

113TH CONGRESS  
1ST SESSION

# S. 1723

To clarify that the anti-kickback laws apply to qualified health plans, the federally-facilitated marketplaces, and other plans and programs under title I of the Patient Protection and Affordable Care Act, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

NOVEMBER 19, 2013

Mr. VITTER introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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## A BILL

To clarify that the anti-kickback laws apply to qualified health plans, the federally-facilitated marketplaces, and other plans and programs under title I of the Patient Protection and Affordable Care Act, 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 “No Obamacare Kick-  
5 backs Act of 2013”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

1           (1) Section 6402(f) of the Patient Protection  
2           and Affordable Care Act (Public Law 111–148) ap-  
3           plies the civil penalties and damages for violations of  
4           the False Claims Act to kickbacks and other acts in-  
5           volving Federal health care programs that are sub-  
6           ject to criminal penalties under section 1128B of the  
7           Social Security Act (42 U.S.C. 1320a–7b).

8           (2) In guidance issued on November 4, 2013,  
9           by the Center for Consumer Information & Insur-  
10          ance Oversight (CCIIO) of the Centers for Medicare  
11          & Medicaid Services, the CCIIO stated that the “De-  
12          partment of Health and Human Services (HHS) has  
13          broad authority to regulate the Federal and State  
14          Marketplaces (e.g. section 1321(a) of the Affordable  
15          Care Act)”. The November 4th statement from the  
16          CCIIO suggests that qualified health plans and  
17          other health care plans and programs established  
18          under title I of the Patient Protection and Afford-  
19          able Care Act are similar to other Federal health  
20          care programs, such as the Medicare Advantage pro-  
21          gram, over which the Secretary of Health and  
22          Human Services also has broad regulatory authority.

23          (3) The private health insurance issuers who  
24          offer qualified health plans through marketplaces es-  
25          tablished under the Patient Protection and Afford-

1        able Care Act and the private health insurance  
2        issuers that offer Medicare Advantage plans under  
3        the Medicare program both receive Federal dollars  
4        directly from the Federal Government, with the  
5        issuers of qualified health plans receiving Federal  
6        dollars through tax credit subsidies and the issuers  
7        of Medicare Advantage plans receiving payments  
8        from the Medicare Trust Funds.

9            (4) The Federal Government facilitates applica-  
10        tions for and enrollment in qualified health plans  
11        through the federally-facilitated marketplaces and  
12        State exchanges in a similar manner to the way the  
13        Federal Government facilitates applications for and  
14        enrollment in plans under the Medicare Advantage  
15        program and the Voluntary Prescription Drug Ben-  
16        efit Program through federally funded call centers,  
17        web portals, and consumer assistance personnel.

18            (5) The Medicare Advantage program is a Fed-  
19        eral health care program to which the anti-kickback  
20        provisions of section 1128B(b) of the Social Security  
21        Act and other prohibited acts involving Federal  
22        health care programs are subject to civil and crimi-  
23        nal penalties under the Social Security Act as well  
24        as civil penalties under the False Claims Act.

1 **SEC. 3. CLARIFICATION OF APPLICATION OF ANTI-KICK-**  
2 **BACK LAWS TO QUALIFIED HEALTH PLANS,**  
3 **MARKETPLACES, AND OTHER PLANS AND**  
4 **PROGRAMS UNDER PPACA.**

5 (a) IN GENERAL.—Section 1128B(f)(1) of the Social  
6 Security Act (42 U.S.C. 1320a–7b(f)(1)) is amended by  
7 inserting before the semicolon the following: “, including  
8 any plan or program established or funded under subtitle  
9 D or E (or the amendments made by such subtitles) of  
10 title I of the Patient Protection and Affordable Care Act  
11 (including the federally-facilitated marketplaces and State  
12 Exchanges, patient navigators, and related programs es-  
13 tablished by such Act, as well as any contract with an indi-  
14 vidual or entity hired by the Federal Government to facili-  
15 tate enrollment in the federally-facilitated marketplaces)”.

16 (b) EFFECTIVE DATE.—The amendment made by  
17 subsection (a) shall take effect as if included in the enact-  
18 ment of the Patient Protection and Affordable Care Act.

19 **SEC. 4. HHS OIG AND GAO JOINT STUDY AND REPORT.**

20 (a) STUDY.—The Inspector General of the Depart-  
21 ment of Health and Human Services and the Comptroller  
22 General of the United States shall jointly conduct a study  
23 regarding the effect of applying the anti-kickback laws and  
24 other prohibited acts involving Federal health care pro-  
25 grams to qualified health plans, federally-facilitated mar-  
26 ketplaces and State Exchanges, and any other plan or pro-

1 gram established or funded under subtitle D or E (or the  
2 amendments made by such subtitles) of title I of the Pa-  
3 tient Protection and Affordable Care Act. In conducting  
4 the study, the Inspector General and Comptroller General  
5 shall—

6 (1) identify all plans and programs that satisfy  
7 the definition of “Federal health care program”  
8 under section 1128B(f) of the Social Security Act  
9 (42 U.S.C. 1320a–7b(f)) (as amended by section  
10 3(a));

11 (2) identify any entity or individual that would  
12 benefit from having qualified health plans, federally-  
13 facilitated marketplaces, and any other plan or pro-  
14 gram established or funded under subtitle D or E  
15 (or the amendments made by such subtitles) of title  
16 I of the Patient Protection and Affordable Care Act  
17 excluded from the definition of “Federal health care  
18 program” under section 1128B(f) of the Social Se-  
19 curity Act (as so amended); and

20 (3) separately estimate with respect to each of  
21 the following, the impact of excluding qualified  
22 health plans, federally-facilitated marketplaces and  
23 State Exchanges, and any other plan or program es-  
24 tablished or funded under subtitle D or E (or the  
25 amendments made by such subtitles) of title I of the

1 Patient Protection and Affordable Care Act from the  
2 definition of “Federal health care program” under  
3 section 1128B(f) of the Social Security Act (as so  
4 amended):

5 (A) Health care premiums (with and with-  
6 out non-federally funded subsidies).

7 (B) Consumer choice in health insurance  
8 coverage.

9 (C) The use of brand name versus generic  
10 drugs.

11 (D) The net cost of the Patient Protection  
12 and Affordable Care Act to the Federal Govern-  
13 ment and to all States and territories.

14 (b) REPORT.—Not later than one year after the date  
15 of enactment of this Act, the Inspector General of the De-  
16 partment of Health and Human Services and the Comp-  
17 troller General of the United States shall jointly submit  
18 a report to Congress on the results of the study conducted  
19 under subsection (a) that includes the information speci-  
20 fied in paragraphs (1) through (3) of that subsection, to-  
21 gether with such recommendations for legislative or ad-  
22 ministrative action as the Inspector General and Comp-  
23 troller General determine appropriate.

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