

2008

1 (1) ERISA.—The table of contents in section 1
2 of the Employee Retirement Income Security Act of
3 1974 (29 U.S.C. 1001 et seq.), as amended by title
4 I, is further amended by inserting after the item re-
5 lating to section 723 the following new item:

“Sec. 724. Increasing transparency by removing gag clauses on price and qual-
ity information.”.

6 (2) IRC.—The table of sections for subchapter
7 B of chapter 100 of the Internal Revenue Code of
8 1986, as amended by title I, is further amended by
9 adding at the end the following new item:

“Sec. 9824. Increasing transparency by removing gag clauses on price and
quality information.”.

10 **SEC. 202. DISCLOSURE OF DIRECT AND INDIRECT COM-**
11 **PENSATION FOR BROKERS AND CONSULT-**
12 **ANTS TO EMPLOYER-SPONSORED HEALTH**
13 **PLANS AND ENROLLEES IN PLANS ON THE IN-**
14 **DIVIDUAL MARKET.**

15 (a) GROUP HEALTH PLANS.—Section 408(b)(2) of
16 the Employee Retirement Income Security Act of 1974
17 (29 U.S.C. 1108(b)(2)) is amended—

18 (1) by striking “(2) Contracting or making”
19 and inserting “(2)(A) Contracting or making”; and
20 (2) by adding at the end the following:

21 “(B)(i) No contract or arrangement for services
22 between a covered plan and a covered service pro-
23 vider, and no extension or renewal of such a contract

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1 or arrangement, is reasonable within the meaning of
2 this paragraph unless the requirements of this
3 clause are met.

4 “(ii)(I) For purposes of this subparagraph:

5 “(aa) The term ‘covered plan’ means a
6 group health plan as defined section 733(a).

7 “(bb) The term ‘covered service provider’
8 means a service provider that enters into a con-
9 tract or arrangement with the covered plan and
10 reasonably expects \$1,000 (or such amount as
11 the Secretary may establish in regulations to
12 account for inflation since the date of enact-
13 ment of the Consolidated Appropriations Act,
14 2021, as appropriate) or more in compensation,
15 direct or indirect, to be received in connection
16 with providing one or more of the following
17 services, pursuant to the contract or arrange-
18 ment, regardless of whether such services will
19 be performed, or such compensation received,
20 by the covered service provider, an affiliate, or
21 a subcontractor:

22 “(AA) Brokerage services, for which
23 the covered service provider, an affiliate, or
24 a subcontractor reasonably expects to re-
25 ceive indirect compensation or direct com-

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1 pensation described in item (dd), provided
2 to a covered plan with respect to selection
3 of insurance products (including vision and
4 dental), recordkeeping services, medical
5 management vendor, benefits administra-
6 tion (including vision and dental), stop-loss
7 insurance, pharmacy benefit management
8 services, wellness services, transparency
9 tools and vendors, group purchasing orga-
10 nization preferred vendor panels, disease
11 management vendors and products, compli-
12 ance services, employee assistance pro-
13 grams, or third party administration serv-
14 ices.

15 “(BB) Consulting, for which the cov-
16 ered service provider, an affiliate, or a sub-
17 contractor reasonably expects to receive in-
18 direct compensation or direct compensation
19 described in item (dd), related to the devel-
20 opment or implementation of plan design,
21 insurance or insurance product selection
22 (including vision and dental), record-
23 keeping, medical management, benefits ad-
24 ministration selection (including vision and
25 dental), stop-loss insurance, pharmacy ben-

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1 efit management services, wellness design
2 and management services, transparency
3 tools, group purchasing organization agree-
4 ments and services, participation in and
5 services from preferred vendor panels, dis-
6 ease management, compliance services, em-
7 ployee assistance programs, or third party
8 administration services.

9 “(cc) The term ‘affiliate’, with respect to a
10 covered service provider, means an entity that
11 directly or indirectly (through one or more
12 intermediaries) controls, is controlled by, or is
13 under common control with, such provider, or is
14 an officer, director, or employee of, or partner
15 in, such provider.

16 “(dd)(AA) The term ‘compensation’ means
17 anything of monetary value, but does not in-
18 clude non-monetary compensation valued at
19 \$250 (or such amount as the Secretary may es-
20 tablish in regulations to account for inflation
21 since the date of enactment of the Consolidated
22 Appropriations Act, 2021, as appropriate) or
23 less, in the aggregate, during the term of the
24 contract or arrangement.

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1 “(BB) The term ‘direct compensation’
2 means compensation received directly from a
3 covered plan.

4 “(CC) The term ‘indirect compensation’
5 means compensation received from any source
6 other than the covered plan, the plan sponsor,
7 the covered service provider, or an affiliate.
8 Compensation received from a subcontractor is
9 indirect compensation, unless it is received in
10 connection with services performed under a con-
11 tract or arrangement with a subcontractor.

12 “(ee) The term ‘responsible plan fiduciary’
13 means a fiduciary with authority to cause the
14 covered plan to enter into, or extend or renew,
15 the contract or arrangement.

16 “(ff) The term ‘subcontractor’ means any
17 person or entity (or an affiliate of such person
18 or entity) that is not an affiliate of the covered
19 service provider and that, pursuant to a con-
20 tract or arrangement with the covered service
21 provider or an affiliate, reasonably expects to
22 receive \$1,000 (or such amount as the Sec-
23 retary may establish in regulations to account
24 for inflation since the date of enactment of the
25 Consolidated Appropriations Act, 2021, as ap-

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1 appropriate) or more in compensation for per-
2 forming one or more services described in item
3 (bb) under a contract or arrangement with the
4 covered plan.

5 “(II) For purposes of this subparagraph, a de-
6 scription of compensation or cost may be expressed
7 as a monetary amount, formula, or a per capita
8 charge for each enrollee or, if the compensation or
9 cost cannot reasonably be expressed in such terms,
10 by any other reasonable method, including a disclo-
11 sure that additional compensation may be earned
12 but may not be calculated at the time of contract if
13 such a disclosure includes a description of the cir-
14 cumstances under which the additional compensation
15 may be earned and a reasonable and good faith esti-
16 mate if the covered service provider cannot otherwise
17 readily describe compensation or cost and explains
18 the methodology and assumptions used to prepare
19 such estimate. Any such description shall contain
20 sufficient information to permit evaluation of the
21 reasonableness of the compensation or cost.

22 “(III) No person or entity is a ‘covered service
23 provider’ within the meaning of subclause (I)(bb)
24 solely on the basis of providing services as an affil-
25 iate or a subcontractor that is performing one or

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1 more of the services described in subitem (AA) or
2 (BB) of such subclause under the contract or ar-
3 rangement with the covered plan.

4 “(iii) A covered service provider shall disclose to
5 a responsible plan fiduciary, in writing, the fol-
6 lowing:

7 “(I) A description of the services to be pro-
8 vided to the covered plan pursuant to the con-
9 tract or arrangement.

10 “(II) If applicable, a statement that the
11 covered service provider, an affiliate, or a sub-
12 contractor will provide, or reasonably expects to
13 provide, services pursuant to the contract or ar-
14 rangement directly to the covered plan as a fi-
15 duciary (within the meaning of section 3(21)).

16 “(III) A description of all direct compensa-
17 tion, either in the aggregate or by service, that
18 the covered service provider, an affiliate, or a
19 subcontractor reasonably expects to receive in
20 connection with the services described in sub-
21 clause (I).

22 “(IV)(aa) A description of all indirect com-
23 pensation that the covered service provider, an
24 affiliate, or a subcontractor reasonably expects

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1 to receive in connection with the services de-
2 scribed in subclause (I)—

3 “(AA) including compensation from a
4 vendor to a brokerage firm based on a
5 structure of incentives not solely related to
6 the contract with the covered plan; and

7 “(BB) not including compensation re-
8 ceived by an employee from an employer
9 on account of work performed by the em-
10 ployee.

11 “(bb) A description of the arrangement be-
12 tween the payer and the covered service pro-
13 vider, an affiliate, or a subcontractor, as appli-
14 cable, pursuant to which such indirect com-
15 pensation is paid.

16 “(cc) Identification of the services for
17 which the indirect compensation will be re-
18 ceived, if applicable.

19 “(dd) Identification of the payer of the in-
20 direct compensation.

21 “(V) A description of any compensation
22 that will be paid among the covered service pro-
23 vider, an affiliate, or a subcontractor, in con-
24 nection with the services described in subclause
25 (I) if such compensation is set on a transaction

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1 basis (such as commissions, finder's fees, or
2 other similar incentive compensation based on
3 business placed or retained), including identi-
4 fication of the services for which such com-
5 pensation will be paid and identification of the
6 payers and recipients of such compensation (in-
7 cluding the status of a payer or recipient as an
8 affiliate or a subcontractor), regardless of
9 whether such compensation also is disclosed
10 pursuant to subclause (III) or (IV).

11 “(VI) A description of any compensation
12 that the covered service provider, an affiliate, or
13 a subcontractor reasonably expects to receive in
14 connection with termination of the contract or
15 arrangement, and how any prepaid amounts
16 will be calculated and refunded upon such ter-
17 mination.

18 “(iv) A covered service provider shall disclose to
19 a responsible plan fiduciary, in writing a description
20 of the manner in which the compensation described
21 in clause (iii), as applicable, will be received.

22 “(v)(I) A covered service provider shall disclose
23 the information required under clauses (iii) and (iv)
24 to the responsible plan fiduciary not later than the
25 date that is reasonably in advance of the date on

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1 which the contract or arrangement is entered into,
2 and extended or renewed.

3 “(II) A covered service provider shall disclose
4 any change to the information required under clause
5 (iii) and (iv) as soon as practicable, but not later
6 than 60 days from the date on which the covered
7 service provider is informed of such change, unless
8 such disclosure is precluded due to extraordinary cir-
9 cumstances beyond the covered service provider’s
10 control, in which case the information shall be dis-
11 closed as soon as practicable.

12 “(vi)(I) Upon the written request of the respon-
13 sible plan fiduciary or covered plan administrator, a
14 covered service provider shall furnish any other in-
15 formation relating to the compensation received in
16 connection with the contract or arrangement that is
17 required for the covered plan to comply with the re-
18 porting and disclosure requirements under this Act.

19 “(II) The covered service provider shall disclose
20 the information required under clause (iii)(I) reason-
21 ably in advance of the date upon which such respon-
22 sible plan fiduciary or covered plan administrator
23 states that it is required to comply with the applica-
24 ble reporting or disclosure requirement, unless such
25 disclosure is precluded due to extraordinary cir-

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1 cumstances beyond the covered service provider's
2 control, in which case the information shall be dis-
3 closed as soon as practicable.

4 “(vii) No contract or arrangement will fail to be
5 reasonable under this subparagraph solely because
6 the covered service provider, acting in good faith and
7 with reasonable diligence, makes an error or omis-
8 sion in disclosing the information required pursuant
9 to clause (iii) (or a change to such information dis-
10 closed pursuant to clause (v)(II)) or clause (vi), pro-
11 vided that the covered service provider discloses the
12 correct information to the responsible plan fiduciary
13 as soon as practicable, but not later than 30 days
14 from the date on which the covered service provider
15 knows of such error or omission.

16 “(viii)(I) Pursuant to subsection (a), subpara-
17 graphs (C) and (D) of section 406(a)(1) shall not
18 apply to a responsible plan fiduciary, notwith-
19 standing any failure by a covered service provider to
20 disclose information required under clause (iii), if
21 the following conditions are met:

22 “(aa) The responsible plan fiduciary did
23 not know that the covered service provider
24 failed or would fail to make required disclosures
25 and reasonably believed that the covered service

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1 provider disclosed the information required to
2 be disclosed.

3 “(bb) The responsible plan fiduciary, upon
4 discovering that the covered service provider
5 failed to disclose the required information, re-
6 quests in writing that the covered service pro-
7 vider furnish such information.

8 “(cc) If the covered service provider fails
9 to comply with a written request described in
10 subclause (II) within 90 days of the request,
11 the responsible plan fiduciary notifies the Sec-
12 retary of the covered service provider’s failure,
13 in accordance with subclauses (II) and (III).

14 “(II) A notice described in subclause (I)(cc)
15 shall contain—

16 “(aa) the name of the covered plan;

17 “(bb) the plan number used for the annual
18 report on the covered plan;

19 “(cc) the plan sponsor’s name, address,
20 and employer identification number;

21 “(dd) the name, address, and telephone
22 number of the responsible plan fiduciary;

23 “(ee) the name, address, phone number,
24 and, if known, employer identification number
25 of the covered service provider;

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1 “(ff) a description of the services provided
2 to the covered plan;

3 “(gg) a description of the information that
4 the covered service provider failed to disclose;

5 “(hh) the date on which such information
6 was requested in writing from the covered serv-
7 ice provider; and

8 “(ii) a statement as to whether the covered
9 service provider continues to provide services to
10 the plan.

11 “(III) A notice described in subclause (I)(cc)
12 shall be filed with the Department not later than 30
13 days following the earlier of—

14 “(aa) The covered service provider’s re-
15 fusals to furnish the information requested by
16 the written request described in subclause
17 (I)(bb); or

18 “(bb) 90 days after the written request re-
19 ferred to in subclause (I)(cc) is made.

20 “(IV) If the covered service provider fails to
21 comply with the written request under subclause
22 (I)(bb) within 90 days of such request, the respon-
23 sible plan fiduciary shall determine whether to ter-
24minate or continue the contract or arrangement
25 under section 404. If the requested information re-

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1 lates to future services and is not disclosed promptly
2 after the end of the 90-day period, the responsible
3 plan fiduciary shall terminate the contract or ar-
4 rangement as expeditiously as possible, consistent
5 with such duty of prudence.

6 “(ix) Nothing in this subparagraph shall be
7 construed to supersede any provision of State law
8 that governs disclosures by parties that provide the
9 services described in this section, except to the ex-
10 tent that such law prevents the application of a re-
11 quirement of this section.”.

12 (b) APPLICABILITY OF EXISTING REGULATIONS.—
13 Nothing in the amendments made by subsection (a) shall
14 be construed to affect the applicability of section
15 2550.408b–2 of title 29, Code of Federal Regulations (or
16 any successor regulations), with respect to any applicable
17 entity other than a covered plan or a covered service pro-
18 vider (as defined in section 408(b)(2)(B)(ii) of the Em-
19 ployee Retirement Income Security Act of 1974, as
20 amended by subsection (a)).

21 (c) INDIVIDUAL MARKET COVERAGE.—Subpart 1 of
22 part B of title XXVII of the Public Health Service Act
23 (42 U.S.C. 300gg–41 et seq.) is amended by adding at
24 the end the following:

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1 **“SEC. 2746. DISCLOSURE TO ENROLLEES OF INDIVIDUAL**
2 **MARKET COVERAGE.**

3 “(a) IN GENERAL.—A health insurance issuer offer-
4 ing individual health insurance coverage or a health insur-
5 ance issuer offering short-term limited duration insurance
6 coverage shall make disclosures to enrollees in such cov-
7 erage, as described in subsection (b), and reports to the
8 Secretary, as described in subsection (c), regarding direct
9 or indirect compensation provided by the issuer to an
10 agent or broker associated with enrolling individuals in
11 such coverage.

12 “(b) DISCLOSURE.—A health insurance issuer de-
13 scribed in subsection (a) shall disclose to an enrollee the
14 amount of direct or indirect compensation provided to an
15 agent or broker for services provided by such agent or
16 broker associated with plan selection and enrollment. Such
17 disclosure shall be—

18 “(1) made prior to the individual finalizing plan
19 selection; and

20 “(2) included on any documentation confirming
21 the individual’s enrollment.

22 “(c) REPORTING.—A health insurance issuer de-
23 scribed in subsection (a) shall annually report to the Sec-
24 retary, prior to the beginning of open enrollment, any di-
25 rect or indirect compensation provided to an agent or

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1 broker associated with enrolling individuals in such cov-
2 erage.

3 “(d) RULEMAKING.—Not later than 1 year after the
4 date of enactment of the Consolidated Appropriations Act,
5 2021, the Secretary shall finalize, through notice-and-com-
6 ment rulemaking, the timing, form, and manner in which
7 issuers described in subsection (a) are required to make
8 the disclosures described in subsection (b) and the reports
9 described in subsection (c). Such rulemaking may also in-
10 clude adjustments to notice requirements to reflect the dif-
11 ferent processes for plan renewals, in order to provide en-
12 rollees with full, timely information.”.

13 (d) TRANSITION RULE.—No contract executed prior
14 to the effective date described in subsection (e) by a group
15 health plan subject to the requirements of section
16 408(b)(2)(B) of the Employee Retirement Income Secu-
17 rity Act of 1974 (as amended by subsection (a)) or by
18 a health insurance issuer subject to the requirements of
19 section 2746 of the Public Health Service Act (as added
20 by subsection (c)) shall be subject to the requirements of
21 such section 408(b)(2)(B) or such section 2746, as appli-
22 cable.

23 (e) APPLICATION.—The amendments made by sub-
24 sections (a) and (c) shall apply beginning 1 year after the
25 date of enactment of this Act.