

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

HEALTH NEW ENGLAND, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Case No. 20-924 C

**COMPLAINT**

**INTRODUCTION**

1. Plaintiff Health New England, Inc. (“Health New England”) brings this action against the United States (the “Government” or “HHS”) pursuant to the Tucker Act to recover damages and other relief based upon the Government’s failure to make payments to Health New England under Section 1342 of the Patient Protection and Affordable Care Act (“Affordable Care Act” or “ACA”) and its implementing regulations which obligate the Government to make risk corridors payments to Health New England.

2. In March 2010, Congress enacted the Affordable Care Act, which significantly reformed the nation’s health care payment and delivery system with the goal of providing health care coverage to more Americans, controlling health care costs, and providing federal financial assistance to those who need assistance paying for health care coverage.

3. Among other things, the ACA provided for the establishment of “exchanges” (also known as “marketplaces”) on which health plans (“health plans,” “plans” or “issuers”) like Health New England sell “Qualified Health Plans” to individuals and small groups.

4. The ACA-mandated exchanges were instituted in 2014, and the ACA requires that Qualified Health Plans offered on the exchanges satisfy certain criteria and requirements.

5. Health New England is a Qualified Health Plan issuer, and it has participated in the ACA-mandated exchange in Massachusetts since 2014.

6. For health plans like Health New England that agreed to do so, participation in the ACA exchanges came with risk and uncertainty.

7. To attract health plans to participate on the exchanges, the ACA created certain programs to address these risks, including the “risk corridors” program set forth in Section 1342 (“Section 1342”).

8. The risk corridors program is a temporary program in which the Government shares in the risk associated with issuers’ claims costs during the first three years of the ACA exchanges (2014, 2015 and 2016). Under the program, the Government “shall pay” risk corridors payments to issuers of Qualified Health Plans, like Health New England, if their costs exceed a target amount by certain thresholds. 42 U.S.C. § 18062(b). The formula for risk corridors payments is set forth in Section 1342 and its implementing regulations.

9. In reliance upon Section 1342 of the ACA, its implementing regulations and the Government’s representations regarding its obligation to make risk corridors payments, Health New England agreed to become a Qualified Health Plan issuer, to participate in the ACA-approved exchange in Massachusetts, and to offer Qualified Health Plans on the exchange.

10. The U.S. Supreme Court recently held that the “Risk Corridors statute created a Government obligation to pay insurers the full amount set out in § 1342’s formula.” *Maine Cmty. Health Options v. United States*, 590 U.S. \_\_\_, 140 S. Ct. 1308, 1319 (Apr. 27, 2020).

11. The Government, however, has breached its obligations to make risk corridors payments to Qualified Health Plan issuers, including Health New England.

12. Specifically, the Government is obligated to pay Health New England at least \$2,414,490.13 in risk corridors payments for calendar year 2016.

13. The Government has failed to pay Health New England these mandatory risk corridors payments for 2016.

14. Health New England has upheld its end of the bargain and the statutory obligations imposed upon it as a Qualified Health Plan issuer under the ACA. The Government should be required to uphold its obligations to Health New England under the risk corridors program.

### **JURISDICTION AND VENUE**

15. This Court has jurisdiction and venue is proper under the Tucker Act because Health New England brings claims for damages over \$10,000 against the United States based upon the Government's violations of money-mandating statutory provisions and regulations and an implied-in-fact contract with the United States. *See* 28 U.S.C. § 1491(a)(1); *Maine Cmty. Health Options*, 140 S. Ct. at 1327 (holding that insurers seeking to recover risk corridors payments under the ACA "properly relied on the Tucker Act to sue for damages in the Court of Federal Claims").

16. The governmental actions or decisions at issue were taken on behalf of the United States, the Defendant in this action.

### **PARTIES**

17. Health New England is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts with a principal place of business in Springfield, Massachusetts.

18. Originally incorporated in 1985, Health New England is a licensed health maintenance organization under Massachusetts law and offers comprehensive, affordable health plans to individuals in its service area, primarily in Western Massachusetts. Health New England's mission is to improve the health and lives of the people in the communities it serves, and it works to further the goals of the Affordable Care Act by, among other things, providing individuals in those communities with access to high quality, affordable health plans on the Massachusetts exchange. Health New England's sole member is Baystate Health, Inc., a nonprofit corporation and integrated healthcare system serving the communities in and around Western Massachusetts.

19. At all relevant times, Health New England has been a Qualified Health Plan issuer participating in the exchange in Massachusetts, known as the Massachusetts Health Connector.

20. Defendant is the Government, the United States, acting at times through HHS (the U.S. Department of Health and Human Services), including an agency of HHS, the Centers for Medicare and Medicaid Services ("CMS").

### **FACTUAL ALLEGATIONS**

#### **A. The risk corridors program was established to address the risks associated with the early years of the health care exchanges mandated by the ACA**

21. In 2010, Congress enacted the Affordable Care Act (Pub. L. No. 111-148, 124 Stat. 119 (2010)) with the goals of expanding the number of Americans covered by health insurance and decreasing health care costs. In particular, the ACA included reforms designed to expand coverage in the individual and small group markets in order to increase health care access and to make affordable health care coverage available to all Americans.

22. Among other things, the ACA created health insurance "exchanges" on which issuers could sell health plans to individuals and small groups. 42 U.S.C. § 18031(b)(1). The

ACA requires health plans issued through the exchanges – Qualified Health Plans or “QHPs” – to satisfy certain criteria, including that such plans provide delineated essential health benefits.

*See* 42 U.S.C. § 18021, *et seq.*

23. The ACA prohibits health plans from setting premiums rates or denying coverage based upon health status, medical history, preexisting conditions, gender, or industry of employment. The ACA requires 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).

24. Recognizing that there would be uncertainty and unknowns with respect to the establishment of the exchanges as health plans “set premiums for a new group of people and implemented a higher standard of coverage,” the ACA created three premium-stabilization programs to assist health plans “through the transition period, and to create a stable, competitive and fair market for health insurance.” CMS, *The Three Rs: An Overview* (Oct. 1, 2015).<sup>1</sup> One of these programs was the risk corridors program established under Section 1342 of the ACA.

25. The risk corridors program was temporary and was in effect for each calendar year from 2014 through 2016.

26. The goal of the risk corridors program was to provide plans which offered Qualified Health Plans on the exchanges “with additional protection against uncertainty in claims costs during the first three years of the [exchanges],” specifically 2014, 2015 and 2016. CMS, *The Three Rs: An Overview* (Oct. 1, 2015). *See also* *Maine Cmty. Health Options*, 140 S. Ct.

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<sup>1</sup> Available at <https://www.cms.gov/newsroom/fact-sheets/three-rs-overview> (last visited July 28, 2020).

at 1315 (the risk corridors program is a “temporary framework meant to compensate insurers for unexpectedly unprofitable plans during the marketplaces’ first three years”).

27. Under the risk corridors program, the Government shares in the risk associated with the early years of the exchanges along with the Qualified Health Plan issuers participating in the exchanges’ individual and small group markets.

28. The risk corridors program applied only to health plans, like Health New England, that participated in the exchanges and accepted the obligations and requirements of Qualified Health Plans set forth in the ACA and its implementing regulations.

29. Under Section 1342(a) of the ACA, all health plans that elected to enter into agreements to become Qualified Health Plan issuers were required to participate in the risk corridors program. 42 U.S.C. § 18062(a).

30. In reliance upon the existence of the premium stabilization programs, including the risk corridors program, Health New England voluntarily offered various Qualified Health Plans on the ACA exchange in Massachusetts since the launch of the ACA-mandated exchanges on January 1, 2014, including in benefit years 2014, 2015 and 2016.<sup>2</sup>

**B. Section 1342 sets forth mandatory risk corridors payment obligations and the methodology for calculation of risk corridor payments**

31. Section 1342(a) of the ACA requires that the Secretary of the U.S. Department of Health and Human Services (the “Secretary”) “establish and administer a program of risk corridors for calendar years 2014, 2015 and 2016....” 42 U.S.C. § 18062(a).

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<sup>2</sup> CMS defines “benefit year” as “[a] year of benefits coverage under an individual health insurance plan.” *See Benefit Year*, Healthcare.gov, <https://www.healthcare.gov/glossary/benefit-year/> (last visited July 28, 2020). The benefit year is the same as the calendar year. *See id.* (“The benefit year for plans bought inside or outside the Marketplace begins January 1 of each year and ends December 31 of the same year”).

32. Under the risk corridors program, the Government must share risk with issuers of Qualified Health Plans “offered in the individual or small group market” using “a payment adjustment system based on the ratio of the allowable costs of the plan to the plan’s aggregate premiums” for each of the three calendar years for which the program was in effect. 42 U.S.C. § 18062(a).

33. “Plans with profits above a certain threshold would pay the Government, while plans with losses below that threshold would receive payments from the Government.” *Maine Cmty. Health Options*, 140 S. Ct. at 1316 (citation omitted).

34. Section 1342(b) sets forth the methodology and formula to calculate payments made by the Government to health plans (“payments out”) and payments made by health plans to the Government (“payments in”) under the risk corridors program:

(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).

35. Under the risk corridors payment formula set forth in Section 1342, for each calendar year from 2014 through 2016, the amount of a Qualified Health Plan issuer's "allowable costs" ("an amount equal to the total costs (other than administrative costs[, risk adjustment and reinsurance payments]) of the plan in providing benefits covered by the plan") is compared against a "target amount" ("an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan"). 42 U.S.C. §§ 18062(c)(1)-(2).

36. The statute sets forth the specific formula for calculating payments by the Government to a plan if the plan's allowable costs exceed the target amount by certain thresholds.

37. Under the risk corridors program, the Government only shares in the risk if a plan's allowable costs are more than 3 percent over (or 3 percent under) the target amount.

38. Under Section 1342(b), if a plan's allowable costs in a calendar year are within 3 percent of the target amount, the plan would keep the gains (or losses) and no payments are made either to the Government by the plan or to the plan by the Government.

39. If a plan's allowable costs in a calendar year are more than 103 percent, but not more than 108 percent, of the target amount, Section 1342(b)(1)(A) requires that "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.” 42 U.S.C. § 18062(b)(1)(A) (emphasis added).

40. If a plan’s allowable costs in a calendar year are more than 108 percent of the target amount, Section 1342(b)(1)(B) requires that “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.” 42 U.S.C. § 18062(b)(1)(B) (emphasis added).

41. If a plan’s allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, Section 1342(b)(2)(A) requires that “the plan shall pay to the Secretary an amount equal to 50 percent of the excess of the 97 percent of the target amount over the allowable costs.” 42 U.S.C. § 18062(b)(2)(A).

42. If a plan’s allowable costs in a calendar year are less than 92 percent of the target amount, Section 1342(b)(2)(B) requires that “the plan shall pay to the Secretary an amount equal to 2.5 percent of the target amount plus 90 percent of the excess of 92 percent of the target amount over the allowable costs.” 42 U.S.C. § 18062(b)(2)(B).

**C. The Government adopts regulations implementing the risk corridors program, confirming the mandatory nature of its risk corridors payment obligations**

43. Section 1342 explicitly directs HHS to “establish and administer” the risk corridors program. HHS delegated the authority to do so to CMS, an agency within HHS.

44. HHS’s and CMS’s initial interpretations of Section 1342 and the final implementing regulations demonstrate that the Government adopted a view that the payments to be made under the risk corridors program are mandatory, that the payments are to be paid promptly, and that the program is not required to be budget neutral.

45. On March 23, 2012, after a notice and comment period, HHS adopted regulations implementing the risk corridors program which include the risk corridors payments calculation

methodology required by Section 1342(b). 77 Fed. Reg. 17,220, 17,251 (Mar. 23, 2012) (codified at 45 C.F.R. § 153.510).

46. The implementing regulations set forth the specific circumstances under which the Government “will pay” plans under the risk corridors program and the calculations for the amounts of those payments:

(b) HHS payment 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.

45 C.F.R. § 153.510(b).

47. Similarly, the regulations set forth the specific circumstances under which plans “must remit” charges to the Government under the risk corridors program and the calculation for the amounts of those charges:

(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.

45 C.F.R. § 153.510(c).

48. The language used in the implementing regulations with respect to the Government's payment obligation and plans' payment obligations – “will pay” and “must remit” – confirms that those obligations are mandatory.

49. Under the implementing regulations, HHS imposed certain data reporting requirements and deadlines for Qualified Health Plans. *See* 45 C.F.R. §§ 153.510(b), 153.530.

50. The risk corridors program requires that once the data is verified, the Government must pay plans at a certain amount to the extent their allowable costs are greater than 103 percent of the target amount and at a certain amount to the extent their allowable costs are greater than 108 percent of the target amount.

51. In its final rule implementing the regulations, HHS confirmed that the risk corridors program only applied to health plans that agreed to provide Qualified Health Plans, like Health New England, and took on the risks associated with doing so. 77 Fed. Reg. 17,220, 17,237 (Mar. 23, 2012). The risk corridors, in turn, “create a mechanism for sharing risk for allowable costs between the Federal government and the QHP issuers.” *Id.* at 17236.

52. While the implementing regulations do not impose a particular deadline for the Government to make its obligatory risk corridors payments, the regulations provide that the risk corridors charges must be remitted “to HHS within 30 days after notification of such charges,” 45 C.F.R. § 153.510(d), and in the March 2012 final rule, CMS acknowledged that “QHP issuers who are owed [risk corridor] amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.” 77 Fed. Reg. at 17,238.

53. Nothing in Section 1342 or its implementing regulations limits or conditions the amount that the Government would be required to pay under the risk corridors program if a Qualified Health Plan issuer's costs meet a threshold for payment.

54. Nothing in Section 1342 or its implementing regulations provides that the amount of the payments made to Qualified Health Plan issuers in a particular calendar year is contingent upon the amount of the payments received by the Government in that calendar year under the risk corridors program.

55. Nothing in Section 1342 or its implementing regulations provides that the risk corridors program must be budget neutral. *See Maine Cmty. Health Options*, 140 S. Ct. at 1321 (“Nothing in § 1342 requires the Risk Corridors program to be budget neutral, either.”)

56. On March 13, 2013, before the risk corridors program began, HHS acknowledged in a final rule that the risk corridors program was “***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 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013) (emphasis added).

57. In Section 1342(a) itself, Congress mandated that the risk corridors program “be based on the [risk mitigation] programs for regional participating provider organizations under [Medicare Part D]” (42 U.S.C. § 18062(a)), which is also not required to be budget neutral. *See* 42 C.F.R. § 423.336.

58. Nothing in Section 1342 or its implementing regulations limited the obligation of the Government to make risk corridors payments subject to the availability of Congressional appropriations for such payments. Such language “appears nowhere in § 1342, even though Congress could have expressly limited an obligation to available appropriations or specific dollar amounts.” *Maine Cmty. Health Options*, 140 S. Ct. at 1322. “[T]he plain terms of the Risk Corridors provision created an obligation neither contingent on nor limited by the availability of appropriations or other funds.” *Id.* at 1323.

**D. The Government's efforts to void its risk corridors payment obligations under Section 1342 are impermissible under applicable law**

59. Section 1342 of the Affordable Care Act imposed a mandatory obligation on the Government to pay health plans that incurred losses exceeding a certain threshold during the first three years of their participation in the ACA-mandated exchanges.

60. In March 2014, after the ACA-mandated exchanges had been established, HHS, for the first time, stated in its annual Notice of Benefit and Payment Parameters for 2015 that it anticipated that the risk corridors program would operate in – and that it intended to implement the program in – a budget neutral manner. 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014).

61. Shortly thereafter, on April 11, 2014, CMS issued a Memorandum again stating that it intended to operate the program in a budget neutral manner:

[I]f 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 obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014).<sup>3</sup>

62. These statements from 2014 were contrary to the provisions of Section 1342 and its implementing regulations, which nowhere state that the risk corridors program must be – or would be – implemented in a budget neutral manner.

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<sup>3</sup> Available at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf> (last visited July 28, 2020).

63. Any attempt to implement the risk corridors program in a budget neutral manner or in a manner in which the Government's payment obligation is contingent on its collections is impermissible and contrary to the language of Section 1342 and its implementing regulations. *See Maine Cmty. Health Options*, 140 S. Ct. at 1321 (“Nothing in § 1342 requires the Risk Corridors program to be budget neutral . . . . Nor does the text suggest that the Secretary's payments to unprofitable plans pivoted on profitable plans' payments to the Secretary, or that a partial payment would satisfy the Government's whole obligation.”).

64. In 2014 and 2015, despite its statements that it intended to implement the risk corridors program in a budget neutral manner, HHS publicly recognized that it was obligated to make risk corridors payments to Qualified Health Plan issuers in accordance with the formula set forth in Section 1342.

65. In May 2014, HHS and CMS stated in a final rule regarding “Exchange and Insurance Market Standards for 2015 and Beyond” that “[i]n the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.” 79 Fed. Reg. 30,240, 30,260 (May 27, 2014).

66. In February 2015, HHS again confirmed “that the Affordable Care Act requires the Secretary to make full payments to issuers.” 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015).

67. At the end of 2014, Congress included a rider in its omnibus appropriations bill for fiscal year 2015, which precluded the use of three funding sources for the Government to use in meeting its risk corridors payments obligations:

Sec. 227. 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. No. 113-235, 128 Stat. 2130, 2491 (2014).

68. Congress included the same rider in appropriations bills enacted for fiscal year 2016 and fiscal year 2017. *See* Pub. L. No. 114-113, § 225, 129 Stat. 2242, 2624 (2015); Pub. L. No. 115-31, § 223, 131 Stat. 135, 543 (2017).

69. While these appropriations riders limited the funds available to HHS to make risk corridors payments, they “neither repealed nor discharged § 1342’s unique obligation.” *Maine Cmty. Health Options*, 140 S. Ct. at 1331.

**E. The Government fails to make mandatory risk corridors payments**

70. Section 1342’s payment obligation is mandatory. The statute and its implementing regulations require that the Government make risk corridors payments each year for 2014, 2015 and 2016 to the extent a health plan’s costs exceed the target amount by certain thresholds.

71. In reliance on the plain terms of Section 1342 and its implementing regulations, Health New England agreed to become a Qualified Health Plan issuer on the exchange in Massachusetts, with the understanding that the Government would be sharing in the risk of its participation if Health New England’s costs exceeded the target amount by certain thresholds.

72. On or about October 1, 2013, Health New England executed agreements to participate in, and to offer Qualified Health Plans on, the Massachusetts exchange. The agreement was amended twice – on or about November 14, 2014, and again on or about May 5, 2015 – and Health New England agreed to participate in, and to offer Qualified Health Plans on, the Massachusetts exchange in calendar year 2015 and calendar 2016, respectively.

73. Health New England, like other plans, relied upon the premium-stabilization programs of the ACA – including the risk corridors program – when it set its premiums for plans offered on the Massachusetts exchange for calendar years 2014, 2015 and 2016.

74. The risk corridors program established under Section 1342 and in HHS's implementing regulations constitutes an offer to health plans that, if the health plans agree to participate in the ACA exchanges, the Government will share in the risk by making required risk corridors payments to health plans with costs that exceeded a target amount by certain thresholds.

75. Pursuant to its obligations under the ACA and regulations thereunder, Health New England complied with its obligations under the risk corridors program and submitted all required data to HHS in a timely manner.

76. It was not until October 2015 that the Government first indicated that it would not be paying the full amounts owed for 2014, but rather it would only be paying a prorated fraction of those amounts: "Based on current data from QHP issuers' risk corridors submissions, issuers will pay \$362 million in risk corridor 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." CMS, *Risk Corridors Payment Proration Rate for 2014* (Oct. 1, 2015).<sup>4</sup>

77. In September 2016, CMS first reported that it anticipated that "no funds will be available . . . for 2015 benefit year risk corridors payments." CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016).<sup>5</sup> At the same time, CMS and HHS recognized that "the Affordable Care Act requires the Secretary to make full payments to issuers. ***HHS will record risk corridors***

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<sup>4</sup> Available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf> (last visited July 28, 2020).

<sup>5</sup> Available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF> (last visited July 28, 2020).



*payments due as an obligation of the United States Government for which full payment is required.” Id. (emphasis added).*

78. In November 2016, CMS stated that the Government would not pay any portion of its risk corridors payment obligation for 2015. CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov 18, 2016).<sup>6</sup>

79. In November 2017, CMS stated that collections for benefit year 2015 were insufficient to pay the remainder of the Government’s risk corridors obligations for 2014 and that all risk corridors collections for 2016 would be used to make additional risk corridors payments for 2014. CMS, *Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year* (Nov. 15, 2017).<sup>7</sup>

80. In other words, in November 2017, the Government stated that it would not be making any of the mandatory risk corridors payments for benefit year 2016.

81. To date, the Government has not retracted the statement that it would not be making any of the mandatory risk corridors payments for benefit year 2016.

**F. The Government breached its obligations to make risk corridors payments to Health New England for 2016**

82. The Government has a statutory obligation to make risk corridors payments owed to Health New England.

83. The Government has a contractual obligation to make risk corridors payments owed to Health New England.

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<sup>6</sup> Available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf> (last visited July 28, 2020).

<sup>7</sup> Available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-Amounts-2016.pdf> (last visited July 28, 2020).

84. For benefit year 2014, Health New England was not required to remit payment to, nor was it entitled to receive payment from, the Government under the risk corridors program.

85. In benefit year 2015, Health New England was obligated to remit a risk corridors charge to HHS in the amount of \$7,531.80, and Health New England did so on a timely basis.

86. In benefit year 2016, Health New England incurred losses obligating the Government to make payments to Health New England under the risk corridors program.

87. In November 2017, CMS issued a bulletin announcing the risk corridors payments and charges calculated for benefit year 2016, by state and issuer. CMS, *Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year* (Nov. 15, 2017) (“November 2017 Bulletin”).

88. The November 2017 Bulletin included a table showing that the risk corridors payments owed to Health New England by the Government for benefit year 2016 total \$2,414,490.13. *See id.*

89. In the November 2017 Bulletin, CMS conceded that, under the risk corridors program, the Government owes Health New England risk corridors payments in the total amount of \$2,414,490.13 for benefit year 2016. *See id.*

90. Health New England is entitled to payment from the Government in the total amount of \$2,414,490.13 under the risk corridors program for benefit year 2016.

91. The Government has failed to make any risk corridors payment to Health New England for benefit year 2016.

92. Despite its obligation to make risk corridors payments for 2016, the Government has not retracted its position that it will not be making risk corridors payments for 2016.

93. As a result of the Government’s failure to perform its obligation to Health New England under the risk corridors program, Health New England has been damaged in the amount

of at least \$2,414,490.13, plus interest, costs and such other relief as the court deems just and proper.

**COUNT I**  
**Violation of Federal Statute and Regulation**

94. Health New England realleges and incorporates the preceding allegations as if fully set forth herein.

95. Section 1342 of the ACA sets forth a mandatory obligation of the Government to make risk corridors payments to Qualified Health Plan issuers if their costs exceed target amounts by certain thresholds for each of the calendar years, 2014, 2015 and 2016.

96. The language of Section 1342 clearly and unambiguously states that the Government “shall pay” risk corridors payments to Qualified Health Plan issuers if the thresholds set forth in the payment formula are met.

97. HHS’s implementing regulations, 45 C.F.R. § 153.510(b), provide that the Government “will pay” risk corridors payments to Qualified Health Plan issuers in accordance with the formula set forth in the regulations and in Section 1342 and confirm the Government’s obligation to make risk corridors payments.

98. The United States Supreme Court has held that Section 1342 sets forth a mandatory obligation on the part of the Government to make risk corridors payments. “The Risk Corridors statute created a Government obligation to pay insurers the full amount set out in § 1342’s formula.” *Maine Cmty. Health Options*, 140 S. Ct. at 1319. “Section 1342 imposed a **legal duty** of the United States that could mature into a **legal liability** through the insurers’ actions—namely, their participating in the healthcare exchanges.” *Id.* at 1320 (emphases added).

99. Because Section 1342 is a money-mandating statute, the Government’s failure to meet its obligation to Health New England under Section 1342 entitles Health New England to

sue for damages in this Court. *See Maine Cmty. Health Options*, 140 S. Ct. at 1329 (“Section 1342’s triple mandate—that the HHS Secretary ‘shall establish and administer’ the program, ‘shall provide’ for payment according to the statutory formula, and ‘shall pay’ qualifying insurers—falls comfortably within the class of money-mandating statutes that permit recovery of money damages in the Court of Federal Claims”).

100. Health New England is a Qualified Health Plan issuer under the ACA and is therefore entitled to receive full and timely risk corridors payments if its costs exceeded the target amount by the thresholds set forth in Section 1342 and 45 C.F.R. § 153.510(b).

101. In calendar year 2016, Health New England was entitled to receive risk corridors payments from the Government in the total amount of \$2,414,490.13.

102. The Government has failed to make these mandatory payments to Health New England under the risk corridors program for 2016.

103. The Government’s obligation to make full and timely risk corridors payments to Health New England is not excused because Congress failed to appropriate sufficient funds to make such payments.

104. The Government’s violation of Section 1342 and 45 C.F.R. § 153.510(b) has caused Health New England to be damaged in the amount of at least \$2,414,490.13, plus interest, costs, and such other relief as the Court deems just and proper.

**COUNT II**  
**Breach of Implied-in-Fact Contract**

105. Health New England realleges and incorporates the preceding allegations as if fully set forth herein.

106. Health New England entered into valid implied-in-fact contracts with the Government under which the Government agreed to make full and timely risk corridors

payments to Health New England for 2014, 2015 and 2016, if Health New England's losses exceeded certain thresholds, in exchange for Health New England's agreement to become a Qualified Health Plan issuer and to participate in the exchange in Massachusetts for each of those years.

107. Section 1342 of the Affordable Care Act, its implementing regulations, and HHS's and CMS's admissions regarding the Government's obligation to make risk corridors payments were made by representatives of the Government who had actual authority to bind the United States, and constituted an unambiguous offer to make full and timely risk corridors payments to health plans, including Health New England, that agreed to participate and were approved to participate in the exchanges.

108. Health New England accepted the Government's offer by agreeing to become a Qualified Health Plan issuer, accepting the obligations and responsibilities required of Qualified Health Plan issuers under the Affordable Care Act, and providing Qualified Health Plans on the exchange in Massachusetts in each of the calendar years for 2014, 2015, and 2016.

109. Health New England satisfied and complied with its obligations and/or conditions which existed under these implied-in-fact contracts.

110. The parties' mutual intent to contract is confirmed by the parties' conduct, performance and statements following Health New England's acceptance of the Government's offer, including Health New England's commitments to participate in the exchange each year for 2014, 2015 and 2016, and the Government's repeated assurances that full and timely risk corridors payment would be made and would not be subject to budget limitations or its risk corridors collections.

111. The implied-in-fact contracts for each of 2014, 2015 and 2016 were authorized by representatives of the Government who had actual authority to bind the Government and were entered into with mutual assent by both parties.

112. The implied-in-fact contracts were supported by mutual consideration.

113. The risk corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced Health New England's decision to agree to become a Qualified Health Plan issuer and to participate in the exchange in Massachusetts each year for 2014, 2015 and 2016.

114. Health New England provided a real benefit to the Government by becoming a Qualified Health Plan issuer, participating in the exchanges in 2014, 2015 and 2016, and remitting a risk corridors charge to the Government in 2015.

115. Health New England's participation in the exchanges for each year in 2014, 2015 and 2016 was crucial to the Government in achieving an overarching goal of the ACA exchanges: to guarantee the availability of affordable, high-quality health plans.

116. Congress's failure to appropriate sufficient funds for its mandatory risk corridors payments did not defeat or otherwise abrogate the Government's contractual obligation to make full and timely risk corridors payments to Health New England.

117. The Government has conceded that, under the formula set forth in Section 1342(b) and 45 C.F.R. § § 153.510(b), Health New England is entitled to receive from the Government risk corridors payments in the total amount of \$2,414,490.13 for calendar year 2016.

118. The Government has failed to make these mandatory risk corridors payments to Health New England for calendar year 2016.

119. The Government's failure to make a full and timely risk corridors payment to Health New England for 2016 is a material breach of the parties' implied-in-fact contract.

120. As a result of the Government's material breach, Health New England has been damaged in the amount of at least \$2,414,490.13, plus interest, costs, and such other relief as this Court deems just and proper.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Health New England, Inc. requests that the Court award to Health New England the following relief:

- (1) Monetary relief of at least \$2,414,490.13, the amount to which Health New England is entitled under Section 1342 of the Affordable Care Act and 45 C.F.R. § 153.510(b) for calendar year 2016;
- (2) Pre-judgment and post-judgment interest at the maximum rate permitted by law;
- (3) Costs, expenses, and attorneys' fees as are available under applicable law; and
- (4) Such other and further relief as the Court deems just and proper.

Respectfully submitted,

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