

119TH CONGRESS
1ST SESSION

S.

To amend the Employee Retirement Income Security Act of 1974 to ensure that pharmacy benefit managers are considered fiduciaries, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. MARSHALL (for himself, Mr. Kaine, Mr. GRASSLEY, and Ms. HASSAN) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the Employee Retirement Income Security Act of 1974 to ensure that pharmacy benefit managers are considered fiduciaries, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “PBM Fiduciary Ac-
5 countability, Integrity, and Reform (FAIR) Act” or the
6 “PBM FAIR Act”.

1 **SEC. 2. ESTABLISHING FIDUCIARY DUTIES OF PHARMACY**2 **BENEFIT MANAGERS.**

3 (a) DEEMING PHARMACY BENEFIT MANAGERS AS
4 ERISA FIDUCIARIES.—Section 3(21) of the Employee
5 Retirement Income Security Act of 1974 (29 U.S.C.
6 1002(21)) is amended by adding at the end the following:

7 “(C) A person or entity shall be deemed to be a fidu-
8 ciary with respect to a group health plan for the purposes
9 of this Act if the person or entity—

10 “(i) maintains for the group health plan, the
11 plan sponsor or plan administrator of such plan, or
12 a health insurance issuer offering group health in-
13 surance coverage a prescription drug provider net-
14 work or prescription drug formulary through the
15 purchase of prescription drugs from a drug manu-
16 facturer, distributor, wholesaler, rebate aggregator,
17 group purchasing organization, or any associated
18 third party; or

19 “(ii) engages in, on behalf of, or in connection
20 with, the group health plan, the plan sponsor or plan
21 administrator of such plan, or a health insurance
22 issuer offering group health insurance coverage—

23 “(I) the negotiation or aggregation of re-
24 bates, fees, discounts, or other price concessions
25 for prescription drugs;

1 “(II) the processing and payment of claims
2 for prescription drugs; or
3 “(III) the performance of utilization review
4 and management for prescription drugs on be-
5 half of a group health plan.”.

6 (b) REQUIRED COMPENSATION DISCLOSURES FROM
7 PHARMACY BENEFIT MANAGERS AND THIRD PARTY AD-
8 MINISTRATORS.—Section 408(b)(2)(B)(ii)(I)(bb) of the
9 Employee Retirement Income Security Act of 1974 (29
10 U.S.C. 1108(b)(2)(B)(ii)(I)(bb)) is amended by adding at
11 the end the following:

12 “(CC) Pharmacy benefit management
13 services provided to a covered plan, for
14 which the covered service provider, an affil-
15 iate, or a subcontractor reasonably expects
16 to receive indirect compensation or direct
17 compensation described in item (dd), in-
18 cluding the establishment and maintenance
19 of a prescription drug provider network or
20 prescription drug formulary or through the
21 purchase of prescription drugs from a drug
22 manufacturer, distributor, wholesaler, re-
23 bate aggregator, group purchasing organi-
24 zation, or any associated third party for
25 the covered plan.

1 “(DD) Third party administrative
2 services provided to a covered plan, for
3 which the covered service provider, an affiliate,
4 or a subcontractor reasonably expects
5 to receive indirect compensation or direct
6 compensation described in item (dd), including establishing and maintaining a network of medical providers, adjudicating or
7 processing health claims, maintaining
8 records, and negotiating reimbursement
9 rates for the covered plan.”.

12 (c) CLARIFICATION OF RESPONSIBLE PLAN FIDUCIARY.—Section 408(b)(2)(B)(ii)(I)(ee) of the Employee
13 1974 (29 U.S.C. Retirement Income Security Act of 1974 (29 U.S.C.
14 1108(b)(2)(B)(ii)(I)(ee)) is amended by inserting at the
15 end the following: “A covered service provider may not be
16 the responsible plan fiduciary for purposes of the disclosures required under clause (iii). Notwithstanding the preceding sentence, in the case of a pharmacy benefit manager who sponsors a covered plan for the employees of the
17 pharmacy benefit manager, the pharmacy benefit manager
18 may be considered the responsible plan fiduciary for such
19 plan.”.

24 (d) PROHIBITION ON INDEMNIFICATION FOR
25 BREACHES BY A SECTION 3(21)(C) FIDUCIARY.—Section

1 410(a) of the Employee Retirement Income Security Act
2 of 1974 (29 U.S.C. 1110(a)) is amended—

3 (1) by striking “Except” and inserting “(1) Ex-
4 cept”; and

5 (2) by adding at the end the following:

6 “(2) Except as provided in subsection (b)(2), no per-
7 son or entity deemed to be a fiduciary under section
8 3(21)(C) may be indemnified, directly or indirectly, or oth-
9 erwise relieved from liability for any responsibility, obliga-
10 tion, or duty of such person or entity under this part.

11 “(3) Any provision of contract in violation of para-
12 graph (2) shall be void as against public policy.”.

13 (e) TECHNICAL AMENDMENT.—Section
14 408(b)(2)(B)(i) of the Employee Retirement Income Secu-
15 rity Act of 1974 (29 U.S.C. 1108(b)(2)(B)(i)) is amended
16 by striking “this clause” and inserting “this subpara-
17 graph”.

18 (f) EFFECTIVE DATE.—The amendments made by
19 this section shall apply with respect to plan years begin-
20 ning with the first plan year that begins at least 12
21 months after the date of enactment of this Act.