

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MINUTEMAN HEALTH INC., a Non-Profit))	
Mutual Insurance Corporation,))	
Plaintiff,))	
v.))	
THE UNITED STATES OF AMERICA,))	No.
Defendant.))	
_____))	

COMPLAINT

1. Plaintiff Minuteman Health Inc. (“Plaintiff or “Minuteman”) is a Massachusetts non-profit health insurance company that operates in Massachusetts and New Hampshire. Minuteman is owed millions of dollars from Defendant the United States of America (“Defendant,” “United States,” or “Government”) under the risk corridors program of the Patient Protection and Affordable Care Act (the “ACA” or the “Act”). The amounts owed to Minuteman are expressly provided for by statute, regulation, and contract. They are specifically determinable as an accounting matter. And they are not in dispute. The Government has acknowledged its obligations to make full risk corridors payments to Minuteman (and other insurers) and has recorded or will record those amounts as payment obligations of the Government. Nevertheless, the Government has failed to pay the acknowledged amounts, and has publicly acknowledged that it does not anticipate meeting its future obligations either.

2. The negative impact of the Government’s failure to tender to Minuteman the full amount owed under the risk corridors program is exacerbated by the fact that Minuteman has to make full (and substantial) payments to the Government under the risk adjustment program. These two programs – risk corridors and risk adjustment – are intended to work in

tandem under the Affordable Care Act. If the programs were functioning properly, Minuteman's losses due to its risk adjustment assessments would be significantly mitigated by the money it would receive from risk corridors payments – an express feature of the risk corridors payment formula that Congress wrote into the ACA. Instead, Minuteman is being forced to pay money it owes to the Government, while also being unable to collect the money that is owed to it.

3. At the very least, where the Government is operating both programs, Minuteman should be entitled to offset – i.e., any amounts Minuteman owes under risk adjustment should be offset by any amount the Government owes under risk corridors. The Government, however, has rejected this basic common sense approach, instead applying a double standard: Minuteman must meet its payment obligations, but the Government need not make good on its debts.

4. In 2010, the Government enacted the ACA, which marked a major reform in the United States health care market. The ACA extended guaranteed availability of health care coverage to all Americans regardless of medical history and prohibited health insurers from using factors such as health status, medical history, gender, and industry of employment to set premium rates.

5. The ACA not only required individuals to purchase coverage if they were not otherwise insured, but also created federal subsidies to offset the cost of coverage. The ACA's individual health insurance policy purchase mandate, coupled with the availability of federal subsidies and the ease of online shopping, dramatically increased the number of individuals - many previously uninsured - who now purchase health insurance. To facilitate access to the new insurance markets, the Act created health insurance exchanges, which are online marketplaces through which individuals may purchase health insurance.

6. Because the ACA introduced thousands of previously uninsured or underinsured citizens into the health care marketplace, it created great uncertainty for health insurers, including Minuteman, which had no previous experience or reliable data to meaningfully assess the risks and set the premiums for this new population of insureds. Congress included three premium-stabilization programs in the ACA to mitigate the effects of this lack of information, which could otherwise compel nervous carriers to charge extremely high premiums to obtain protection against such unknown risks: a 3-year temporary reinsurance program, a 3-year temporary risk corridors program, and a permanent risk adjustment program. The reinsurance program is not at issue in this Complaint.

7. The permanent risk adjustment program aims to protect consumer access to coverage options by “reducing the incentive for insurance companies to seek only to insure healthy individuals.” CMS, *The Three Rs: An Overview* (Oct. 1, 2015), available at <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-01.html>. It does this by distributing funds to and making assessments against insurers based on the actuarial risk (*i.e.*, the relative health or sickness) of their enrollees. *Id.* Theoretically,¹ insurance issuers with healthier populations will make payments to the Government, and issuers with sicker populations will receive payments from the Government. The program aims to “level the playing field” among insurers to prevent carriers from making or losing money solely because they draw healthier or sicker enrollees.

8. The risk adjustment program can be administered by the states or by the Government. One of the states in which Minuteman issues health insurance policies –

¹ Minuteman has challenged the Government’s implementation of the risk adjustment program under the Administrative Procedures Act in a separate action pending in the United States District Court for the District of Massachusetts.

Massachusetts – chose to operate its own risk adjustment program for years 2014-2016. New Hampshire, the only other state where Minuteman issues health insurance policies, has elected to allow the federal Government to handle its risk adjustment program.

9. The three-year risk corridors program aims to support the marketplace by providing insurers with additional protection against uncertainty in claims costs during the first three years of the Marketplace. *Id.* It does this by having the Government share risk in a health plan's losses and gains. "Issuers whose premiums exceed claims and other costs by more than a certain amount pay into the program, and insurers whose claims exceed premiums by a certain amount receive payments for their shortfall." *Id.* If the amount an issuer collects in premiums in a relevant calendar year exceeds its medical expenses by a certain target amount, the issuer must make a payment to the Government. If annual premiums fall short of this target, however, the Government must make risk corridors payments to the issuer under a formula expressly prescribed in Section 1342 of the ACA.

10. The United States has admitted its statutory and regulatory obligations to pay the full amount of risk corridors payments owed to qualified health plans ("QHPs"), but has failed to make the required payments, to the tune of *over \$2.5 billion* for 2014 alone.

11. Instead of paying the full amount of risk corridors payments owed, the Government arbitrarily has paid Plaintiff, and other issuers, only a pro-rata share - roughly 12.6% - of the total amount due for 2014. The Government has recently announced that it will pay nothing for 2015. In addition, the Government is now asserting – despite its early representations to the contrary – that full payment is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in Minuteman's contracts with the Government.

12. In addition to its failure to pay risk corridors payments, the Government has continued to assess full risk adjustment payments against Minuteman without allowing for offset for the sizeable debt owed under the risk corridors program.

13. This action seeks damages from the Government of at least \$5,528,101 which represents the total amount of risk corridors payments owed to Minuteman for 2014 and the estimated amounts for 2015. This includes risk corridors payment for Minuteman's operations in both New Hampshire and Massachusetts.

14. In addition, Minuteman seeks a declaration that the Government is required to offset Minuteman's risk adjustment assessments against the risk corridors payments that will be owed by the Government to Minuteman.

15. Plaintiff also seeks declaratory relief from the Court regarding the Government's obligation to make full and timely risk corridors payments for 2015 and 2016, in accordance with the Defendant's legal obligations. The law is clear, and the Government must abide by its statutory obligations. Minuteman respectfully asks the Court to compel the Government to meet its obligations.

16. Minuteman therefore brings this action to recover damages and for declaratory relief for: (1) Defendant's failure to make mandatory risk corridors payments in violation of Section 1342 of the ACA and its implementing federal regulations; (2) Defendant's failure to make risk corridors payments in breach of its contractual obligations; (3) Defendant's breaches of the covenant of good faith and fair dealing implied in Defendant's contracts with Minuteman; (4) Defendant's improper collection of full risk adjustment payments without offsetting risk corridors payments that are or will be owed to Minuteman; and (5) Defendant's

unlawful taking of Plaintiff's property without just compensation in violation of the Fifth Amendment of the U.S. Constitution.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because Plaintiff brings claims for damages over \$10,000 against the United States, and these claims are 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 Plaintiff's property in violation of the Fifth Amendment of the Constitution.

18. 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

19. Minuteman is a not-for-profit Massachusetts company with headquarters located in Boston, serving over 25,000 members.

20. Minuteman is a member-led QHP issuer on the Massachusetts and New Hampshire exchanges. It is organized as a non-profit under the ACA CO-OP program and offers comprehensive health insurance benefits. Minuteman began providing affordable, high-quality health plans in Massachusetts in 2014 and in New Hampshire in 2015.

21. Minuteman set out to offer affordable health care coverage by securing low reimbursement rates (prices for services) from a select network of health care providers. Minuteman excludes high-priced and inefficient hospital systems from its network and instead

directs its members' care to low-cost, high-quality health care providers. In essence, Minuteman drives down the cost of healthcare services by partnering with providers willing to offer low rates without sacrificing quality, and then passes those price savings on to its members through lower insurance premiums.

22. Minuteman's business model is sound and successful. Since it entered the market in 2014, Minuteman has expanded coverage to over 25,000 members, many of whom are cost conscious and have been frustrated for years with the overpriced health insurance plans being offered in two of the most expensive insurance markets in the country.

23. Defendant is the United States of America. HHS and CMS are agencies of the Defendant United States of America. These Government agencies are responsible for overseeing the administration of the ACA.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

24. In 2010, Congress enacted the ACA, Pub. L. No. 111-148, 42 U.S.C. § 18001, *et seq.*

25. The ACA aimed to increase the number of Americans covered by health insurance and to reduce the cost of health care in the United States.

26. 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." ACA, Pub. L. No. 111-148, § 2702(a) (codified at 42 U.S.C. § 300gg-1(a)).

27. The ACA also bars insurers from charging higher premiums on the basis of a person's health. ACA, Pub. L. No. 111-148, § 2701 (codified at 42 U.S.C. § 300gg).

28. Beginning on January 1, 2014, individuals and small businesses were permitted to purchase private health insurance through competitive statewide marketplaces called “American Health Benefit Exchanges.” ACA Section 1311 establishes the framework for these exchanges. *See* ACA, Pub. L. No. 111-148, § 1311 (codified at 42 U.S.C. § 18031).

29. Minuteman participated in the Massachusetts exchange in 2014 and the Massachusetts and New Hampshire exchanges in 2015. It is currently participating in the Massachusetts and New Hampshire exchanges in 2016.

Minuteman’s Agreements with the Government

30. As noted, *supra*, one major aspect of the ACA’s health care overhaul was the establishment of health insurance exchanges, which offered consumers organized platforms to shop for coverage with specified benefit levels. These exchanges were established to meet the ACA’s goal of providing “competitive environments in which consumers can choose from a number of affordable and high quality health plans.” Steven Sheingold, et al., *Competition and Choice in the Health Insurance Marketplaces, 2014-2015: Impact on Premiums*, ASSISTANT SEC’Y FOR PLANNING AND EVALUATION ISSUE BRIEF (July 27, 2015), at 1, available at https://aspe.hhs.gov/sites/default/files/pdf/108466/rpt_MarketplaceCompetition.pdf.

31. To offer plans on the exchanges, an issuer must certify that the plans are QHPs, that is, that they meet certain federally-mandated criteria. The ACA offers tax credits and cost sharing subsidies to help lower-income individuals purchase QHPs through the exchanges. *See* ACA, Pub. L. No. 111-148, §§ 1401-02 (codified at 26 U.S.C. § 36, 42 U.S.C. § 18071).

32. In order to promote competition within the exchanges and to provide consumers with greater choice among QHPs, the ACA created the CO-OP program, which provided funding to new non-profit health insurers committed to the development of innovative health insurance models that would invigorate competition, drive costs down, and increase the

quality of health care delivered to consumers in the individual and small group markets. *See* ACA, Pub. L. No. 111-148, § 1322(a)(1)-(2) (codified at 42 U.S.C. § 18042(a)(1)-(2)); HHS, et al., *Loan Funding Opportunity Number: OO-COO-11-001* (Dec. 9, 2011), at 7, 10, available at <https://apply07.grants.gov/apply/opportunities/instructions/oppOO-COO-11-001-cfda93.545-instructions.pdf>.

33. Minuteman was initiated when a group of Massachusetts hospitals and physician practices came together to sponsor the creation of a new insurance carrier that would focus on driving down costs and steering patients to providers committed to bending the health care cost curve. These providers sponsored Minuteman to apply for CO-OP funding.

34. Minuteman was awarded this funding, and on August 13, 2012, Minuteman signed a loan agreement (“Loan Agreement”) with HHS to fund its initial formation and operation in Massachusetts. *See* Loan Agreement, CMS & Minuteman (Aug. 13, 2012). The stated purpose of the Loan Agreement (which was drafted by the Government) was to permit Minuteman “to offer qualified health plans in the individual and small group markets” on the exchanges. *Id.* at 8.

35. The Loan Agreement required Minuteman to develop a viable and sustainable CO-OP, offering plans certified by CMS as QHPs to participate on the exchanges. *See* HHS, et al., *Loan Funding Opportunity Number: OO-COO-11-001*, at 8, 22.

36. To be deemed certified, Minuteman was required to comply with all standards set forth in Section 1311(c) of the ACA, all state specific standards, and any CO-OP regulatory standards.

37. The Loan Agreement further mandated that Minuteman was to offer at least two-thirds of its plans as QHPs in the individual and small group markets. In other words,

unlike other issuers that can mitigate exposure to market instability by focusing on the large group, self-insured, and off-exchange markets, Minuteman is *required* to transact substantially all of its business in the individual, small group, and on-exchange markets – precisely those markets that are being rocked by the dysfunctional risk corridors and risk adjustment programs.

38. The Loan Agreement was executed by representatives of the Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

39. The financial risk sharing that Congress mandated through the risk corridors program was a significant factor in Minuteman’s decision to agree to execute the Loan Agreement, become a QHP, and undertake the many responsibilities and obligations required for Minuteman to participate in the ACA exchanges.

The ACA’s Premium-Stabilization Programs

40. To help protect health insurers against the risks inherent in covering a new and previously uninsured population about whom little was known, the ACA established three premium-stabilization programs, commonly referred to as the “Three Rs”: (1) a three-year risk corridors program; (2) a three-year reinsurance program; and (3) a permanent risk adjustment program. Two are relevant to this action: risk corridors and risk adjustment.

41. The goal of the temporary risk corridors program, which is the main focus of this action, is to give insurers payment stability as insurance market reforms are implemented.

42. The ongoing risk adjustment program is intended to make 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.

43. The financial protections that Congress provided in the statutory premium-stabilization programs, including the mandatory risk corridors payments, provided QHPs with

the security – backed by federal law and the full faith and credit of the United States – to become participating health insurers in their respective states’ ACA exchanges, at considerable cost to the QHPs, and despite the significant financial risks posed by the uncertainty in the new health care markets.

44. Minuteman has stayed true to its mission and to the goals of the ACA, expanding health care coverage by providing quality health insurance products at affordable rates. But doing so is not easy in a new market where the risk profile of its enrolled population is unknown. Minuteman has none of the information that is typically used by insurers to set premiums. Minuteman could have protected itself from these unknown risks by setting premiums high – attempting to ensure that it would take in more money than it would pay out in claims. But, doing that would be anathema to the mission of Minuteman and the ACA. Rather, Minuteman relied on the protections built into the market stabilization programs, including the risk corridors program, to keep its premiums at affordable levels. The premium rates Minuteman set for its QHPs were lower than they would have been in the absence of the Government’s promise of risk corridors payments.

45. The lower premiums obviously benefit Minuteman’s 25,000 members. But they also benefit the Government and the taxpayers. The Government is obligated to provide premium tax credits under the ACA, to help individuals pay premiums for QHPs. Higher premiums equates to higher Government payments. By keeping premiums low, the tax credits provide by the Government to Minuteman members were much less than they otherwise would have been.

46. Minuteman 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

47. As noted above, this action is primarily concerned with the risk corridors program.

48. 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 between the Government and certain participating health plans in the individual and small group markets. *See* ACA, Pub. L. No. 111-148, § 1342 (codified at 42 U.S.C. § 18062).

49. The risk corridors program applies only to participating plans that agreed to accept the responsibilities and obligations of 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. As a CO-OP, Minuteman was required by its Loan Agreement to become a QHP and thus to participate in the risk corridors program.

50. Under the risk corridors program, the 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.

51. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the exchanges during the first few years, 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.

52. 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. Risk corridors were designed to protect against the uncertainty that health insurers, like Minuteman, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the Government and issuers of QHPs in each of the first three years of the new regulatory scheme and exchange marketplaces.

53. Congress, through Sections 1342(b)(1) and (2) of the ACA, expressly established the payment methodology and formula for 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.

ACA, Pub. L. No. 111-148, § 1342(b) (codified at 42 U.S.C. § 18062(b)) (emphasis added).

54. HHS implemented the risk corridors program in the Code of Federal Regulations at 45 C.F.R. § 153.510. In relevant part, Section 153.510 states:

(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.

Risk Corridors Establishment and Payment Methodology, 45 C.F.R. § 153.510(b) (2016) (emphasis added).

55. 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).

56. 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.

57. As detailed below, in 2014 and 2015, Minuteman experienced allowable-cost losses in excess of its target amount, making Minuteman eligible to receive mandatory risk corridors payments required under Section 1342, although the Government has failed to make full and timely payment.

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

59. HHS and CMS, which are charged with administering the risk corridors program, lack authority to pay anything less than 100% of the risk corridors payments due to Minuteman and are legally obligated to make full payment.

HHS and CMS's Recognition of Risk Corridors Payment Obligations

60. Since Congress's enactment of the ACA in 2010, HHS and CMS have repeatedly and publicly acknowledged and confirmed their statutory and regulatory obligations to make full and timely – *i.e.*, annual – risk corridors payments to qualifying QHPs.

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

62. HHS and CMS intended for QHPs to rely on these public statements to assume and continue their QHP status, and participate on the ACA exchanges.

63. 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.” *Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment*, HEALTHCARE.GOV (July 11, 2011) (emphasis added).

64. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment. *See Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment*, 77 Fed. Reg. 17,219 (Mar. 23, 2012). Although HHS did not expressly propose deadlines for making risk corridors 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.” *Id.* at 17,238. The payment deadline for QHP issuers to pay HHS under the risk corridors program is, for each applicable year, “within 30 days after notification of such charges” by the Government. *See* 45 C.F.R. § 153.510(d).

65. On March 11, 2013, HHS publicly affirmed that the risk corridors program is *not* statutorily required to be budget neutral, *i.e.*, payments into the program do not have to equal payments out of the program. *See* HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,409 (Mar. 11, 2013). 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.” *Id.* at 15,473. Most recently, on September 14, 2016, Andrew Slavitt, the Acting Administrator of CMS, testified at a joint hearing of Subcommittees within the Committee on Energy and Commerce. When asked whether CMS takes the position that insurance plans are entitled to be made whole on risk corridors payments, even if there is no congressional appropriation to do so, Mr. Slavitt responded under oath: “Yes. It is an obligation of the federal government.” Energy and Commerce Committee, *The Affordable Care Act on*

Shaky Ground: Outlook and Oversight (Sept. 14, 2016), available at <https://energycommerce.house.gov/hearings-and-votes/hearings/affordable-care-act-shaky-ground-outlook-and-oversight>.

66. The statute is in fact clear that the Government will share in the losses for plans with higher than anticipated costs so that if, hypothetically, all plans have higher than anticipated costs, the Government would need to make full payments to each plan, even though there would be no insurer payments coming in. The risk corridors program thus could not have been subject to budget neutrality and still in accord with Congressional intent. Had the program been cabined by budget neutrality concerns, the ACA would have failed to attract sufficient entrants into the marketplace because the investment would have been too risky, as payments owed could easily swamp payments made into the program (as actually happened). HHS's timely payment to plans under the risk corridors program is essential to realizing the ACA's intent that the program stabilize premiums. Indeed, Section 1342 is modeled for just that reason on the Medicare Part D program, which also is not required to be budget neutral. *See Risk Sharing Arrangements*, 42 C.F.R. § 423.336 (2016).

67. In deciding to enter into the Loan Agreement and to become a QHP, Minuteman relied upon HHS's commitments to make full risk corridors payments annually, as required by Section 1342 of the ACA, regardless of whether risk corridors payments to QHPs were greater than risk corridors charges collected from QHPs for a particular calendar year.

The Government Reneges on Its Statutory Obligation to Make Full and Timely Risk Corridors Program Payments

68. Since its enactment, Congress has not altered the Government's obligations under the ACA's risk corridors program. Nevertheless, the Government has taken several steps to frustrate the purpose the program was intended to serve: timely and complete

annual payment to QHP issuers in order to permit them to survive, learn from, and adapt to this uncharted new market.

69. The first such step was in March 2014, when HHS stated in the Federal Register that “HHS intends to implement this [risk corridors] program in a budget neutral manner.” HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,743, 13,829 (Mar. 11, 2014).

70. That 2014 guidance radically departed from what the ACA intended and requires and what the implementing regulation reflected: that the risk corridors program had been enacted without regard to annual budget neutrality. Indeed, one year earlier, HHS clearly stated “[t]he risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.” HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. at 15,473.

71. Then, in April 2014, CMS issued a statement entitled “Risk Corridors and Budget Neutrality,” asserting:

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.

CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), at 1, available at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf>.

72. On December 16, 2014, Congress enacted the “Consolidated and Further Continuing Appropriations Act, 2015” (the “2015 Appropriations Act”). *See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130.*

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

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

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2491 (emphasis added).

74. Section 1342(b)(1) of Public Law 111-148 – referenced immediately above – is the ACA’s prescribed methodology for the Government’s mandatory risk corridors payments to QHPs.

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

76. On October 1, 2015, after collecting risk corridors data from QHPs for 2014, HHS and CMS announced that they intended to prorate the risk corridors payments owed to QHPs, including Plaintiff, for 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.**

CMS, *Risk Corridors Payment Proration Rate for 2014* (Oct. 1, 2015), available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf> (emphasis in original).

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

78. More recently, on April 1, 2016, CMS reaffirmed in a letter to another QHP that - although “remaining risk corridors claims will be paid” - the amounts owed would be delayed and contingent upon the Government’s receipt of sufficient risk corridors charges/collections for 2015 and/or 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces & Dir. of CCIIO, to David L. Holmberg, President & CEO of Highmark Health (Apr. 1, 2016). The Government has thus left QHPs to guess when—if ever—the United States will make the 2014 risk corridors payments it owes.

79. HHS and CMS failed to cite any statutory authority for their unilateral decision to make only partial, prorated risk corridors payments.

80. Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, on November 19, 2015, HHS and CMS issued a bulletin acknowledging the Government’s obligation to make full risk corridors 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.

CMS, *Risk Corridors Payments for the 2014 Benefit Year* (Nov. 19, 2015), available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.

81. The Government’s written acknowledgement of its risk corridors payment obligation, however, is no substitute for full and timely payment of the amounts owed.

82. On December 18, 2015, Congress enacted the “Consolidated Appropriations Act, 2016” (the “2016 Appropriations Act”). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242.

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

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

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225, 129 Stat. 2624 (emphasis added).

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

85. Congress’s failure to appropriate sufficient funds for risk corridors payments, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States’ statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Minuteman. While Congress may have the power to amend legislation through an appropriations act, it can only do so when the text of that act expressly provides for such a modification. The mere failure to appropriate funds does not, by itself, extinguish any Government obligation under the ACA, or any other statute.

86. Indeed, a “cardinal rule” of statutory interpretation is that “repeals by implication are not favored.” *Morton v. Mancari*, 417 U.S. 535, 549 (1974). The doctrine disfavoring repeals by implication “applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.” *TVA v. Hill*, 437 U.S. 153, 190 (1978). Even when Congress acts deliberately to appropriate less than is owed under a statutory obligation, the obligation remains in place absent explicit language repealing the obligation. *See New York Airways, Inc. v. United States*, 177 Ct. Cl. 800, 810 (Ct. Cl. 1966) (“[T]he mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.”)

87. None of the relevant Appropriations Acts repealed or altered the mandatory risk corridors payment obligation set forth in the plain text of the ACA.

The Government Fails to Pay Money Owed to Minuteman

88. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs’ risk corridors charges and payments for 2014, and emphasized that “[r]isk 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.” CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 1, available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf>. In other words, issuers who had to pay into the risk corridors program had to pay 100% of their obligation while those who were owed money could expect only a prorated share to be paid by the Government.

89. Minuteman’s losses in the ACA Massachusetts Individual Market for plan year 2014 resulted in the Government being required to pay Minuteman a risk corridors payment of \$1,138,642.67. *Id.* at 13-14.

90. The Government announced, however, that it would pay Minuteman a prorated amount of only \$143,672.41 for Minuteman’s 2014 losses. *See id.*

91. Minuteman did not have gains in 2014 that resulted in Minuteman being required to remit risk corridors charges to the Secretary of HHS. *See generally id.*

92. Had Minuteman been required to remit a risk corridors charge to the Secretary of HHS, then Minuteman would have been required to remit 100% of the amount of the charge to HHS before the close of calendar year 2015.

93. The Government has made some prorated risk corridors payments to Plaintiff totaling \$139,606 as of the date of the filing of this Complaint. This amount represents only approximately 12.3% of 2014 risk corridors payments that the Government owes to Plaintiff - even less than the 12.6% pro rata amount that the Government stated it would pay Minuteman for 2014 risk corridors payments.

94. HHS lacks the authority, under statute, regulation or contract, to withhold full and timely 2014 risk corridors payments from QHPs such as Minuteman. The Government owes Minuteman \$999,037 for 2014 risk corridors payments.

Forecast Risk Corridors Payment and Charge Amounts for 2015

95. The United States has now stated it will not make full and timely risk corridors payments to QHPs for 2015.

96. In the 2016 Appropriations Act, Congress again specifically withheld appropriations from three large funding sources for the Government's 2015 risk corridors payments, although again Congress did not alter or repeal the Government's risk corridors payment obligation. *See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225, 129 Stat. 2624.*

97. HHS and CMS have repeatedly announced that 2015 risk corridors collections will first be paid out towards the 87.4% of 2014 risk corridors payments that remain due and owing to QHPs, as a result of the Government's failure to provide full and timely 2014 risk corridors payments. CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), at 1; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,239, 30,260 (May 27, 2014) (“[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.”)

98. 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 corridors 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), available at

https://www.globalcreditportal.com/ratingsdirect/renderArticle.do?articleId=1476233&SctArtId=352088&from=CM&nsl_code=LIME&sourceObjectId=9401106&sourceRevId=5&fee_ind=N&exp_date=20251105-19:10:01.

99. Based on estimated calculations as of the filing of this Complaint, the Government owes Minuteman mandatory risk corridors payments of at least \$4,529,064 for 2015.

100. The Government's official announcement regarding 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 Government is in anticipatory breach of its obligation to pay Minuteman's 2015 risk corridors payments.

**The Government's Refusal to Offset Risk Adjustment Assessments
Against Its Unpaid Risk Corridors Debt**

101. As noted *supra*, the temporary risk corridors program is one of three inter-related premium stabilization programs under the ACA that were intended to work together to stabilize insurance premiums.

102. The permanent premium stabilization program is the risk adjustment program, which aims to protect consumer access to coverage options by "reducing the incentive for insurance companies to seek only to insure healthy individuals." CMS, *The Three Rs: An Overview* (Oct. 1, 2015). It does this by distributing funds to and making assessments against insurers based on the actuarial risk (*i.e.*, the relative health or sickness) of their enrollees. *Id.*

103. States may offer their own risk adjustment program or allow the Government to administer the program for them.

104. For years 2014-2016, Massachusetts has elected to operate its own program, though that program was always subject to Government scrutiny and approval. Beginning in 2017, Massachusetts will not run its own state program.

105. New Hampshire has always opted to allow the Government to administer its risk adjustment program.

106. The text of the ACA statute provides that the risk adjustment program shall operate as follows:

each State shall assess a charge on health plans and health insurance issuers [in the individual or small group market within the State] . . . if the actuarial risk of the enrollees of such plans or coverage for a year is less than the average actuarial risk of all enrollees in all plans or coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974). . . .

each State shall provide a payment to health plans and health insurance issuers [in the individual or small group market within the State] . . . if the actuarial risk of the enrollees of such plans or coverage for a year is greater than the average actuarial risk of all enrollees in all plans and coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974).

ACA, Pub. L. No. 111-148, § 1343(a) (codified at 42 U.S.C. § 18063(a)).

107. The premium stabilization programs were intended to work in tandem, and the actual amount of payments and/or liability under each of the programs is intertwined.

108. As described above, the risk corridors calculation compares a QHP's allowable costs against a target.

109. The ACA expressly specifies that “[a]llowable costs shall [be] reduced by any *risk adjustment* and reinsurance payments received under section 1341 and 1343.” ACA, Pub. L. No. 111-148, § 1342(c)(1)(B) (codified at 42 U.S.C. § 18062(c)(1)(B)) (emphasis

added). Under CMS regulations, the inverse is true as well: a plan's "allowable costs" are increased by any risk adjustment or reinsurance payments made or accrued. Risk Corridors Data Requirements, 45 C.F.R. § 153.530(b)(1) (2016).

110. Based on this plain language, Minuteman appropriately believed that the risk corridors program would work together with the risk adjustment program such that if Minuteman were assessed a risk assessment payment, it could mitigate the financial loss from making that payment by collecting money from the Government under the risk corridors program. But the Government has never operated the programs in this manner. Instead, Minuteman has been forced to make its full risk adjustment payments owed in both 2014 and 2015 without receiving the full risk corridor payments.

111. While admittedly withholding the lion's share of risk corridors payments owed to Minuteman, CMS has continued to demand full risk adjustment payments from Minuteman and other QHP issuers. For example, Minuteman's risk adjustment assessment for New Hampshire was in excess of \$10 million.

112. CMS itself has construed the ACA, through its regulations, as authorizing QHP issuers to offset or "net" payments owed against payments the Government owes to the issuers, and vice versa, including with respect to risk adjustment payments, risk corridors payments, reinsurance payments, cost sharing subsidies, and premium tax credits. Payment and Collections Processes, 45 C.F.R. § 156.1215(c) (2016). CMS regulations state that the "determination of debt" owed by QHP issuers must be calculated "after HHS nets amounts owed by the Federal government under these programs..." *Id.* But CMS has refused to net QHPs' risk adjustment assessments against the full risk corridors payments owed.

113. The purpose and structure of the ACA, and CMS's implementing regulations, leave no room for CMS to unilaterally collect payments under one of the Three Rs while refusing to honor obligations under another.

114. If CMS refuses to fulfill its risk corridors obligations by direct payment because of the congressional appropriations riders, CMS should at least decrease risk adjustment collections for Minuteman by the amounts that the Government is statutorily required to pay in risk corridors payments.

Minuteman's and Other QHPs' Efforts to Resolve Issues Out of Court

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

116. On March 17, 2016, another QHP that is owed risk corridors payments for 2014 sent a formal demand letter to HHS and CMS. *See* Letter from David L. Holmberg, President & CEO of Highmark Health, to Kevin J. Counihan, CEO of Health Insurance Marketplaces & Dir. of CCIIO (Mar. 17, 2016).

117. The Government responded to the QHP's March 17, 2016 demand letter on April 1, 2016, affirming that "remaining risk corridors payments will be paid," but repeating the Government's plan to make such payments out of 2015 risk corridors collections, and if necessary, 2016 collections - a position that is without support in Section 1342 or its implementing regulations. Letter from Counihan to Holmberg (Apr. 1, 2016).

118. The Government's position on when the risk corridors 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.

119. 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. ACA, Pub. L. No. 111-148, § 1342(b)(1) (codified at 42 U.S.C. § 18062(b)(1)).

120. The Government's Response Letter of April 1, 2016, states Defendant's final position regarding its refusal to fully and timely pay risk corridors payments owed for 2014 and 2015 to QHPs, including Minuteman. *See* Letter from Counihan to Holmberg (Apr. 1, 2016).

121. On information and belief, there are no administrative avenues Minuteman is required to take before bringing this action. Even if there were, to the extent required, Plaintiff has exhausted any required non-judicial avenues to remedy the Government's failure to provide the full and timely mandated risk corridors payments or any such avenues are futile.

COUNT I

Violation of Federal Statutory and Regulatory Mandate to Make Payments

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

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

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

in accordance with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

125. 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.

126. HHS and CMS's statements in the Federal Register on July 15, 2011 and March 23, 2012, state that risk corridors "payment deadlines should be the same for HHS and QHP issuers." Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,929, 41,943 (proposed July 15, 2011); Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 17,238.

127. Minuteman was a QHP in 2014 and was qualified for and entitled to receive mandated risk corridors payments from the Government.

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

129. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$1,138,642.67 that the Government concedes it owes Minuteman for 2014. *See CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 13-14.

130. For 2015, Minuteman anticipates that the Government will owe it \$4,529,064 in risk corridors payments.

131. The United States has failed to make full and timely risk corridors payments to Minuteman, despite the Government confirming in writing that Section 1342 mandates that the Government make risk corridors payments.

132. The United States has represented that it will not make full and timely payment for the risk corridors amounts owed for 2015 or 2016.

133. Congress's failure to appropriate sufficient funds for risk corridors payments due did not and could not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Minuteman.

134. The Government's failure to make full and timely risk corridors payments to Minuteman 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).

135. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), Minuteman has been and/or will be damaged in the amount of at least \$5,528,101 together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II

Breach of Implied Covenant of Good Faith and Fair Dealing – Loan Agreement

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

137. A covenant of good faith and fair dealing is implied in every contract, 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.

138. The Loan Agreement was executed based on the reasonable expectation for Minuteman that full and timely risk corridors payments would be paid by the Government, in

order to assure that Minuteman could be a financially sustainable enterprise offering QHPs on the exchange, as it was required by the Loan Agreement.

139. By failing to make full and timely risk corridors payments to Minuteman, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the Loan Agreement, in breach of the implied covenant of good faith and fair dealing. The United States breached the implied covenant of good faith and fair dealing by, among other things:

- (a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridors charges to the Government, but failing to make full payment of risk corridors payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline. *See e.g.*, Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 17,238-39.
- (b) Requiring QHPs to fully remit risk corridors charges to the Government, but unilaterally deciding, in direct violation of the ACA, that the Government may make prorated risk corridors payments to QHPs; making repeated statements regarding its obligation to make risk corridors payments, then depriving Minuteman of full and timely risk corridors payments after Plaintiff had fulfilled its obligations as a QHP by participating on the exchanges in 2014, 2015, and 2016 and had suffered losses which the Government had promised would be shared through mandatory risk corridors payments.

140. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$1,138,642.67 that the Government concedes it owes Plaintiff for 2014. *See CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 13-14. The Government has also announced that it does not intend to pay risk corridors amounts in full in 2015, leaving QHPs to wonder what, if any amounts they will receive in 2016.

141. As a direct and proximate result of the aforementioned breach of the covenant of good faith and fair dealing, Minuteman has been damaged in the amount of at least \$5,528,101 together with any losses actually sustained as a result of the Government's breach, and such other damages and relief as this Court deems just and proper.

COUNT III

Breach of Implied-In-Fact Contract

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

143. Minuteman entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely risk corridors payments to Minuteman for benefit year 2014 in exchange for Minuteman's agreement to become a QHP issuer and participate in the Massachusetts Exchange.

144. 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 corridors 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 corridors payments to health insurers, including Plaintiff, that agreed to participate as QHPs in the 2014 ACA Exchanges.

145. Minuteman accepted the Government's offer by agreeing to become a QHP and to participate in and accept the uncertain risks imposed by the ACA Exchanges.

146. By agreeing to become a QHP, Plaintiff 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.*

147. Minuteman has satisfied and complied with its obligations and/or conditions which existed under the implied-in-fact contracts.

148. The Government's agreement to make full and timely risk corridors payments was a significant factor material to Minuteman's agreement to become a QHP issuer.

149. The parties' agreement is further confirmed by the parties' conduct, performance and statements following Minuteman's acceptance of the Government's offer, and the Government's repeated assurances that full and timely risk corridor payments would be made and would not be subject to budget limitations.

150. The implied-in-fact contract was authorized by representatives of the Government who had actual authority to bind the United States and was entered into with mutual assent and consideration by both parties.

151. The risk corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced Minuteman's decision to agree to become a QHP and to participate in the 2014 Exchange.

152. Minuteman, in turn, provided a real benefit to the Government by agreeing to become a QHP and participate on the Exchange, despite the uncertain financial risk.

153. 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, encouraged Minuteman to participate on the 2014 Exchange.

154. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely risk corridors payments to qualifying QHPs in 2014 through its conduct and statements to the public and to Minuteman and other similarly situated QHPs, made by representatives of the Government who had actual authority to bind the United States.

155. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$1,138,642.67, that the Government concedes it owes Minuteman for 2014. *See CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 13-14.

156. Congress's failure to appropriate sufficient funds for risk corridor payments due for 2014 did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridor payments.

157. The Government's failure to make full and timely 2014 risk corridors payments to Minuteman is a material breach of the implied-in-fact contract.

158. As a result of the United States' material breaches of its implied-in-fact contract that it entered into with Minuteman, Minuteman has been damaged in the amount of at least \$1,138,642.67, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT IV

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

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

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

161. Minuteman has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridors payments. Minuteman had and has a reasonable investment-backed expectation of receiving the full and timely risk corridors payments payable to it under the statutory and regulatory formula, based on the Loan Agreement, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

162. The Government expressly and deliberately interfered with and has deprived Plaintiff of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments. 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." HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. at 13,829.

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

164. HHS and CMS continue to refuse to make full and timely risk corridors payments to Minuteman, and, therefore, the Government has deprived Plaintiff of the economic benefit and use of such payments.

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

166. Minuteman is entitled to receive just compensation for the United States' taking of its property in the amount of at least \$5,528,101, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT V

Violation of Federal Statute and Regulations – Refusal to Offset Risk Adjustment

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

168. The Government's decision to assess and collect the full risk adjustment payments it alleges Minuteman owes, while refusing to honor its statutory obligation to make full risk corridors payments to Minuteman, violates Section 1342 and 1343 of the ACA and its implementing regulations.

169. The actual amount of payments and/or liability under the risk corridors and risk adjustment programs are directly intertwined. The amount of risk corridors payments owed to a QHP depends on the amount that its "allowable costs" exceed a "target amount," and the statute expressly specifies that "[a]llowable costs shall [be] reduced by any risk adjustment and reinsurance payments received under section 1341 and 1343." ACA, Pub. L. No. 111-148, § 1342(c)(1)(B) (codified at 42 U.S.C. §18062(c)(1)(B)). Under CMS regulations, the inverse is true as well: a

plan's "allowable costs" are increased by any risk adjustment or reinsurance payments made or accrued. 45 C.F.R. § 153.530(b)(1).

170. The regulations further authorize QHP issuers to offset or "net" payments owed to the federal Government against payments the federal Government owes to the issuers, and vice versa, including with respect to risk adjustment payments, risk corridors payments, reinsurance payments, cost sharing subsidies, and premium tax credits. 45 C.F.R. § 156.1215(c). CMS regulations state that the "determination of debt" owed by QHP issuers must be calculated "after HHS nets amounts owed by the Federal government under these programs..." *Id.*

171. In light of the Government's admitted failure to pay presently due risk corridors payments, under the statute and regulations, the Government must at least decrease the risk adjustment amounts assessed against Plaintiff by the amount of the Government's unpaid debt under the risk corridors program.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and against the Defendant, the United States of America, and requests the following relief:

(1) That the Court award monetary relief in the amount Plaintiff is entitled to under Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the 2014 and 2015 risk corridors payments;

(2) That the Court award damages sustained by Plaintiff as a result of the Government's breach implied covenant of good faith and fair dealing contained in the Loan Agreement.

(3) That the Court award damages sustained by Plaintiff as a result of the Government's breach of its implied-in-fact contract with Plaintiff.

(4) That the Court award just compensation for the United States' taking of its property in the amount of at least \$5,528,101.

(5) That the Court award appropriate declaratory relief, including but not limited to a declaration that the Government is obligated to make 2015 and 2016 risk corridors payments to Plaintiff within 30 days of determination of the payment amount;

(6) That the Court award appropriate declaratory relief that that the Government must set off any amounts due by Minuteman by the amounts owed by the Government under the risk corridors program.

(7) That the Court award Plaintiff such additional damages and other monetary relief as is available under applicable law;

(8) That the Court award all available interest, including, but not limited to, post-judgment interest, to Plaintiff;

(9) That the Court award all available attorneys' fees and costs to Plaintiff; and

(10) That the Court award such other and further relief to Plaintiff as the Court deems just and proper.

Dated: October 27, 2016

Respectfully submitted:

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