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ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
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U.S. COURT OF
FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. f/k/a HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY d/b/a HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., and HIGHMARK SELECT RESOURCES INC.,	)	
Plaintiffs,	)	No. 16-587 C
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

COMPLAINT

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

INTRODUCTION

1. The Plaintiff Insurers bring this action to recover damages owed by Defendant for violations of the mandatory risk corridor payment obligations prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing federal regulations, as well as Defendant's breaches of its risk corridor payment obligations under express or implied-in-fact contracts, breaches of the covenant of good faith and fair dealing implied in

Defendant's contracts with the Plaintiff Insurers, and Defendant's taking of the Plaintiff Insurers' property without just compensation in violation of the Fifth Amendment of the U.S. Constitution.

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

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

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

5. Congress, recognizing such uncertainty for health insurers, included in the ACA three premium-stabilization programs to help protect health insurers against risk selection and market uncertainty, including the temporary risk corridors program, which mandated that health insurers be paid annual risk corridor 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, Qualified Health Plans ("QHPs") – such as Plaintiffs – and the federal government share in the risk 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 collects in premiums in any one of these years exceeds its medical expenses by a certain target amount, the QHP will make a payment to the Government. If annual premiums fall short of this target, however, Congress required the Government to make risk corridor payments to the QHP under a formula prescribed in Section 1342.

7. The temporary risk corridors program was designed to ease the transition between the old and new health insurance marketplaces and help stabilize premiums for consumers, and was modeled on a similar program in Medicare Part D signed into law by President George W. Bush.

8. The United States has specifically admitted in writing its statutory and regulatory obligations to pay the Plaintiff Insurers the full amount of risk corridor payments owed to them for calendar year 2014 ("CY 2014"), but it has failed to pay the full amount due. Instead, the Government arbitrarily has paid the Plaintiff Insurers only a pro-rata share – less than 12.6% – of the total amount due, asserting that full payment to the Plaintiff Insurers is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in the Plaintiff Insurers' contracts with the Government.

9. Although the United States has repeatedly acknowledged its obligation to make full risk corridor payments to the Plaintiff Insurers, it has failed to do so, despite the Plaintiff Insurers' repeated requests that the Government honor its statutory, regulatory and contractual obligations. This action seeks damages from the Government of at least $222,939,981.70, the amount of risk corridor payments owed to the Plaintiff Insurers for CY 2014.

10. Should this Court find that the United States failed to make full and timely CY 2014 risk corridor payments to the Plaintiff Insurers in violation of Defendant's statutory, regulatory and/or contractual obligations, and/or the Plaintiff Insurers' constitutional rights under the Fifth Amendment, then Plaintiffs also seek declaratory relief from the Court regarding the Government's obligation to make full and timely risk corridor payments for CY 2015 and CY 2016, in accordance with the Defendant's legal obligations.

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 the Plaintiff Insurers bring claims for damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, an express contract and/or an implied-in-fact contract with the United States, and a taking of the Plaintiff Insurers' 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 FIRST PRIORITY LIFE INSURANCE COMPANY, INC. ("First Priority") is a Pennsylvania stock insurance company with its principal place of business in Wilkes-Barre, Pennsylvania. First Priority is a QHP issuer on the Pennsylvania Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

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

15. Plaintiff HM HEALTH INSURANCE COMPANY d/b/a HIGHMARK HEALTH

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

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

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

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

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

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

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

21. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care.

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

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

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

25. Collectively, the Plaintiff Insurers participated in the state Marketplaces in Pennsylvania, Delaware, and West Virginia in CY 2014 and CY 2015, and all Plaintiffs are collectively participating in the Pennsylvania, Delaware, and West Virginia Exchanges in CY 2016.

The ACA's Premium-Stabilization Programs

26. To help protect health insurers against risk selection and market uncertainty, the ACA established three premium-stabilization programs, which began in 2014: temporary reinsurance and risk corridor 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.

27. This action only addresses the temporary, three-year risk corridors program, which began in CY 2014 and expires at the end of CY 2016.

28. Congress's overarching goal of the premium-stabilization programs, along with other Exchange-related provisions and policies in the ACA, was to make affordable health insurance available to individuals who previously did not have access to such coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

29. 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.

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

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

32. In CY 2014, Highmark enrolled the majority of insureds in the ACA markets in Pennsylvania and Delaware, and Highmark was the only insurer to participate in West Virginia.

33. Highmark has demonstrated its willingness to be a meaningful partner in the ACA program, and has done so in good faith, with the understanding that the United States would honor its statutory, regulatory, and contractual commitments regarding the premium-stabilization programs, including the temporary risk corridors program.

The ACA's Risk Corridors Program

34. Section 1342 of the ACA expressly requires the Secretary of HHS to establish a temporary risk corridors program that provides for the sharing in gains or losses resulting from inaccurate rate setting from CY 2014 through CY 2016 between the Government and certain participating health plans in the individual and small group markets. *See* 42 U.S.C. § 18062, attached hereto at Exhibit 01.

35. Congress required the ACA risk corridors program established in Section 1342 to be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program that was signed into law by President George W. Bush. *See* 42 U.S.C. § 18062(a) (mandating that the risk corridors "program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act").

36. The risk corridors program applies only to participating plans defined to be QHPs. All insurers that elect to enter into agreements to become QHPs are required by Section 1342(a) of the ACA to participate in the risk corridors program.

37. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population during the first years of Exchange operation, health insurers may not be able to predict their risk accurately, and their premiums may reflect costs that are

ultimately lower or higher than predicted.

38. Congress intended the ACA's temporary risk corridors provision as an important safety valve for consumers and insurers as millions of Americans would transition to new coverage in a brand new Marketplace, protecting against the uncertainty that health insurers, like Plaintiffs, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the federal government and issuers of QHPs in each of the first three years of the Marketplace.

Plaintiffs are QHPs

39. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, each of the Plaintiffs agreed to become QHPs, and to enter into QHP Agreements with CMS, a federal agency within HHS, which QHP Agreements are attached to this Complaint at Exhibits 02 to 17.

40. First Priority executed a QHP Agreement on September 10, 2013, and QHP Agreements with identical terms to those in the September 10, 2013 First Priority QHP Agreement were executed by Highmark West Virginia on September 9, 2013, by Highmark Health Services and HHIC on September 10, 2013, and by Highmark Delaware on September 11, 2013. These five QHP Agreements are collectively referred to herein as the "CY 2014 QHP Agreements." *See* Exhibits 02 to 06.

41. The CY 2014 QHP Agreements were executed by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

42. Per Section III.a. of the CY 2014 QHP Agreements, the CY 2014 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.

43. Section II.d. of each of the CY 2014 QHP Agreements states that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions."

44. On October 20, 2014, First Priority executed a QHP Agreement with terms that were materially and substantially identical to those found in the CY 2014 QHP Agreements, and QHP Agreements with identical terms to those in the October 20, 2014 First Priority QHP Agreement were executed by Highmark West Virginia on October 20, 2014, by Highmark Inc. and HHIC on October 21, 2014, and by Highmark Delaware on October 22, 2014. These five QHP Agreements are collectively referred to herein as the "CY 2015 QHP Agreements." *See* Exhibits 07 to 11.

45. The CY 2015 QHP Agreements were executed by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

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

47. On September 22, 2015, First Priority executed a QHP Agreement with terms that were materially and substantially identical to those found in the CY 2015 QHP Agreements, and QHP Agreements with identical terms to those in the September 22, 2015 First Priority QHP Agreement were executed by Highmark Delaware, Highmark West Virginia and HSR on September 22, 2015, and by Highmark Inc. and HHIC on September 23, 2015. These six QHP Agreements are collectively referred to herein as the "CY 2016 QHP Agreements." *See* Exhibits

12 to 17.

48. The CY 2016 QHP Agreements were executed by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

49. Per Section IV.a. of the CY 2016 QHP Agreements, the CY 2016 QHP Agreements have effective dates from the date of execution by the last of the two parties until December 31, 2016, the last day of CY 2016.

50. Section III.a. of each of the CY 2015 and CY 2016 QHP Agreements states that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions."

51. In addition to certifying that each Plaintiff Insurer is a QHP, each of the CY 2014, CY 2015, and CY 2016 QHP Agreements expressly states that it is governed by United States law and HHS and CMS regulations, stating specifically in Section V.g. that:

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

52. The financial protections Congress mandated through the risk corridors program were significant factors in the Plaintiffs' decision to agree to become QHPs.

The Risk Corridors Payment Methodology

53. Under the risk corridors program, the federal government shares risk with QHP health insurers by collecting charges from a health insurer if the insurer's QHP premiums exceed claims costs of QHP enrollees by a certain amount, and by making payments to the insurer if the insurer's QHP premiums fall short by a certain amount, subject to certain adjustments for taxes,

administrative expenses, and other costs and payments.

54. Congress, through Sections 1342(b)(1) and (2) of the ACA, established the payment methodology and formula for the payments in and the payments out to determine the amounts the QHPs must pay to the Secretary of HHS and the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

55. 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).

56. To determine whether a QHP pays into, or receives payments from, the risk corridors program, HHS compares allowable costs (essentially, claims costs subject to adjustments for health care quality, health IT, risk adjustment payments and charges and reinsurance payments) and the target amount – the difference between a QHP's earned premiums and allowable administrative costs.

57. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY 2016, QHPs with allowable costs that are less than 97 percent of the QHP's target amount are required to remit charges for a percentage of those cost savings to HHS, while QHPs with allowable costs greater than 103 percent of the QHP's target amount will receive payments from HHS to offset a percentage of those losses.

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

59. 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 (emphasis added).

60. 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 (emphasis added).

61. Alternatively, Section 1342(b)(2) sets forth the amount of 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.

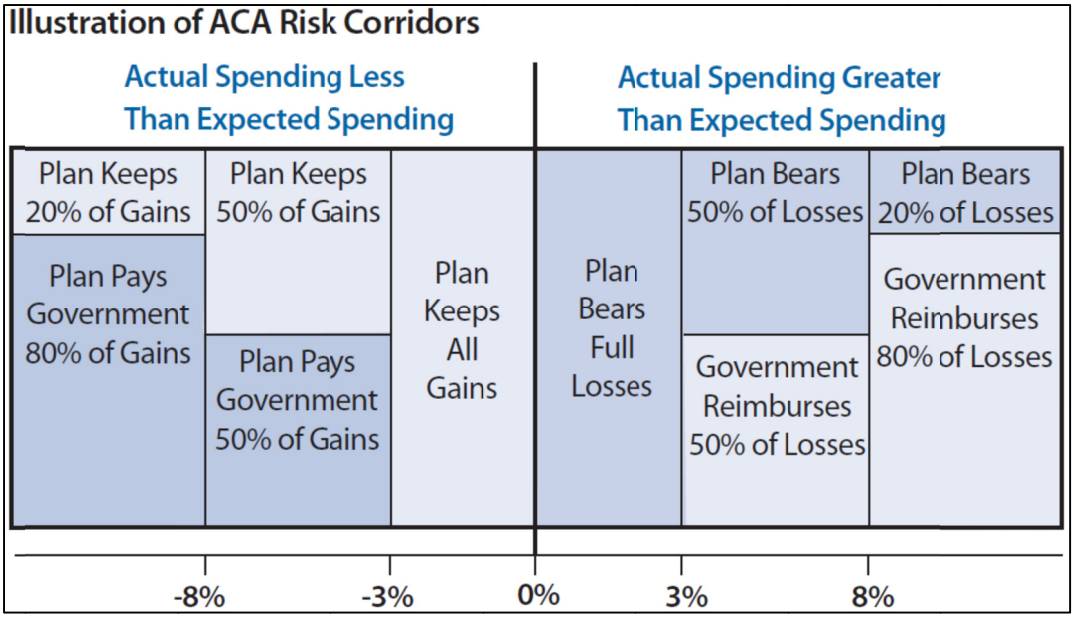
62. Section 1342(b)(2)(A) requires that if a QHP's allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, then "the plan *shall pay* to the Secretary [of HHS]" an amount equal to 50 percent of the excess of 97 percent of the target amount over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

63. 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 (emphasis added).

64. 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. 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.

65. 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 corridor payments the Government must pay under different allowable cost, target amount, and gain and loss scenarios. *See* 76 FR 41929, 41943 (July 15, 2011), attached hereto at Exhibit 18.

66. 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 19.

67. As detailed below, in CY 2014, the Plaintiff Insurers experienced allowable-cost losses of more than three percent of target amounts in most of the ACA markets in which they collectively participated, making them eligible to receive mandatory risk corridor payments required under Section 1342.

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

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

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

71. HHS and CMS thus lack statutory authority to pay anything less than 100% of the

risk corridor payments due to Plaintiff Insurers for CY 2014.

72. Furthermore, HHS publicly affirmed in the Federal Register dated March 11, 2013 – while health insurers, including the Plaintiff Insurers, were contemplating whether to agree to participate in the new Exchanges that were opening on January 1, 2014 – that the risk corridors program is not statutorily required to be budget neutral, and HHS confirmed that, "Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013), attached hereto at Exhibit 20.

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

74. The United States, however, has refused to make full and timely risk corridor payments to the Plaintiff Insurers for CY 2014 as required by Section 1342.

HHS's Risk Corridors Regulations

75. Congress directed HHS to administer the risk corridors program enacted in Section 1342. *See* 42 U.S.C. § 18062(a). Accordingly, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153.

76. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation 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 21.

77. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk

corridor 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.

78. 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.

79. Additionally, 45 C.F.R. § 153.510(d) imposes a 30-day deadline for a QHP to fully remit charge payments to HHS when the QHP's allowable costs in a calendar year are less than 97 percent of the QHP's target amount, specifically stating that:

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

80. CMS did not impose a deadline for HHS to tender full risk corridor payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount.

81. During the proposed rulemaking that ultimately resulted in adoption of the 30-day charge-remittance deadline for QHPs at 45 C.F.R. § 153.510(d), however, CMS and HHS stated that the deadline for the Government's payment of risk corridor 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. 18; 77 FR 17219, 17238 (Mar. 23, 2012), attached hereto at Exhibit 22.

82. On July 15, 2011, CMS and HHS printed the following in its proposed rule in the Federal Register:

> 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. 18.

83. On March 23, 2012, CMS and HHS printed the following in its final rule in the Federal Register:

> 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*.

77 FR 17219, 17238 (Mar. 23, 2012), Ex. 22 (emphasis added).

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

85. Plaintiffs relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become QHPs in their respective states and accept the obligations and responsibilities of QHPs, believing that the Government would pay the full risk corridor payments owed to them within 30 days after payment obligations for a calendar year were determined should the Plaintiffs experience losses sufficient to qualify for risk corridor payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

86. The United States should have paid the Plaintiff Insurers the full CY 2014 risk corridor payments due by the end of CY 2015, but failed to do so.

87. The United States has failed or refused to make full and timely risk corridor payments to the Plaintiff Insurers for CY 2014 as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

HHS and CMS's Recognition of Risk Corridors Payment Obligations

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

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

90. Plaintiffs relied on these public statements by HHS and CMS to assume and continue their QHP status, including their continued participation in the ACA Exchanges in their respective states.

91. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," stating that under the risk corridors program, "qualified health plan issuers with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of those losses." HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011), attached hereto at Exhibit 23.

92. 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 corridor payments, HHS 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), Ex. 22.

93. 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, "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. 20.

94. In September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, First Priority, Highmark West Virginia, Highmark Health Services, HHIC, and Highmark Delaware executed the CY 2014 QHP Agreements and became QHPs. *See* Exs. 02 to 06.

95. In HHS's response letter to the U.S. Government Accountability Office ("GAO") dated May 20, 2014, HHS again admitted that "Section 1342(b)(1) … establishes … the formula

to determine … the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met." Letter from William B. Schulz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), attached hereto at Exhibit 24.

96. 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 25.

97. In October 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, First Priority, Highmark West Virginia, Highmark Inc., HHIC, and Highmark Delaware executed the CY 2015 QHP Agreements. *See* Exs. 07 to 11.

98. On February 27, 2015, HHS's implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), further confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." 80 FR 10749, 10779 (Feb. 27, 2015), attached hereto at Exhibit 26.

99. CMS's letter to state insurance commissioners on July 21, 2015, stated in boldface text that "**CMS remains committed to the risk corridor program.**" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), attached hereto at Exhibit 27.

100. In September 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, First Priority, Highmark West Virginia, Highmark Delaware, HSR, Highmark Inc., and HHIC executed the CY 2016 QHP

Agreements. *See* Exs. 12 to 17.

101. 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." Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), attached hereto at Exhibit 28.

102. HHS and CMS's direct statements to the Plaintiff Insurers also have unequivocally confirmed the agencies' position that risk corridor payments owed to the Plaintiff Insurers are a binding obligation of the United States.

103. CMS's letter to the Plaintiff Insurers on October 8, 2015 stated, "I wish to reiterate to you that the Department of Health and Human Services (HHS) recognizes that the Affordable Care Act *requires* the Secretary to make full payments to issuers." Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to David L. Holmberg, President and CEO, Highmark Health (Oct. 8, 2015) (emphasis added), attached hereto at Exhibit 29.

104. In CMS's letter to the Plaintiff Insurers on April 1, 2016, although CMS reaffirmed that "remaining risk corridor claims *will be paid*," it stated that the amounts owed would be delayed and contingent upon the Government's receipt of sufficient risk corridor charges/collections for CY 2015 and/or CY 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to David L. Holmberg, President and CEO, Highmark Health (Apr. 1, 2016) (emphasis added), attached hereto at Exhibit 30. The Government thus left the Plaintiff Insurers guessing when—if ever—the United States would make the CY 2014 risk corridor payments owed to them.

The United States' Failure to Honor its Obligations

105. Beginning in 2014 – after the Plaintiff Insurers (which had executed the CY 2014 QHP Agreements in September 2013) had already begun to participate in their respective states' CY 2014 ACA Exchanges in reliance upon the risk corridor payment provisions in Section 1342 and 45 C.F.R. § 153.510, as well as upon HHS and CMS's statements confirming their obligations to make full and timely risk corridor payments – the Government announced that the United States would not honor its mandatory risk corridor payment obligations.

106. On March 11, 2014, HHS stated in the Federal Register that "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Exhibit 31.

107. This statement was inconsistent with HHS's prior statement – made exactly one year earlier in the Federal Register, March 11, 2013 – which stated: "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 20.

108. On April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," which contained HHS and CMS's statement 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 32.

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

110. Only one month earlier, on March 11, 2014, HHS and CMS had announced in the Federal Register 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. 31.

111. On December 16, 2014, 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.

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

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

128 Stat. 2491 (emphasis added), attached hereto at Exhibit 33.

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

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

115. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, HHS and CMS announced that it intended to prorate the risk corridors payments owed to QHPs, including the Plaintiff Insurers, for CY 2014, stating that:

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

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), attached hereto at Exhibit 34.

116. 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 corridor payments to QHPs starting in December 2015. *See id.*

117. Simultaneously on October 1, 2015, HHS and CMS sent to Highmark President and Chief Executive Officer, David Holmberg, a letter stating that "The remaining 2014 risk corridors claims [owed to the Plaintiff Insurers] will be paid out of 2015 risk corridors collections, and if necessary, 2016 collections." Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to David L. Holmberg, President and CEO, Highmark Health

(Oct. 1, 2015), attached hereto at Exhibit 35.

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

> Since this is a three year program, we will not know the total loss or gain for the program until the fall of 2017 when the data from all three years of the program can be analyzed and verified. In the event of a shortfall for the 2016 program year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments.

Id.

119. HHS and CMS failed to provide the Plaintiff Insurers with any statutory authority for their unilateral decision to make only partial, prorated risk corridor payments for CY 2014, and to withhold delivery of full risk corridor payments for CY 2014 beyond 2015.

120. Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, on October 8, 2015, HHS and CMS stated by letter to Mr. Holmberg that:

> 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, and 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.

Letter from Counihan, CMS, to Holmberg, Highmark Health (Oct. 8, 2015), Ex. 29.

121. HHS and CMS made the same acknowledgement in a public bulletin on November 19, 2015, regarding CY 2014 risk corridor payments:

> HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation [sic] of the United States Government for which full payment is required.

Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Ex. 28.

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

123. On December 18, 2015, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

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

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

129 Stat. 2624 (emphasis added), attached hereto at Exhibit 36.

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

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

The Plaintiff Insurers' Risk Corridors Payment and Charge Amounts for CY 2014

127. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridor 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 37.

128. First Priority's losses in the Pennsylvania Individual Market for CY 2014 resulted in the Government being required to pay First Priority a risk corridors payment of $10,933,783.20. *See* CY 2014 Risk Corridors Report at Table 39 – Pennsylvania, Ex. 37.

129. The Government announced, however, that it will pay First Priority a prorated amount of $1,379,610.17 for First Priority's losses in the ACA Pennsylvania Individual Market for CY 2014. *See id.*

130. Highmark Health Service – which was referred to by HHS and CMS in the CY 2014 Risk Corridors Report as "Highmark Inc." (hereinafter referred to as "Highmark Inc.") – experienced losses in the ACA Pennsylvania Individual Market for CY 2014 that resulted in the Government being required to pay Highmark Inc. a risk corridors payment of $158,255,675.15. *See id.*

131. The Government announced, however, that it will pay Highmark Inc. a prorated amount of $19,968,489.86 for Highmark Inc.'s losses in the ACA Pennsylvania Individual Market for CY 2014. *See id.*

132. Highmark Inc.'s losses in the ACA Pennsylvania Small Group Market for CY 2014 resulted in the Government being required to pay Highmark Inc. a risk corridors payment

of $1,561,432.70. *See id.*

133. The Government announced, however, that it will pay Highmark Inc. a prorated amount of $197,019.49 for Highmark Inc.'s losses in the ACA Pennsylvania Small Group Market for CY 2014. *See id.*

134. HHIC's losses in the ACA Pennsylvania Individual Market for CY 2014 resulted in the Government being required to pay HHIC a risk corridors payment of $31,690,007.63. *See id.*

135. The Government announced, however, that it will pay HHIC a prorated amount of $3,998,602.87 for HHIC's losses in the ACA Pennsylvania Individual Market for CY 2014. *See id.*

136. Highmark West Virginia's losses in the ACA West Virginia Individual Market for CY 2014 resulted in the Government being required to pay Highmark West Virginia a risk corridors payment of $14,385,457.00. *See* CY 2014 Risk Corridors Report at Table 49 – West Virginia, Ex. 37.

137. The Government announced, however, that it will pay Highmark West Virginia a prorated amount of $1,815,137.76 for Highmark West Virginia's losses in the ACA West Virginia Individual Market for CY 2014. *See id.*

138. Highmark West Virginia's losses in the ACA West Virginia Small Group Market for CY 2014 resulted in the Government being required to pay Highmark West Virginia a risk corridors payment of $38,227.31. *See id.*

139. The Government announced, however, that it will pay Highmark West Virginia a prorated amount of $4,823.47 for Highmark West Virginia's losses in the ACA West Virginia Small Group Market for CY 2014. *See id.*

140. Highmark Delaware's losses in the ACA Delaware Individual Market for CY 2014 resulted in the Government being required to pay Highmark Delaware a risk corridors payment of $6,075,398.71. *See id.*

141. The Government announced, however, that it will only pay Highmark Delaware a prorated amount of $766,585.70 for Highmark Delaware's losses in the ACA Delaware Individual Market for CY 2014. *See id.*

142. The amount of Highmark Delaware's gains in the ACA Delaware Small Group Market for CY 2014 resulted in Highmark Delaware being required to remit a risk corridors charge to the Secretary of HHS in the amount of $90,018.42. *See* CY 2014 Risk Corridors Report at Table 9 – Delaware, Ex. 37.

143. Highmark Delaware was required to remit 100% of the amount of this charge ($90,018.42) to HHS before the close of calendar year 2015. *See id.*

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

Plaintiff	State / Market	Risk Corridor Amount	Prorated Amount	Percent Pro Rata
First Priority	PA / Individual	$10,933,783.20	$1,379,610.17	12.6%
Highmark Inc.	PA / Individual	$158,255,675.15	$19,968,489.86	12.6%
Highmark Inc.	PA / Small Group	$1,561,432.70	$197,019.49	12.6%
HHIC	PA / Individual	$31,690,007.63	$3,998,602.87	12.6%
Highmark West Virginia	WV / Individual	$14,385,457.00	$1,815,137.76	12.6%
Highmark West Virginia	WV / Small Group	$38,227.31	$4,823.47	12.6%
Highmark Delaware	DE / Individual	$6,075,398.71	$766,585.70	12.6%
Highmark Delaware	DE / Small Group	($90,018.42)	($90,018.42)	100%

145. In total, the Government is required to pay the Plaintiff Insurers CY 2014 risk corridor payments of $222,939,981.70, but the Government has announced that it will only make prorated payments to the Plaintiff Insurers equal to 12.6% of the amounts owed totaling $28,130,269.32.

146. Highmark Delaware was required to pay the Government 100% of its CY 2014

Delaware Small Group market risk corridor charges – not some unilaterally determined fraction thereof – and to do so promptly.

147. Highmark Delaware made its full and timely remittance of risk corridor charges to the Government on November 20, 2015. *See* November 2015 Financial Transaction Report for Highmark Delaware, CMS Marketplace Payments (Nov. 30, 2015), attached hereto at Exhibit 38 (showing "RCCHG" – Risk Corridor Charge – of $90,018.42 paid on EFT date of 11/20/2015).

148. The Government made some prorated risk corridor payments to the Plaintiff Insurers on December 21, 2015, January 22, 2016, February 23, 2016, and March 23, 2016, totaling $27,334,068 as of the date of the filing of this Complaint. This amount represents only approximately 12.26% of CY 2014 risk corridor payments that the Government owes to the Plaintiff Insurers; this amount does not even equal the 12.6% of CY 2014 risk corridor payments that the Government has committed to paying the Plaintiff Insurers, let alone the full risk corridor payments the Government is obligated to make to the Plaintiff Insurers.

149. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2014 risk corridor payments from QHPs such as First Priority, Highmark Inc., HHIC, Highmark West Virginia, and Highmark Delaware.

Forecast Risk Corridors Payment and Charge Amounts for CY 2015

150. The Plaintiff Insurers anticipate that the United States will fail to provide full and timely risk corridor payments to QHPs for CY 2015.

151. In the 2016 Appropriations Act, Congress specifically withheld appropriations from three large funding sources for the Government's CY 2015 risk corridor payments. 129 Stat. 2624, Ex. 36.

152. HHS and CMS have repeatedly announced that CY 2015 risk corridor collections

will first be paid for the 87.4% of CY 2014 risk corridor payments that remain due and owing to QHPs, as a result of the Government's failure to provide full and timely CY 2014 risk corridor payments. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 32; 79 FR 30239, 30260 (May 27, 2014), attached hereto at Exhibit 39 ("[I]f 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.").

153. Standard & Poor's Ratings Services predicted on November 5, 2015, that "the 2015 risk corridor [will] be significantly underfunded if external funding is not added to the risk corridor funds. We estimate that the amount of underfunding in 2015 could be close to what it was for 2014. In addition, the 2015 corridor will not have adequate funds to cover the 2014 deficit." Standard & Poor's Ratings Services, The ACA Risk Corridor Will Not Stabilize The U.S. Health Insurance Marketplace In 2015 (Nov. 5, 2015), attached hereto at Exhibit 40.

154. The Plaintiff Insurers estimate that the Government will owe them mandatory risk corridor payments totaling in excess of $300 million for CY 2015.

155. The Government's official announcement regarding CY 2015 risk corridors payment and charge amounts is anticipated to be made in the Fall of 2016, after HHS and CMS collect and analyze the relevant data from QHPs.

The Plaintiff Insurers' Efforts to Resolve Issues Out of Court

156. Since learning of HHS and CMS's decision not to make the full risk corridor payments owed to the Plaintiff Insurers in a timely manner, the Plaintiff Insurers have made

significant efforts to resolve the issue. Unfortunately, the Plaintiff Insurers' efforts to persuade HHS and CMS to honor their statutory, regulatory and contractual obligations to make full and timely risk corridors payments have been unsuccessful to date.

157. Throughout October 2015, the Plaintiff Insurers engaged in multiple communications with HHS, CMS, Members of Congress, Governors, and White House Officials to discuss the deficiency in CY 2014 risk corridor payments due to the Plaintiff Insurers.

158. On March 17, 2016, the Plaintiff Insurers sent a formal demand letter to HHS and CMS. *See* Plaintiff Insurers' Demand Letter to HHS and CMS (March 17, 2016) ("Demand Letter"), attached hereto at Exhibit 41.

159. The Plaintiff Insurers' March 17, 2016 Demand Letter requested the agencies give their final response within three weeks of that date, which was April 7, 2016. *See* Demand Letter, Ex. 41.

160. On April 1, 2016, the Plaintiff Insurers received a response to their Demand Letter from HHS and CMS, which affirmed the Government's payment obligation by stating that "2014 risk corridor payments … will be paid," but repeated the Government's plan to make such payments out of CY 2015 risk corridor collections, and if necessary, CY 2016 collections – a position that is without support in Section 1342 or its implementing regulations. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to David L. Holmberg, President and CEO, Highmark Health (Apr. 1, 2016) ("Response Letter"), Ex. 30.

161. The Response Letter also exposes the Government's position that none of the risk corridor payments for CY 2014, CY 2015 or CY 2016 are due until the Fall of 2017, after the risk corridors program has concluded. *See id.*

162. The Government's position on when the risk corridor payments must be made is

contrary to the nature, purpose, intent, and language of Section 1342 and its implementing regulations, as well as the risk corridors program's role within the ACA as a temporary program designed to mitigate the potentially significant risks posed *each year* within the first three years of the ACA Exchanges.

163. Indeed, Section 1342(b)(1) provides that the Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "for any plan year" exceed the targeted amount by a certain threshold. 42 U.S.C. § 18062(b)(1).

164. Confirming that HHS and CMS interpreted their risk corridors payment obligation to be an annual one for each of the three years of the temporary program, CMS officially booked its CY 2014 risk corridor shortfall obligation amount as a FY 2015 obligation. *See, e.g.*, Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Ex. 28 ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation of the United States Government for which full payment is required.").

165. HHS and CMS's Response Letter represents the agencies' final position, which is to refuse to agree to honor their statutory, regulatory and contractual obligations to make the full risk corridors payments owed to the Plaintiff Insurers when they became due. *See* Response Letter.

166. To the extent required, the Plaintiff Insurers have exhausted their non-judicial avenues to remedy the Government's failure to provide the full and timely mandated risk corridor payments for CY 2014 required by statute, regulation and contract.

COUNT I
Violation of Federal Statute and Regulation

(Plaintiffs First Priority, Highmark Inc., HHIC, Highmark Delaware, and Highmark West Virginia)

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

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

169. HHS and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" risk corridor 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.

170. HHS and CMS's regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit charges to HHS within 30 days after notification of such charges.

171. HHS and CMS's statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridor "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011), Ex. 18; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 22.

172. Each of the Plaintiff Insurers were QHPs in CY 2014, *see* Ex. 02 to Ex. 06, and were qualified for and entitled to receive mandated risk corridor payments from the Government.

173. Each of the Plaintiff Insurers 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 corridor payments from the Government for CY 2014.

174. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and

published the full risk corridors payment amount, totaling $222,939,981.70, that the Government concedes it owes the Plaintiff Insurers for CY 2014. *See* Ex. 37.

175. The United States has failed to make full and timely risk corridor payments to the Plaintiff Insurers for CY 2014, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make risk corridor payments.

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

177. The Government's failure to make full and timely risk corridor payments to the Plaintiff Insurers for CY 2014 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).

178. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), the Plaintiff Insurers have been damaged in the amount of at least $222,939,981.70, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II
Breach of Express Contract

(Plaintiffs First Priority, Highmark Inc., HHIC, Highmark Delaware, and Highmark West Virginia)

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

180. Each of the Plaintiff Insurers entered into separate and valid written QHP

Agreements with CMS: the CY 2014 QHP Agreements. *See* Ex. 02 to Ex. 06.

181. Each of the CY 2014 QHP Agreements were executed by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

182. Each of the CY 2014 QHP Agreements obligate CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." *Id.* at § II.d.

183. By agreeing to become QHPs, each of the Plaintiff Insurers agreed to provide health insurance on particular exchanges established under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*.

184. Each of the Plaintiff Insurers satisfied and complied with their obligations and/or conditions under the CY 2014 QHP Agreements.

185. Each of the CY 2014 QHP Agreements provide that they "will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies … ." Ex. 02 to Ex. 06 at § V.g.

186. Each CY 2014 QHP Agreement therefore incorporates the provisions of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) into each CY 2014 QHP Agreement.

187. The Government's statutory and regulatory obligations to make full and timely risk corridor payments were significant factors material to the Plaintiff Insurers' agreement to enter into the CY 2014 QHP Agreements.

188. The Government's failure to make full and timely risk corridor payments to the Plaintiff Insurers is a material breach of CMS's obligation to support the Plaintiff Insurers' functions as QHPs.

189. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $222,939,981.70, that the Government concedes it owes the Plaintiff Insurers for CY 2014. *See* Ex. 37.

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

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

192. As a result of the United States' material breaches of the CY 2014 QHP Agreements that it entered into with the Plaintiff Insurers, the Plaintiff Insurers have been damaged in the amount of at least $222,939,981.70, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT III
Breach of Implied-In-Fact Contract

(Plaintiffs First Priority, Highmark Inc., HHIC, Highmark Delaware, and Highmark West Virginia)

193. Plaintiffs reallege and incorporate by reference all of the allegations contained in

the preceding paragraphs as if fully set forth herein.

194. In the alternative, each of the Plaintiff Insurers entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely risk corridor payments to the Plaintiff Insurers for CY 2014 in exchange for each Plaintiff Insurer's agreement to become QHPs and participate in the ACA Exchanges for their respective states.

195. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's admissions regarding their obligation to make risk corridor payments were made by representatives of the Government who had actual authority to bind the United States, and constituted a clear and unambiguous offer by the Government to make full and timely risk corridor payments to health insurers, including the Plaintiff Insurers, that agreed to participate as QHPs in the CY 2014 ACA Exchanges.

196. The Plaintiff Insurers each accepted the Government's offer by agreeing to become QHPs and to participate in and accept the uncertain risks imposed by the ACA Exchanges.

197. By agreeing to become QHPs, each of the Plaintiff Insurers agreed to provide health insurance on particular exchanges established under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*.

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

199. The Government's agreement to make full and timely risk corridor payments was

a significant factor material to the Plaintiff Insurers' agreement to enter into the QHP Agreements.

200. The parties' agreement is further confirmed by the parties' conduct, performance and statements following the Plaintiff Insurers' acceptance of the Government's offer, the execution by the Parties of the CY 2014 QHP Agreements expressly incorporating "the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies," *see* Ex. 02 to Ex. 06 at § V.g., and the Government's repeated assurances that full and timely risk corridor payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 20.

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

202. The risk corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced the Plaintiff Insurers' decision to agree to become QHPs and participate in the CY 2014 ACA Exchanges.

203. The Plaintiff Insurers, in turn, provided a real benefit to the Government by agreeing to become QHPs and participate in the CY 2014 ACA Exchanges, despite the uncertain financial risk. Highmark West Virginia, for example, was the only health insurer to agree to participate as a QHP in West Virginia's ACA Exchange during CY 2014.

204. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the CY 2014 ACA Exchange programs: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to

ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

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

206. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely risk corridor payments to qualifying QHPs for CY 2014 through its conduct and statements to the public and to the Plaintiff Insurers, made by representatives of the Government who had actual authority to bind the United States. *See, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 22; Letter from Counihan, CMS, to Holmberg, Highmark Health (Oct. 8, 2015), Ex. 29; Response Letter (Apr. 1, 2016), Ex. 30.

207. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $222,939,981.70, that the Government concedes it owes the Plaintiff Insurers for CY 2014. *See* Ex. 37.

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

209. The Government's failure to make full and timely CY 2014 risk corridor payments to the Plaintiff Insurers is a material breach of each implied-in-fact contract.

210. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with the Plaintiff Insurers regarding the CY 2014 ACA Exchanges, the

Plaintiff Insurers have been damaged in the amount of at least $222,939,981.70, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

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

(Plaintiffs First Priority, Highmark Inc., HHIC, Highmark Delaware, and Highmark West Virginia)

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

212. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

213. The express or, alternatively, the implied-in-fact contracts entered into between the United States and the Plaintiff Insurers regarding the CY 2014 ACA Exchanges created the reasonable expectations for the Plaintiff Insurers that full and timely CY 2014 risk corridor payments would be paid by the Government to QHPs, just as the Government expected that full and timely CY 2014 risk corridor remittance charges would be paid by QHPs to the Government.

214. By failing to make full and timely CY 2014 risk corridor payments to the Plaintiff Insurers, the United States has destroyed the Plaintiff Insurers' reasonable expectations regarding the fruits of the express or, alternatively, the implied-in-fact contracts, in breach of an implied

covenant of good faith and fair dealing existing therein.

215. Despite the Government's failure to honor its contractual obligations, Highmark Delaware, in good faith conformance with its express or implied-in-fact contractual obligations, has submitted its full and timely CY 2014 risk corridors remittance charge owed to the Government.

216. The CY 2014 QHP Agreements allow CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions," but do not define standards for CMS's implementation of the function-supporting systems and processes.

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

218. CMS is afforded substantial discretion in determining the systems and processes that it will implement to support the Plaintiff Insurers' functions as QHPs.

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

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

(a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridor charges to the Government, but failing to create a similar deadline for the Government's full payment of risk corridor

payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline (*see, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 22);

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

(c) In Section 227 of the 2015 Appropriations Act, legislatively targeting and limiting funding sources for CY 2014 risk corridor payments after the Plaintiff Insurers had undertaken significant expense in performing their obligations as QHPs in their respective ACA Exchanges, based on the reasonable expectation that the Government would make full and timely risk corridor payments if the Plaintiff Insurers experienced sufficient losses in CY 2014;

(d) In Section 225 of the 2016 Appropriations Act, legislatively targeting and limiting funding sources for CY 2014 risk corridor payments after the Plaintiff Insurers had undertaken significant expense in performing their obligations as QHPs in their respective ACA Exchanges, based on the reasonable expectation that the Government would make full and timely risk corridor payments if the Plaintiff Insurers experienced sufficient losses in CY 2014; and

(e) Making statements regarding risk corridor payments upon which the Plaintiff Insurers relied to agree to become QHPs and participate in the ACA Exchanges, then depriving the Plaintiff Insurers of full and timely

risk corridor payments after the Plaintiff Insurers had fulfilled their obligations as QHPs by participating in the ACA Exchanges for their respective states and had suffered losses which the Government had promised would be shared through mandatory risk corridor payments.

221. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $222,939,981.70, that the Government concedes it owes the Plaintiff Insurers for CY 2014. *See* Ex. 37.

222. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, the Plaintiff Insurers have been damaged in the amount of at least $222,939,981.70, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

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

(Plaintiffs First Priority, Highmark Inc., HHIC, Highmark Delaware, and Highmark West Virginia)

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

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

225. The Plaintiff Insurers have vested property interests in their contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridor payments for CY 2014. The

Plaintiff Insurers had a reasonable investment-backed expectation of receiving the full and timely CY 2014 risk corridor payments payable to them under the statutory and regulatory formula, based on their QHP Agreements, their implied-in-fact contracts with the Government, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

226. The Government expressly and deliberately interfered with and has deprived the Plaintiff Insurers of property interests and their reasonable investment-backed expectations to receive full and timely CY 2014 risk corridor payments. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 31.

227. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 risk corridor payments would be reduced pro rata to the extent of any shortfall in risk corridor collections. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 32.

228. Further, in Section 227 of the 2015 Appropriations Act and Section 225 of the 2016 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridor payment obligations under Section 1342 of the ACA, expressly limiting the source of funding for the United States' CY 2014 risk corridor payment obligations owed to a specific small group of insurers, including the Plaintiff Insurers. *See* 128 Stat. 2491, Ex. 33; 129 Stat. 2624, Ex. 36. HHS and CMS continue to refuse to make full and timely risk corridor payments to the Plaintiff Insurers, and therefore the Government has deprived the Plaintiff Insurers of the economic benefit and use of such payments.

229. The Government's action in withholding, with no legitimate governmental

purpose, the full and timely CY 2014 risk corridor payments owed to the Plaintiff Insurers constitutes a deprivation and taking of the Plaintiff Insurers' property interests and requires payment to the Plaintiff Insurers of just compensation under the Fifth Amendment of the U.S. Constitution.

230. The Plaintiff Insurers are entitled to receive just compensation for the United States' taking of their property in the amount of at least $222,939,981.70, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

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

(1) For Count I, awarding damages sustained by the Plaintiff Insurers, in the amount of at least $222,939,981.70, subject to proof at trial, less any prorated payments made by the Government, as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the CY 2014 risk corridor payments;

(2) For Count II, awarding damages sustained by the Plaintiff Insurers, in the amount of at least $222,939,981.70, subject to proof at trial, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the CY 2014 QHP Agreements regarding the CY 2014 risk corridor payments;

(3) Alternatively, for Count III, awarding damages sustained by the Plaintiff Insurers, in the amount of at least $222,939,981.70, subject to proof at trial, less any prorated payments

made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contracts with the Plaintiff Insurers regarding the CY 2014 risk corridor payments;

(4) For Count IV, awarding damages sustained by the Plaintiff Insurers, in the amount of at least $222,939,981.70, subject to proof at trial, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the implied covenant of good faith and fair dealing that exists in the CY 2014 QHP Agreements or, alternatively, the implied-in-fact contracts regarding the CY 2014 risk corridor payments;

(5) For Count V, awarding damages sustained by the Plaintiff Insurers, in the amount of at least $222,939,981.70, subject to proof at trial, less any prorated payments made by the Government, as a result of the Defendant's taking of the Plaintiff Insurers' property without just compensation in violation of the Fifth Amendment to the U.S. Constitution;

(6) Should the Court determine, under any Count, that the Government is liable to the Plaintiff Insurers for monetary damages for failure to make full and timely risk corridor payments for CY 2014, and thus enter judgment against the United States, the Plaintiff Insurers further request that the Court declare, as incidental to that monetary judgment, that based on the Court's legal determinations as to the Government's CY 2014 risk corridor payment obligations, the Government must make full and timely CY 2015 and CY 2016 risk corridor payments to any of the Plaintiffs that experience qualifying losses during those years;

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

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

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

Dated: May 17, 2016

Respectfully Submitted,

s/ Lawrence S. Sher

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