08. 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.

77. 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.*

78. 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.

79. Anthem relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become, and continue to act as, a QHP in California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia and Wisconsin, 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 Anthem experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

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

81. The United States should have paid Anthem the full CY 2014 risk corridors payments due by the end of CY 2015, the full CY 2015 risk corridors payments due by the end of CY 2016, and the full CY 2016 risk corridors payments due by the end of CY 2017, but failed or refused to do so as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

Plaintiffs Were Accepted and Approved as QHPs

82. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, as well as on the Government's statements and conduct regarding its risk corridors obligations, each of the Plaintiffs agreed to become QHPs, and to enter into QHP Agreements either with CMS, a federal agency within HHS, or with the state-level operator of the ACA Exchange in California, Colorado, Connecticut, Kentucky and New York, after CMS and/or the state-level operator had exercised its discretion to certify each of the Plaintiffs as QHPs in, respectively, California, Colorado,

Connecticut, Georgia, Indiana, Kentucky, Missouri, Nevada, New York, Ohio, and Wisconsin. Collectively, the QHP Agreements are attached to this Complaint at Exhibits 09 to 36.

83. Anthem GA executed a QHP Agreement with CMS on September, 11, 2013, and QHP Agreements with CMS containing identical terms to those in the September 11, 2013 Anthem GA QHP Agreement were executed by Anthem IN, Anthem MO, Anthem OH, and Anthem WI on September 11, 2013, regarding their participation on their respective states' ACA Exchanges for CY 2014, which QHP Agreements are referred to herein as the "CY 2014 CMS QHP Agreements." *See* Exhibits 09 to 13.

84. Anthem CA executed a QHP Agreement with the state-level operator of the ACA Exchange in California ("Covered California") on July 26, 2013, *see* Exhibit 14; Anthem CO and Rocky Mt. CO executed a QHP Agreement with the state-level operator of the ACA Exchange in Colorado ("Connect for Health Colorado" or "C4HCO") on September 25, 2013, *see* Exhibit 15; Anthem CT executed a QHP Agreement with the state-level operator of the ACA Exchange in Connecticut ("Access Health CT") on October 1, 2013, *see* Exhibit 16; and Anthem KY executed a QHP Agreement with the state-level operator of the ACA Exchange in Kentucky ("The Kentucky Office of the Health Benefit and Health Information Exchange" or "KOHBHIE") on September 25, 2013, *see* Exhibit 17, regarding their participation on their respective states' ACA Exchanges for CY 2014, which QHP Agreements, along with the CY 2014 CMS QHP Agreements, are collectively referred to herein as the "CY 2014 QHP Agreements."

85. Anthem NV, and Rocky Mt. NV, and Anthem NY were approved as QHPs by the state-level operator of the ACA Exchanges in, respectively, Nevada and New York for CY 2014, and participated as QHPs in those respective states for CY 2014.

86. Pursuant to Section III.a. of the CY 2014 CMS QHP Agreements, the CY 2014 CMS QHP Agreements had effective dates from the date of execution by the last of the two parties until December 31, 2014, the last day of CY 2014.

87. On October 20, 2014, Anthem GA executed a QHP Agreement with CMS containing terms that were materially and substantially similar to those found in the CY 2014 CMS QHP Agreements, and QHP Agreements with identical terms to those in the October 20, 2014 Anthem GA QHP Agreement were executed by Anthem IN, Anthem MO, Anthem NV, Rocky Mt. NV, Anthem OH, and Anthem WI on October 20, 2014, regarding their participation on their respective states' ACA Exchanges for CY 2015, which QHP Agreements are referred to herein as the "CY 2015 CMS QHP Agreements." *See* Exhibits 18 to 24.

88. On June 1, 2015, Anthem CA executed an amendment to its CY 2014 QHP Agreement with Covered California that extended the term of the agreement through CY 2015, *see* Exhibit 25; on December 23, 2015, Anthem CO and Rocky Mt. CO executed a Carrier Participation Agreement with Connect for Health Colorado that certified Anthem CO's and Rocky Mt. CO's participation as QHPs on the Colorado ACA Exchange for CY 2015, *see* Exhibit 26; and on October 9, 2014, Anthem KY executed a QHP Agreement with KOHBHIE for CY 2015, *see* Exhibit 27, confirming their participation on their respective states' ACA Exchanges for CY 2015, which QHP Agreements, along with the CY 2015 CMS QHP Agreements, are collectively referred to herein as the "CY 2015 QHP Agreements."

89. Anthem CT and Anthem NY were approved as QHPs by the state-level operator of the ACA Exchanges in, respectively, Connecticut and New York for CY 2015, and participated as QHPs in those respective states for CY 2015.

90. Pursuant to Section IV.a. of the CY 2015 CMS QHP Agreements, the CY 2015 CMS QHP Agreements had effective dates from the date of execution by the last of the two parties until December 31, 2015, the last day of CY 2015.

91. On September 21, 2015, Anthem GA executed a QHP Agreement with CMS containing terms that were materially and substantially identical to those found in the CY 2015 CMS QHP Agreements, and QHP Agreements with identical terms to those in the September 21, 2015 Anthem GA QHP Agreement were executed by Anthem IN, Anthem MO, Anthem NV, Rocky Mt. NV, Anthem OH, and Anthem WI on September 21, 2015, regarding their participation on their respective states' ACA Exchanges for CY 2016, which QHP Agreements are referred to herein as the "CY 2016 CMS QHP Agreements." *See* Exhibits 28 to 34.

92. On April 4, 2016, Anthem CA executed an amendment to its CY 2014 QHP Agreement with Covered California that extended the term of the agreement through CY 2016, *see* Exhibit 35; and on October 28, 2015, Anthem KY executed a Participation Agreement with KOHBHIE for CY 2016, *see* Exhibit 36, confirming their participation on their respective states' ACA Exchanges for CY 2016, which QHP Agreements, along with the CY 2016 CMS QHP Agreements, are collectively referred to herein as the "CY 2016 QHP Agreements."

93. In CY 2016, Anthem CT continued to operate as a QHP with Access Health CT.

94. Anthem NY was approved as a QHP by the state-level operator of the New York ACA Exchange for CY 2016, and participated as a QHP in New York for CY 2016.

95. Pursuant to Section IV.a. of the CY 2016 CMS QHP Agreements, the CY 2016 CMS QHP Agreements had effective dates from the date of execution by the last of the two parties until December 31, 2016, the last day of CY 2016 and the ACA's risk corridors program.

96. 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 37.

97. 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.

98. Before Anthem executed the CY 2014, CY 2015 and CY 2016 QHP Agreements, Anthem executed dozens of attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges in all of the states in which Plaintiffs voluntarily participated in the ACA Marketplace.

99. Plaintiffs submitted their respective attestations for CY 2014 on April 24, 2013 for California; on May 10, 2013 for Colorado; on May 28, 2013 for Connecticut; on April 29, 2013 for Georgia; on April 29, 2013 for Indiana; on April 24, 2013 for Kentucky; on April 29, 2013 for Missouri; on June 25, 2013 for Nevada; on April 24, 2013 for Ohio; and on April 29, 2013 for Wisconsin. *See* Exhibits 38 to 47 (collectively referred to herein as the "CY 2014 Attestations").

100. Plaintiffs' respective CY 2015 attestations were submitted on May 28, 2014 for Colorado; on June 12, 2014 and November 17, 2014 for Connecticut; on May 27, 2014 for

Georgia; on May 27, 2014 for Indiana; on May 28, 2014 and July 3, 2014 for Kentucky; on May 27, 2014 for Missouri; on May 28, 2014 and August 15, 2014 for Nevada; on July 3, 2014 for Ohio; and on May 27, 2014 for Wisconsin. *See* Exhibits 48 to 56 (collectively referred to herein as the "CY 2015 Attestations").

101. Plaintiffs' respective CY 2016 attestations were submitted on April 13, 2015 and May 12, 2015 for Colorado; on April 13, 2015 and May 20, 2015 for Connecticut; on May 8, 2015 for Georgia; on May 8, 2015 for Indiana; on April 13, 2015 and April 24, 2015 for Kentucky; on May 8, 2015 for Missouri; on April 13, 2015 and July 27, 2015 for Nevada; on January 6, 2016 for New York; on April 13, 2015 for Ohio; and on May 8, 2015 for Wisconsin. *See* Exhibits 57 to 66 (collectively referred to herein as the "CY 2016 Attestations").

102. By executing and submitting their annual attestations on CMS' forms, Plaintiffs agreed to the many obligations and responsibilities imposed upon all QHPs that accept the Government's offer to participate in the ACA Exchanges. Those obligations and responsibilities that Plaintiffs undertook include, *inter alia*, licensing, reporting requirements, employment restrictions, marketing parameters, HHS oversight of the QHP's compliance plan, maintenance of an internal grievance process, benefit design standards, cost-sharing limits, rate requirements, enrollment parameters, premium payment process requirements, participating in financial management programs established under the ACA (including the risk corridors program), adhering to data standards, and establishing dedicated and secure server environments and data security procedures.

103. Through these annual attestations, Plaintiffs affirmatively attested that they would agree to comply with certain "Financial Management" obligations, including, among others:

> 2. Applicant attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:

a. risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 CFR 153.510);

b. remit charges to HHS under the circumstances described in 45 CFR 153.510(c).

104. Congress mandated that "the Secretary shall pay" risk corridors payments to eligible QHPs like Anthem under 42 U.S.C. § 18062(b). Had Anthem known that the Government would fail to fully and timely make the risk corridors payments owed to Anthem – reneging on the Government's assurances that "[t]he risk corridors program … will protect against uncertainty in rates for [QHPs] by limiting the extent of issuer losses and gains," 77 FR 73118, 73119 (Dec. 7, 2012), Ex. 03 – then Anthem's annual premiums on the various ACA Exchanges on which it voluntarily participated would necessarily have been higher than actually charged, as a result of the increased risks in the Marketplace. The Government's promised risk-sharing mandated through the risk corridors program was a significant factor in Anthem's decision to agree to become a QHP and undertake the many responsibilities and obligations required for Anthem to participate in the ACA Exchanges.

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

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

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

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

but not limited to, the HHS Secretary and Kevin J. Counihan, the CMS official designated as the Chief Executive Officer of the ACA Health Insurance Marketplaces and Director of CMS's Center for Consumer Information and Insurance Oversight ("CCIIO"), which regulates health insurance at the federal level. *See* CMS Leadership, Center for Consumer Information and Insurance Oversight, Kevin Counihan, https://www.cms.gov/About-CMS/Leadership/cciio/Kevin-Counihan.html (last visited Jan. 12, 2017), attached hereto at Exhibit 67 (Mr. Counihan's job description).

108. Anthem relied on these repeated public statements by HHS and CMS to assume and continue its QHP status, including its continued participation in the California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Missouri, Nevada, New York, Ohio, and Wisconsin ACA Exchanges each year from CY 2014 through CY 2016, and beyond.

109. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov stating that under the risk corridors program, "[f]rom 2014 through 2016" – "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 68.

110. 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.*

111. On July 15, 2011, in a proposed rule, HHS noted that although the proposed regulations did not contain any deadlines for QHPs to remit charges to HHS or for HHS to make

risk corridors payments to QHPs, such deadlines were under consideration, with HHS stating that:

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

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

112. 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.

113. 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.

114. 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.*

115. 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 69.

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

117. 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.

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

> The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.

78 FR 15409, 15473 (Mar. 11, 2013) (emphasis added), Ex. 08.

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

120. A March 2013 CMS written presentation regarding the final rule to health insurers – some of whom, including Anthem, were preparing to apply to become certified as QHPs for the upcoming CY 2014 ACA Marketplace – contained the same affirmations of Government-to-QHP risk-sharing as in the March 2012 presentation discussed above. *See* Presentation, CMS, *HHS Notice of Benefit and Payment Parameters for 2014*, at 18 & 19 (Mar. 2013), attached hereto at Exhibit 70.

121. Between April 2013 and June 2013, Plaintiffs executed and submitted their CY 2014 Attestations regarding, *inter alia*, their adherence to the risk corridors program for CY 2014. *See* Exs. 38 to 47.

122. Between July 2013 and October 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiffs executed their respective CY 2014 QHP Agreements and, upon approval and certification by CMS or the state-level operators of their respective State-Based Exchanges, became QHPs in, respectively, California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Missouri, Nevada, New York, Ohio, and Wisconsin. *See* Exs. 09 to 17.

123. On January 1, 2014, Anthem began offering plans on the CY 2014 California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia and Wisconsin ACA Exchanges, pursuant to its commitments with and attestations to the Government.

124. 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 71. 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 72.

125. 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 73.

126. 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 74; 79 FR 13743, 13829 (Mar. 11, 2014), attached hereto at Exhibit 75.

127. 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. 75.

The Government Breaches its Risk Corridors Payment Obligations

128. 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.*

129. This statement was directly contrary to HHS' prior statement – made exactly one year earlier in the Federal Register, March 11, 2013 – which stated: "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 08.

130. The Government's announcement that the United States would not honor its risk corridors obligations in the manner it had promised came after Plaintiffs (which had executed the CY 2014 QHP Agreements between July 2013 and October 2013) already had begun to participate in their respective states' CY 2014 ACA Exchanges in reliance upon the Government's risk corridors payment obligations.

131. 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 76.

132. HHS' "budget neutral" statement of March 11, 2014, was also contrary to Congress' intent for the Government to share risk with insurers, and Congress' direction to model the ACA risk corridors program on the Medicare Part D program, which is not required to be budget neutral. *See* 42 C.F.R. § 423.336, attached hereto at Exhibit 77; 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 78 ("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. 05, ("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.").

133. HHS' statement was also contrary to the CBO's February 2014 published projections that the risk corridors program would net the Government $8 billion in positive revenue. *See* CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 n. 6 (Feb. 2014), attached hereto at Exhibit 79.

134. The December 2, 2013 proposed rule demonstrates the agencies' lack of reasoned decision-making regarding budget neutrality because the proposed rule 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. 74. Therefore, the budget neutrality position adopted in the March 11, 2014 final rule was not the product of notice-and-comment rulemaking.

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

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

Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014) (emphasis added), attached hereto at Exhibit 80.

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

137. 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. 75.

138. Indeed, in the April 11, 2014 Bulletin, HHS and CMS assured QHPs that "[w]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments." Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), Ex. 80.

139. HHS' and CMS' change in position to call for "budget neutrality" in the risk corridors program caused the CBO to update its projections for risk corridors payments and charges in April 2014. *See* CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014* (Apr. 2014), attached hereto at Exhibit 81. 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.

140. 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" and 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 82.

141. 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.*

142. In HHS' response letter to the U.S. Government Accountability Office ("GAO") dated May 20, 2014, HHS again admitted that "Section 1342(b)(1) … establishes … the formula to determine … the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met." Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), attached hereto at Exhibit 83.

143. Between May 2014 and November 2014, Plaintiffs executed and submitted their CY 2015 Attestations regarding, *inter alia*, their adherence to the risk corridors program for CY 2015. *See* Exs. 48 to 56.

144. 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 84.

145. In October 2014, June 2015, and December 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements and assurances described above, Plaintiffs executed their respective CY 2015 QHP Agreements, committing to the California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Missouri, Nevada, New York, Ohio, and Wisconsin ACA Exchanges for CY 2015. *See* Exs. 18 to 27.

146. 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 85. HHS also repeated that "we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments," and that "***HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.***" *Id.* at 70700 (emphasis added). So confident was HHS about the collections potential for the risk corridors program, that in its November 26, 2014 proposed rulemaking, HHS discussed its "propos[al] that if, for the 2016 benefit year, cumulative risk corridors collections exceed cumulative risk corridors payment requests, we would [adjust certain parameters] to pay out all collections to QHP issuers." *Id.* No detailed plan was expressed for a scenario in which collections were insufficient to satisfy all payment requests.

147. On December 16, 2014 – after Anthem 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.

148. In the 2015 Appropriations Act, Congress limited the source of appropriations for risk corridors payment obligations from three large funding sources by including the following text at Section 227 of the 2015 Appropriations Act:

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

128 Stat. 2491, attached hereto at Exhibit 86.

149. 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.

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

151. On January 1, 2015, Anthem began offering plans on the CY 2015 California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia and Wisconsin ACA Exchanges, pursuant to its commitments with and attestations to the Government.

152. On February 27, 2015, HHS' implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), finalized the proposed policy that HHS planned to implement if cumulative risk corridors collections exceed cumulative payment obligations by CY 2016, and further confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In the unlikely event that risk corridors collections, including any potential carryover from the prior years, are

insufficient to make risk corridors payments for the 2016 program year, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." 80 FR 10749, 10779 (Feb. 27, 2015), attached hereto at Exhibit 87.

153. Between April 2015 and January 2016, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiffs executed and submitted their CY 2016 Attestations. *See* Exs. 57 to 66. Unlike in previous years, however, the CY 2016 attestation forms created by the Government and submitted by Anthem GA, Anthem IN, Anthem MO, Anthem NV, Rocky Mt. NV, Anthem OH, and Anthem WI omitted any attestations regarding QHPs' adherence to the risk corridors program for CY 2016. Nevertheless, the CY 2016 attestation forms submitted by Anthem CA, Anthem CO, Rocky Mt. CO, Anthem CT, Anthem KY, and Anthem NY still contained attestations regarding their adherence to the risk corridors program for CY 2016.

154. CMS' letter to state insurance commissioners on July 21, 2015, stated in boldface text that "**CMS remains committed to the risk corridor program.**" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), attached hereto at Exhibit 88.

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

156. In September 2015, October 2015, and June 2016, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiffs executed their respective CY 2016 QHP Agreements, and committed to the CY 2016 ACA Exchanges in California, Colorado, Connecticut, Georgia, Indiana, Kentucky,

Missouri, Nevada, New York, Ohio, and Wisconsin for the final year of the risk corridors program. *See* Exs. 28 to 34.

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

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

Bulletin, CMS, *Risk Corridors Payment Proration Rate for 2014* (Oct. 1, 2015), attached hereto at Exhibit 89.

158. 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.*

159. Anthem made its CY 2014 risk corridors charge remittances in November 2015, pursuant to Plaintiffs' obligations, and HHS and CMS began their fractional, piecemeal CY 2014 risk corridors payments to Anthem in December 2015.

160. On November 4, 2015, Anthem, 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 Joseph R. Swedish, CEO, Anthem, Inc. (Nov. 4, 2015) (emphasis added), attached hereto at Exhibit 90. 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.*

161. CMS also stated in an email transmitting Mr. Counihan's letter to Anthem that the "letter from CMS reiterat[es] that risk corridors payments *are an obligation of the U.S. Government*." Email from Counihan, CMS, to Swedish, Anthem (Nov. 4, 2015) (emphasis added).

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

163. 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 91.

164. By stating that the remaining 87.4% of Anthem'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.

165. 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.

166. In the 2016 Appropriations Act, Congress again limited the source of appropriations for the risk corridors payment obligations from three large funding sources by including the following text at Section 225 of the 2016 Appropriations Act:

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

129 Stat. 2624, attached hereto at Exhibit 92.

167. 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.

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

169. On January 1, 2016, Plaintiffs began offering plans on the CY 2016 California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia and Wisconsin ACA Exchanges, pursuant to their commitments with and attestations to the Government.

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

171. 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, seeking 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 93. 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.*

172. In its November 18, 2016 announcement of the severe risk corridors shortfall for CY 2015, CMS confirmed 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) ("CY 2015 Risk Corridors Report") (emphasis added), attached hereto at Exhibit 94. In the announcement, CMS confirmed "that all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that no timely CY 2015 risk corridors payments would be made to QHPs like Anthem. *Id.*

173. The December 2016 payment schedule was consistent with CMS' written presentation to insurers on June 7, 2016, which represented to Anthem and other QHPs that "CMS will begin making [CY 2015] RC [risk corridor] payments to issuers" in "December 2016," supporting HHS' and CMS' continued intention and representation to make annual risk

corridors payments by the end of the year. CMS, *Completing the Risk Corridors Plan-Level Data Form for the 2015 Benefit Year* at 7 (June 7, 2016), attached hereto at Exhibit 95.

174. 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.

175. This increased the total risk corridors shortfall for CY 2014 and CY 2015 to over $8 billion owed to QHPs by the Government.

176. 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 limited the source of appropriations for the risk corridors payment obligations from three large funding sources by including the following text at Section 223 of the 2017 Appropriations Act:

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

Pub. L. 115-31, § 223, 131 Stat. 135 (May 5, 2017), attached hereto at Exhibit 96.

177. 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 97.

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

179. On November 13, 2017, HHS and CMS announced the CY 2016 collection and payment amounts for the final year of the risk corridors program. *See* Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016), Ex. 94. The data HHS and CMS provided in the November 13, 2017 announcement indicated that the Government owes QHPs $3,978,220,798.38 in CY 2016 risk corridors payments and QHPs owe the Government $27,090,317.25 in CY 2016 risk corridors collections.

180. In total, for all three years of the risk corridors program, the Government owes QHPs CY 2014, CY 2015 and CY 2016 risk corridors payments of approximately $12.3 billion. In total, QHPs owed the Government CY 2014, CY 2015 and CY 2016 risk corridors collections of approximately $484.5 million.

181. The Government failed to provide Plaintiffs with any statutory authority for its 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 make no risk corridors payments for CY 2016 by the end of CY 2017, while Anthem was obligated to fully remit its annual risk corridors collection charges to the Government on time.

182. 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).

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

184. The United States Court of Appeals for the Federal Circuit held that "Section 1342 is unambiguously mandatory. It provides that '[t]he Secretary *shall* establish and administer' a risk corridors program pursuant to which '[t]he Secretary *shall* provide' under the program that 'the Secretary *shall* pay' an amount according to a statutory formula. 42 U.S.C. § 18062 (emphases added). Nothing in section 1342 indicates that the payment methodology is somehow limited by payments in. It simply sets forth a formula for calculating payment amounts based on a percentage of a 'target amount' of allowable costs." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1321 (Fed. Cir. 2018), *petition for rehearing en banc denied, per curiam*, 908 F.3d 738 (Fed. Cir. 2018, *cert. granted*, 2019 US Lexis 4338 (June 24, 2019).

185. The Federal Circuit in *Moda Health* held that the risk corridors payment "obligation is created by the statute itself, not by the agency….We conclude that the plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program." *Id.* at 1322.

186. The Federal Circuit in *Moda Health* concluded that "[a]n appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money

intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Id.* at 1321 (citations omitted).

187. Accordingly, the Federal Circuit in *Moda Health* held that it was of "no moment that, as the government notes, HHS could not have made payments out to insurers in an amount totaling more than the amount of payments in without running afoul of the Anti-Deficiency Act.". *Id*. at 1322 (observing that "the Supreme Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government." (citations omitted)).

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

189. Congress has not repealed Section 1342, and all prior attempts to repeal Section 1342 have failed. *Id*. at 1332 (Newman, J., dissenting); *see also* S. 1726, Obamacare Taxpayer Bailout Prevention Act, *available at* https://www.congress.gov/bill/113th-congress/senate-bill/1726.

190. 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 Anthem, for CY 2014, CY 2015, and CY 2016.

191. The Federal Circuit in *Moda Health* determined that Congress, in passing the appropriations riders limiting the source of funds from which HHS could make risk corridors payments must have intended, implicitly, to temporarily suspend or cap, Congress' underlying statutory payment obligation. 892 F.3d at 1327-29. The Supreme Court granted *certiorari* in *Moda Health* on June 24, 2019 to review whether that holding is inconsistent with controlling precedent.

Anthem's Risk Corridors Payment and Charge Amounts for CY 2014

192. 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 98.

193. Anthem CO's losses in the ACA Colorado Individual Market for CY 2014 resulted in the Government being required to pay Anthem CO a risk corridors payment of $1,479,675.14. *See* CY 2014 Risk Corridors Report at Table 6 – Colorado, Ex. 98.

194. The Government, however, only paid Anthem CO a prorated amount of $245,517.00 for Anthem CO's losses in the ACA Colorado Individual Market for CY 2014.

195. Anthem IN's losses in the ACA Indiana Individual Market for CY 2014 resulted in the Government being required to pay Anthem IN a risk corridors payment of $812,580.18. *See* CY 2014 Risk Corridors Report at Table 15 – Indiana, Ex. 98.

196. The Government, however, only paid Anthem IN a prorated amount of $136,070.00 for Anthem IN's losses in the ACA Indiana Individual Market for CY 2014.

197. Anthem MO's losses in the ACA Missouri Small Group Market for CY 2014 resulted in the Government being required to pay Anthem MO a risk corridors payment of $22,591.92. *See* CY 2014 Risk Corridors Report at Table 26 – Missouri, Ex. 98.

198. The Government, however, only paid Anthem MO a prorated amount of $3,783.00 for Anthem MO's losses in the ACA Missouri Small Group Market for CY 2014.

199. Anthem NV's losses in the ACA Nevada Small Group Market for CY 2014 resulted in the Government being required to pay Anthem NV a risk corridors payment of $2,715.74. *See* CY 2014 Risk Corridors Report at Table 29 – Nevada, Ex. 98.

200. The Government, however, failed to pay Anthem NV any prorated amount for Anthem NV's losses in the ACA Nevada Small Group Market for CY 2014.

201. Anthem OH's losses in the ACA Ohio Small Group Market for CY 2014 resulted in the Government being required to pay Anthem OH a risk corridors payment of $16,036.90. *See* CY 2014 Risk Corridors Report at Table 36 – Ohio, Ex. 98.

202. The Government, however, only paid Anthem OH a prorated amount of $2,685.00 for Anthem OH's losses in the ACA Ohio Small Group Market for CY 2014.

203. Anthem WI's losses in the ACA Wisconsin Individual Market for CY 2014 resulted in the Government being required to pay Anthem WI a risk corridors payment of $4,931,489.14. *See* CY 2014 Risk Corridors Report at Table 50 – Wisconsin, Ex. 98.

204. The Government, however, only paid Anthem WI a prorated amount of $825,800.00 for Anthem WI's losses in the ACA Wisconsin Individual Market for CY 2014.

205. The amount of Anthem CA's gains in the ACA California Individual Market for CY 2014 resulted in Anthem CA being required to remit a risk corridors charge to the Secretary of HHS in the amount of $8,679,121.40. *See* CY 2014 Risk Corridors Report at Table 5 – California, Ex. 98.

206. The amount of Anthem CO's gains in the ACA Colorado Small Group Market for CY 2014 resulted in Anthem CO being required to remit a risk corridors charge to the Secretary of HHS in the amount of $21,811.05. *See* CY 2014 Risk Corridors Report at Table 6 – Colorado, Ex. 98.

207. The amount of Anthem CT's gains in the ACA Connecticut Individual Market for CY 2014 resulted in Anthem CT being required to remit a risk corridors charge to the Secretary of HHS in the amount of $863,733.24. *See* CY 2014 Risk Corridors Report at Table 7 – Connecticut, Ex. 98.

208. The amount of Anthem CT's gains in the ACA Connecticut Small Group Market for CY 2014 resulted in Anthem CT being required to remit a risk corridors charge to the Secretary of HHS in the amount of $26,699.38. *See* CY 2014 Risk Corridors Report at Table 7 – Connecticut, Ex. 98.

209. The amount of Anthem GA's gains in the ACA Georgia Individual Market for CY 2014 resulted in Anthem GA being required to remit a risk corridors charge to the Secretary of HHS in the amount of $5,981,961.36. *See* CY 2014 Risk Corridors Report at Table 11 – Georgia, Ex. 98.

210. The amount of Anthem GA's gains in the ACA Georgia Small Group Market for CY 2014 resulted in Anthem GA being required to remit a risk corridors charge to the Secretary of HHS in the amount of $3,041.08. *See* CY 2014 Risk Corridors Report at Table 11 – Georgia, Ex. 98.

211. The amount of Anthem IN's gains in the ACA Indiana Small Group Market for CY 2014 resulted in Anthem IN being required to remit a risk corridors charge to the Secretary of HHS in the amount of $319.45. *See* CY 2014 Risk Corridors Report at Table 15 – Indiana, Ex. 98.

212. The amount of Anthem KY's gains in the ACA Kentucky Individual Market for CY 2014 resulted in Anthem KY being required to remit a risk corridors charge to the Secretary

of HHS in the amount of $620,075.73. *See* CY 2014 Risk Corridors Report at Table 18 – Kentucky, Ex. 98.

213. The amount of Anthem KY's gains in the ACA Kentucky Small Group Market for CY 2014 resulted in Anthem KY being required to remit a risk corridors charge to the Secretary of HHS in the amount of $12,523.99. *See* CY 2014 Risk Corridors Report at Table 18 – Kentucky, Ex. 98.

214. The amount of Anthem NV's gains in the ACA Nevada Individual Market for CY 2014 resulted in Anthem NV being required to remit a risk corridors charge to the Secretary of HHS in the amount of $53,370.48. *See* CY 2014 Risk Corridors Report at Table 29 – Nevada, Ex. 98.

215. The amount of Anthem OH's gains in the ACA Ohio Individual Market for CY 2014 resulted in Anthem OH being required to remit a risk corridors charge to the Secretary of HHS in the amount of $1,827,325.84. *See* CY 2014 Risk Corridors Report at Table 36 – Ohio, Ex. 98.

216. Plaintiffs' risk corridors payments and charges, 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
Anthem CA	CA / Individual	($8,679,121.40)	($8,679,121.40)	100%
Anthem CO	CO / Individual	$1,479,675.14	$245,517.00	16.6%
Anthem CO	CO / Small Group	($21,811.05)	($21,811.05)	100%
Anthem CT	CT / Individual	($863,733.24)	($863,733.24)	100%
Anthem CT	CT / Small Group	($26,699.38)	($26,699.38)	100%

Anthem GA	GA / Individual	($5,981,961.36)	($5,981,961.36)	100%
Anthem GA	GA / Small Group	($3,041.08)	($3,041.08)	100%
Anthem IN	IN / Individual	$812,580.18	$136,070.00	16.7%
Anthem IN	IN / Small Group	($319.45)	($319.45)	100%
Anthem KY	KY / Individual	($620,075.73)	($620,075.73)	100%
Anthem KY	KY / Small Group	($12,523.99)	($12,523.99)	100%
Anthem MO	MO / Small Group	$22,591.92	$3,783.00	16.7%
Anthem NV	NV / Individual	($53,370.48)	($53,370.48)	100%
Anthem NV	NV / Small Group	$2,715.74	$0.00	0%
Anthem OH	OH / Individual	($1,827,325.84)	($1,827,325.84)	100%
Anthem OH	OH / Small Group	$16,036.90	$2,685.00	16.7%
Anthem WI	WI / Individual	$4,931,489.14	$825,800.00	16.7%

217. In total, the Government was required to pay Anthem risk corridors payments for CY 2014 of $7,265,089.02, but the Government paid only a prorated amount to Anthem equal to 16.7% of the amounts owed ($1,213,855.00) for CY 2014.

218. Anthem, on the other hand, was required to pay the Government 100% of its CY 2014 risk corridors charges ($21,063,703.04) – not some unilaterally determined fraction thereof – and to do so promptly, as it had affirmatively attested it would do.

219. Anthem made its full and timely remittance of CY 2014 risk corridors charges to the Government on November 20, 2015. *See* November 2015 Financial Transaction Report for Anthem CA, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 99

(showing "RCCHG" – Risk Corridors Charge – of $8,679,121.40 paid on EFT date of 11/20/2015); November 2015 Financial Transaction Report for Anthem CO and Anthem NV, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 100 (combined "RCCHG" of $75,181.53); November 2015 Financial Transaction Report for Anthem CT, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 101 ("RCCHG" of $890,432.62); November 2015 Financial Transaction Report for Anthem GA, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 102 ("RCCHG" of $5,985,002.44); November 2015 Financial Transaction Report for Anthem IN, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 103 ("RCCHG" of $319.45); November 2015 Financial Transaction Report for Anthem KY, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 104 ("RCCHG" of $632,599.72); November 2015 Financial Transaction Report for Anthem OH, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 105 ("RCCHG" of $1,827,325.84) .

220. The Government lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2014 risk corridors payments from QHPs such as Anthem.

Anthem's Risk Corridors Payment and Charge Amounts for CY 2015

221. 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. CY 2015 Risk Corridors Report, Ex. 94.

222. Anthem CO's losses in the ACA Colorado Individual Market for CY 2015 resulted in the Government being required to pay Anthem CO a risk corridors payment of $3,002,631.67. *See id*. at 3.

223. Anthem CO's losses in the ACA Colorado Small Group Market for CY 2015 resulted in the Government being required to pay Anthem CO a risk corridors payment of $38,482.92. *See id*. at 3.

224. Anthem GA's losses in the ACA Georgia Individual Market for CY 2015 resulted in the Government being required to pay Anthem GA a risk corridors payment of $2,761,214.17. *See id*. at 4.

225. Anthem KY's losses in the ACA Kentucky Individual Market for CY 2015 resulted in the Government being required to pay Anthem KY a risk corridors payment of $730,766.76. *See id*. at 6.

226. Anthem NV's losses in the ACA Nevada Individual Market for CY 2015 resulted in the Government being required to pay Anthem NV a risk corridors payment of $3,155,927.89. *See id*. at 9.

227. The amount of Anthem CA's gains in the ACA California Individual Market for CY 2015 resulted in Anthem CA being required to remit a risk corridors charge to the Secretary of HHS in the amount of $808,605.43. *See id.* at 3.

228. The amount of Anthem CT's gains in the ACA Connecticut Individual Market for CY 2015 resulted in Anthem CT being required to remit a risk corridors charge to the Secretary of HHS in the amount of $691,198.86. *See id.* at 3.

229. The amount of Anthem IN's gains in the ACA Indiana Individual Market for CY 2015 resulted in Anthem IN being required to remit a risk corridors charge to the Secretary of HHS in the amount of $691,308.47. *See id.* at 5.

230. The amount of Anthem IN's gains in the ACA Indiana Small Group Market for CY 2015 resulted in Anthem IN being required to remit a risk corridors charge to the Secretary of HHS in the amount of $10,160.00. *See id.* at 5.

231. The amount of Anthem MO's gains in the ACA Missouri Individual Market for CY 2015 resulted in Anthem MO being required to remit a risk corridors charge to the Secretary of HHS in the amount of $1,003,114.69. *See id.* at 8.

232. The amount of Anthem NY's gains in the ACA New York Individual Market for CY 2015 resulted in Anthem NY being required to remit a risk corridors charge to the Secretary of HHS in the amount of $297,726.69. *See id.* at 9.

233. The amount of Anthem OH's gains in the ACA Ohio Individual Market for CY 2015 resulted in Anthem OH being required to remit a risk corridors charge to the Secretary of HHS in the amount of $4,249,438.31. *See id.* at 10.

234. The amount of Anthem WI's gains in the ACA Wisconsin Individual Market for CY 2015 resulted in Anthem WI being required to remit a risk corridors charge to the Secretary of HHS in the amount of $93,143.86. *See id.* at 13.

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

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
Anthem CA	CA / Individual	($808,605.43)	100%

Anthem CO	CO / Individual	$3,002,631.67	0%
Anthem CO	CO / Small Group	$38,482.92	0%
Anthem CT	CT / Individual	($691,198.86)	100%
Anthem GA	GA / Individual	$2,761,214.17	0%
Anthem IN	IN / Individual	($691,308.47)	100%
Anthem IN	IN / Small Group	($10,160.00)	100%
Anthem KY	KY / Individual	$730,766.76	0%
Anthem MO	MO / Individual	($1,003,114.69)	100%
Anthem NV	NV / Individual	$3,155,927.89	0%
Anthem NY	NY / Individual	($297,726.69)	100%
Anthem OH	OH / Individual	($4,249,438.31)	100%
Anthem WI	WI / Individual	($93,143.86)	100%

236. In total, the Government was required to pay Anthem risk corridors payments for CY 2015 of $9,689,023.41, but the Government has not made any payments for CY 2015 risk corridors owed to Plaintiffs.

237. Anthem, on the other hand, was required to promptly pay the Government 100% of its CY 2015 risk corridors charges ($17,581,996.47), as it had affirmatively attested it would do. Anthem made its full and timely remittance of CY 2015 risk corridors charges to the Government on November 30, 2016.

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

Anthem's Risk Corridors Payment and Charge Amounts for CY 2016

239. In a report released on November 13, 2017, HHS and CMS publicly announced the amount of risk corridors payments the Government owes to QHPs, and the amount of risk corridors charges the Government will collect from QHPs, for the CY 2016 plan year. CMS announced that "HHS will use 2016 benefit year risk corridors collection to make additional payments toward 2014 benefit year balances," indicating that the Government will not make any payments to QHPs, including Anthem, toward the Government's CY 2015 or CY 2016 risk corridors amounts still owed. Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year* at 1 (Nov. 13, 2017) ("CY 2016 Risk Corridors Report"), attached hereto at Exhibit 106.

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

241. Contrary to recent guidance by CMS, which had represented to Anthem and other QHPs that "Remittance of Risk Corridors Payments Begins" on "12/2017," *see* CMS, *Key Dates for Calendar Year 2017* at 3 (Apr. 13, 2017), attached hereto at Exhibit 107, HHS and CMS announced on November 13, 2017 that "HHS … will begin remitting risk corridors payments to issuers in January 2018, as collections are received." CY 2016 Risk Corridors Report at 2, Ex. 106.

242. Anthem CA's losses in the ACA California Individual Market for CY 2016 resulted in the Government being required to pay Anthem CA a risk corridors payment of $55,180,958.69. *See id.* at 3.

243. Anthem CO's losses in the ACA Colorado Individual Market for CY 2016 resulted in the Government being required to pay Anthem CO a risk corridors payment of $2,015,531.53. *See id.* at 4.

244. Anthem CO's losses in the ACA Colorado Small Group Market for CY 2016 resulted in the Government being required to pay Anthem CO a risk corridors payment of $45,449.80. *See id.* at 4.

245. Rocky Mt. CO's losses in the ACA Colorado Individual Market for CY 2016 resulted in the Government being required to pay Rocky Mt. CO a risk corridors payment of $14,813,129.30. *See id.* at 4.

246. Anthem CT's losses in the ACA Connecticut Individual Market for CY 2016 resulted in the Government being required to pay Anthem CT a risk corridors payment of $6,673,451.37. *See id.* at 4.

247. Anthem GA's losses in the ACA Georgia Individual Market for CY 2016 resulted in the Government being required to pay Anthem GA a risk corridors payment of $212,623.53. *See id.* at 5.

248. Rocky Mt. NV's losses in the ACA Nevada Individual Market for CY 2016 resulted in the Government being required to pay Rocky Mt. NV a risk corridors payment of $4,030,060.93. *See id.* at 13.

249. Anthem NY's losses in the ACA New York Individual Market for CY 2016 resulted in the Government being required to pay Anthem NY a risk corridors payment of $8,305,584.61. *See id.* at 14.

250. The amount of Anthem KY's gains in the ACA Kentucky Small Group Market for CY 2016 resulted in Anthem KY being required to remit a risk corridors charge to the Secretary of HHS in the amount of $37,294.97. *See id.* at 8.

251. The amount of Anthem NV's gains in the ACA Nevada Small Group Market for CY 2016 resulted in Anthem NV being required to remit a risk corridors charge to the Secretary of HHS in the amount of $7,237.91. *See id.* at 13.

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

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
Anthem CA	CA / Individual	$55,180,958.69	0%
Anthem CO	CO / Individual	$2,015,531.53	0%
Anthem CO	CO / Small Group	$45,449.80	0%
Rocky Mt. CO	CO / Individual	$14,813,129.30	0%
Anthem CT	CT / Individual	$6,673,451.37	0%
Anthem GA	GA / Individual	$212,623.53	0%
Anthem KY	KY / Small Group	($37,294.97)	100%
Anthem NV	NV / Small Group	($7,237.91)	100%
Rocky Mt. NV	NV / Individual	$4,030,060.93	0%
Anthem NY	NY / Individual	$8,305,584.61	0%

253. In total, the Government was required to pay Anthem risk corridors payments for CY 2016 of $91,276,789.76, but the Government has not made any CY 2016 risk corridors payments to Plaintiffs.

254. Anthem, on the other hand, was required to promptly pay the Government 100% of its CY 2016 risk corridors charges ($44,532.88), before the close of CY 2017. Anthem made its full and timely remittance of CY 2016 risk corridors charges to the Government on November 30, 2017.

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

256. In total, the Government owes Plaintiffs $107,551,274 in unpaid risk corridors payments for CY 2014, CY 2015 and CY 2016 combined. Anthem is entitled to receive, and demands, full and immediate payment from the United States.

COUNT I

Violation of Federal Statute and Regulation

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

258. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridors payments to eligible QHPs based on their annual ACA exchange losses, in accordance with the payment formula set forth in the statute. *See* 42 U.S.C. § 18062(b), Ex. 04; 45 C.F.R. § 153.510, Ex. 07.

259. HHS' and CMS' implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that "when" QHPs' allowable costs exceed the 3 percent risk corridors threshold, HHS "will pay" risk corridors payments to QHPs in accordance with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

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

261. HHS' and CMS' regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit risk corridors charges it owes to HHS within 30 days after notification of such charges. In CY 2014, CY 2015, and CY 2016, Anthem timely and fully complied with this requirement.

262. Plaintiffs voluntarily applied to become, were certified as, committed themselves to be, and in fact were, QHPs on, respectively, the California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Missouri, Nevada, New York, Ohio, and Wisconsin ACA Exchanges in CY 2014, CY 2015 and CY 2016, *see* Exs. 09 to 36, and were qualified for and entitled to receive mandated risk corridors payments from the Government for CY 2014, CY 2015 and CY 2016.

263. Plaintiffs are entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government for CY 2014, CY 2015 and CY 2016.

264. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $39,035.74, that the Government concedes it owes Anthem for CY 2014. *See* Ex. 98.

265. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $52,339,075.46, that the Government concedes it owes Anthem for CY 2015. *See* Ex. 94.

266. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $91,276,789.76, that the Government concedes it owes Anthem for CY 2016. *See* Ex. 106.

267. The Government was obligated to make full risk corridors payments promptly to Plaintiffs for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017.

268. The United States has failed to make full and timely risk corridors payments to Anthem for CY 2014, CY 2015 and CY 2016, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make full risk corridors payments.

269. Instead, the Government arbitrarily has paid Anthem only a pro-rata share of the total amount due for CY 2014, and has not paid any of the total amounts due for CY 2015 or CY 2016, asserting that full payment to Anthem is limited by available appropriations, even though no such limits appear anywhere in the ACA, the money-mandating Section 1342, or the money-mandating implementing regulations.

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

271. The Government's failure to make full and timely risk corridors payments to Anthem for CY 2014, CY 2015 and CY 2016 constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

272. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), Anthem has been damaged in the amount of at least $ $107,551,274 in unpaid risk corridors payments for CY 2014, CY 2015 and CY 2016 combined.

COUNT II

Breach of Implied-In-Fact Contract

273. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

274. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with Plaintiffs regarding the Government's obligation to make full and timely risk corridors payments to Plaintiffs for CY 2014 and/or CY 2015 and/or CY 2016 in exchange for Plaintiffs' respective voluntary agreements to become QHPs and participate in their respective states' ACA Exchanges for CY 2014 and/or CY 2015 and/or CY 2016, including Plaintiff's obligation to remit full and timely risk corridors collection charges to the Government if Plaintiff was required to do so.

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

276. Section 1342 of the ACA and HHS' implementing regulations (45 C.F.R. § 153.510), confirmed and ratified by HHS' and CMS' repeated assurances admitting the Government's obligation to make full risk corridors payments, constituted a clear and unambiguous offer by the Government to make full and timely risk corridors payments to health

insurers, including Plaintiffs, that agreed to participate as QHPs in the CY 2014 and/or CY 2015 and/or CY 2016 ACA Exchanges and were approved as certified QHPs at the Government's discretion. This offer evidences a clear intent by the Government to contract with Plaintiffs.

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

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

279. By agreeing to become QHPs, Plaintiffs agreed to provide services by offering health insurance on particular Exchanges established under the ACA, and to accept the new obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq.*

280. Plaintiffs were not obligated to participate as QHPs, to incur Exchange-related costs and losses, and to provide healthcare benefits to numerous enrollees who had not previously been insured at premiums that were lower than they would have been without the Government's promised risk-sharing.

281. The Government's agreement to make full and timely risk corridors payments was a significant factor material to Plaintiffs' respective agreements to become QHPs and participate in the CY 2014, CY 2015 and CY 2016 ACA Exchanges.

282. The Government also induced QHPs, like Anthem, to commit to the CY 2015 and CY 2016 ACA Exchanges during and after HHS' and CMS' announcement in 2014 of their intention to implement the risk corridors program in a budget neutral manner by repeatedly giving assurances to QHPs that "full" risk corridors payments were owed and that risk corridors collections would be sufficient to cover all of the Government's risk corridors payments for a calendar year. *See, e.g.*, Bulletin, CMS, *Risk Corridors and Budget Neutrality*, at 1 (Apr. 11, 2014), Ex. 80 ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

283. Plaintiffs, in turn, provided a real benefit to the Government by agreeing to become QHPs and, despite the uncertain financial risk, to offer affordable health insurance on and to participate in the CY 2014, CY 2015 and CY 2016 ACA Exchanges in their respective states. Without sufficient health insurers voluntarily agreeing to participate in the new ACA Exchanges, the ACA could not have been implemented as intended. The Government also benefitted from Plaintiffs participation as QHPs with lower premiums because the lower premiums translated into reduced tax subsidies and attendant savings for the federal fisc.

284. Plaintiffs satisfied and complied with their obligations and/or conditions which existed under the implied-in-fact contracts with the Government, including, but not limited to, remitting full and timely risk corridors charges owed to the Government for CY 2014, CY 2015 and CY 2016.

285. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance and statements, including, but not limited to, Plaintiffs' execution of QHP Agreements and attestations, including the attestations regarding risk corridors payments and charges, and the Government's repeated assurances that full and timely risk corridors payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 08.

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

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

288. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $7,265,089.02, that the Government concedes it owes Anthem for CY 2014. *See* Ex. 98.

289. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $9,689,023.41, that the Government concedes it owes Anthem for CY 2015. *See* Ex. 94.

290. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $91,276,789.76, that the Government concedes it owes Anthem for CY 2016. *See* Ex. 106.

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

292. Anthem honored its obligation to remit full risk corridors collections charges promptly to the Government for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017.

293. The Government was obligated to make full risk corridors payments promptly to Plaintiffs for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017.

294. The Government's failure to make full and timely CY 2014, CY 2015 and CY 2016 risk corridors payments to Plaintiffs is a material breach of the implied-in-fact contracts.

295. As a result of the United States' material breach of its implied-in-fact contracts that it entered into with Plaintiffs regarding ACA risk corridors payments for CY 2014, CY 2015 and/or CY 2016, Plaintiffs have been damaged in the amount of at least $107,551,274 in unpaid risk corridors payments for CY 2014, CY 2015 and CY 2016 combined.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against the Defendant, the United States of America, as follows:

(1) For Count I, awarding damages sustained by Plaintiffs, in the amount of at least $107,551,274, subject to proof at trial, as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the CY 2014, CY 2015 and CY

2016 risk corridors payments;

(2) For Count II, awarding damages sustained by Plaintiffs, in the amount of at least $107,551,274, subject to proof at trial, regarding the CY 2014, CY 2015 and CY 2016 risk corridors payments;

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

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

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

Dated: November 18, 2019

Respectfully Submitted,

s/ Lawrence S. Sher

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