

Dear Speaker Ryan,

On September 9, 2016, the Centers for Medicare and Medicaid Services (CMS) published a memo announcing the Agency's intention to circumvent the Congressional prohibition on risk corridor payments by settling with insurers and paying damages from the Judgment Fund. The move is a brazen effort to violate Section 225 of Public Law No: 114-113 in which Congress made clear that CMS is prohibited from using appropriated funds to make risk corridor payments. Accordingly, we urge you to initiate a civil action on behalf of the House of Representatives in Federal court, pursuant to the authority granted you under House Resolution 676 of the 113th Congress and which remains in effect through the rules of the 114th Congress.

In its memo, CMS informed insurers that not only will HHS "record risk corridors payments due as an obligation of the United States Government for which full payment is required," CMS is also "open to discussing resolution of those claims." According to subsequent news reports, the Administration is "eager to negotiate a broad settlement" which would draw from the Judgment Fund before the next President assumes office. In accordance with longstanding precedent of the Judgment Fund, using it to settle these claims is illegal and must be challenged.

In 1998, The Government Accountability Office asserted that "converting the Judgment Fund" in the absence of "appropriations that would otherwise be available to cover those expenses" is a clear violation of the law. In the same year, the Justice department concurred with GAO's analysis of this backdoor settlement stating:

The Judgment Fund does not become available simply because an agency may have insufficient funds at a particular time to pay a judgment. If the agency lacks sufficient funds to pay a judgment, but possesses statutory authority to make the payment, its recourse is to seek funds from Congress.

Even the Administration's own Department of Justice agrees that it would be illegal to make such payments without Congressional authorization. On September 30, the Department of Justice filed motions to dismiss two lawsuits initiated by Moda Healthcare and Blue Cross Blue Shield of North Carolina to obtain a combined \$338 million they believe they are owed in risk corridors payments. In addition to arguing that the claims are not yet ripe, the Department of Justice argued on the merits that,

Section 1342 [of the ACA] does not require HHS to make risk corridors payments beyond those funded from collections. And even if that intent were unclear when the Affordable Care Act was enacted in 2010, Congress removed any ambiguity when it enacted annual appropriations laws

for fiscal years 2015 and 2016 that prohibited HHS from paying risk corridors amounts from appropriated funds other than collections.

Although we are heartened to see that at least some officials at the Department of Justice take seriously their responsibility to enforce the law, we don't believe DOJ's motion will end the Administration's attempts to bypass Congress's spending power with respect to the risk corridors program. In recent testimony before Congress, CMS Acting Administrator Andy Slavitt confirmed the Administration's intent to use taxpayer funds to settle insurers' claims.

Such an egregious misuse of taxpayer funds is not only a violation of the law but also represents an institutional challenge to the legislative branch and should be met with the fullest opposition from the House of Representatives. If such a payment is not met with a challenge from Congress, there is no limit to any Administration's ability to decide which of its priorities to fund.

In accordance with the Rules of the House of Representatives, we urge you to intervene to stop this illegal use of taxpayer funds.

Sincerely,

Chris Stewart