



To: Pro-Life Members of Congress and Staff
From: Americans United for Life Legal Team
Subject: Abortion funding in existing law and health care reform legislation
Date: January 6, 2010

Below is a comparison of how the Hyde Amendment, H.R. 3962, and H.R. 3590 address federal funding for abortion and for insurance plans that include abortion coverage. The relevant provisions are included for quick reference. While opponents of the Stupak-Pitts amendment argue that it goes farther than existing law, this comparison reveals that the amendment is nearly identical to the Hyde Amendment. In contrast, the abortion language in the Senate bill, which has been wrongly touted as maintaining the status quo, is a radical departure from existing federal law and policy.

| Issues for Comparison | Hyde Amendment (as included in the Omnibus Appropriations Act, 2009 (H.R. 1105), signed into law March 11, 2009 (PL 111-8)) | House Bill (H.R. 3962, as amended by the Stupak-Pitts Amendment) | Senate Bill (H.R. 3590, the Senate Health Care Reform Bill as amended by the Reid Manager’s Amendment) |
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| Application | Applies to all funds appropriated through LHHS Approps, including Medicaid. [Not perm. law, but added to yearly LHHS Approps bill to prohibit fed. funding from being used to pay for abortion.] | Applies to funds authorized and appropriated through H.R. 3962. | Applies to funds authorized and appropriated through H.R. 3590. |

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| <p>Prohibits the use of federal funds that are authorized or appropriated in connection to the underlying legislation from being used to pay for abortions</p> | <p>YES. §507(a): “None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.”¹</p> | <p>YES. §265(a): “No funds authorized or appropriated by this Act . . . may be used to pay for any abortion...”</p> | <p>YES; however, the prohibition is dependant on the existence of the Hyde Amdt; if the Hyde Amdt is ever eliminated, the prohibition on federal funding for abortions in this bill would be rendered meaningless. ² Further, the prohibition on federal funding in this bill is not as comprehensive as that found in the Hyde Amdt and H.R. 3962.</p> <p>§ 1303(b)(2)(A): “If a qualified health plan provides coverage of . . . [Hyde-prohibited abortions] the issuer of the plan shall not use any amount attributable to the credit under section 36B of the Internal Revenue Code of 1986 (and the amount (if any) of the advance payment of the credit under section 1412 . . . [or] any cost-sharing reduction under section 1402 . . . (and the amount (if any) of the advance of the reduction under section 1412. . . for purposes of paying for such services. . .”³</p> |

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| Prohibits the use of federal funds to subsidize health insurance plans that cover abortions | YES. §§507(b) and (c): “ None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion. . . ‘health benefits coverage’ means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.” | YES. §265(a): “or to cover any part of the costs of any health plan that includes coverage of abortion. . .” | NO. In departure from longstanding federal policy, insurance plans in the exchanges that receive federal funds are not prohibited from covering abortions. Therefore, federal dollars will subsidize insurance plans that offer abortion coverage. § 1303(b)(1)(A)(ii): “subject to subsection (a) [which allows states to prohibit abortion coverage], the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [Hyde prohibited and permitted abortions] as part of such benefits for the plan year.” |
| Provides exceptions to funding prohibitions for abortions in cases of rape, incest, and the life of the mother | YES. §§508(a)(1) and (2): “The limitations . . . shall not apply to an abortion . . . [in cases of] rape . . . incest; or [when]the woman [is] in danger of death . . .” | YES. §265(a): “...except . . . [when] the woman [is] in danger of death . . .or [in cases of] rape or incest.” | YES (implied in § 1303(b)(2)(A)). Again, these exceptions are tied to the exceptions in the Hyde Amendment. If the Hyde Amendment were ever eliminated, federal funding for ALL abortions would be permitted. |

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| <p>Explicitly allows supplemental abortion coverage so long as it is not tied to federal funding or funding for which there are federal matching funds</p> | <p>YES. §508(b): “Nothing . . . shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State’s or locality’s contribution of Medicaid matching funds).”</p> | <p>YES. §265(b): “Nothing . . . shall be construed as prohibiting any nonfederal entity (including an individual or a State or local government) from purchasing separate supplemental coverage for abortions for which funding is prohibited under this section, or a plan that includes such abortions, so long as such coverage or plan is paid for entirely using only funds not authorized or appropriated by this Act; and such coverage or plan is not purchased using individual premium payments required for a Exchange-participating health benefits plan towards which an affordability credit is applied; or other nonfederal funds required to receive a federal payment, including a State’s or locality’s contribution of Medicaid matching funds.”</p> | <p>NO. §265(b) in H.R. 3962 (see center column) was carefully crafted to mirror the Hyde Amendment, in that it clarifies that nonfederal entities may offer supplemental abortion coverage as long as it is not tied to federal funding or funding for which there are federal matching funds.</p> <p>In contrast, the Senate bill does not include such a provision because individuals can choose a federally-subsidized insurance plan that covers abortions in an exchange.</p> |

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| <p>Explicitly permits private insurance plans to offer abortion coverage so long as the coverage is not subsidized by federal dollars</p> | <p>YES. §508(c). “Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State’s or locality’s contribution of Medicaid matching funds).”</p> | <p>YES. §265(c): “Nothing in this section shall restrict any nonfederal QHBP offering entity from offering separate supplemental coverage for abortions for which funding is prohibited under this section, or a plan that includes such abortions, so long as premiums for such separate supplemental coverage or plan are paid for entirely with funds not authorized or appropriated by this Act; administrative costs and all services offered through such supplemental coverage or plan are paid for using only premiums collected for such coverage or plan; and any nonfederal QHBP offering entity that offers an Exchange-participating health benefits plan that includes coverage for abortions for which funding is prohibited under this section also offers an Exchange-participating health benefits plan</p> | <p>NO. §265(c) in H.R. 3962 (see center column) was carefully crafted to mirror the Hyde Amendment, in that it clarifies that the bill does not prohibit private insurance plans from offering abortion coverage. They can even offer abortion coverage in an exchange so long as it is not federally subsidized and they offer an identical plan that does not cover abortion. The House provision protects the integrity of federal law by ensuring that private abortion coverage is not subsidized by federal dollars.</p> <p>In contrast, the Senate bill permits subsidization of plans that do cover abortions.</p> |

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| | | that is identical in every respect except that it does not cover abortions for which funding is prohibited under this section.” | |
| Prevents Preemption of State Abortion Funding or Coverage Laws | The Hyde Amendment has no effect on state laws related to abortion funding or coverage as long as the laws do not pertain to federal funding or the use of federal matching funds (See 508(b)). | YES. §258(a): “Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) <i>coverage, funding</i> , or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.” | YES. Also, the Senate bill allows States to “opt out” of allowing abortion coverage in their exchanges. HOWEVER , this provision places a burden on States to enact new laws that prohibit abortion coverage by qualified health plans. §1303(a): “A State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law to provide for such prohibition . . . A State may repeal [such] a law . . . and provide for the offering of such services through the Exchange.” §1303(c)(1): “Nothing in this Act shall be construed to preempt or |

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| | | | otherwise have any effect on State laws regarding the prohibition of (or requirement of) <i>coverage, funding,</i> or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.” |
| Offers conscience protection for providers who do not want to participate in abortions | YES. §508(d): “None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. (2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a | YES. § 304(d) (as amended by Stupak-Pitts): “No Exchange participating health benefits plan may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.” §259: “A Federal agency or program, and any State or local government that receives Federal financial assistance under this Act ... may not (1) subject any individual or institutional health care entity to discrimination; or (2) require any health plan created or | YES, but much more limited. The bill does not include a prohibition on discrimination by government entities. §1303(b)(4): No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.” |

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| | hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.” | regulated under this Act (or an amendment made by this Act) to subject any individual or institutional health care entity to discrimination, on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions... In this section, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan... | |
| Ensures that neither the underlying legislation nor an individual or entity may mandate abortion coverage by private insurance plans | Not applicable because does not address private insurance plans. | YES – to the extent that the concern exists in the H.R. 3962. “The Health Benefits Advisory Committee may not recommend under section 223(b), and the Secretary may not adopt in | Only partially. This provision is narrow and does not address the concern that private plans may be required to cover abortions under other provisions, such as the Mikulski amendment (added to the bill on the Senate Floor) which |

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| | | standards under section 224(b), the services described in paragraph (4)(A) or (4)(B) as part of the essential benefits package and the Commissioner may not require such services for qualified health benefits plans to participate in the Health Insurance Exchange.” | allows an administrative agency to determine what constitutes “preventive care.” If abortion is categorized as “preventive care,” private insurance plans will be required to cover abortion. § 1303(b)(1)(A)(i): Notwithstanding any other provision of this title . . . nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of ...[Hyde-permitted or Hyde-prohibited abortions] as part of its essential health benefits for any plan year. . .” |

¹ While the Hyde Amendment is the most frequently discussed federal law pertaining to abortion funding, other federal laws reflect the same policy that is found in the Hyde Amendment. See, i.e. §§ 613 and 614 (Federal Employee Health Benefits Program) at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1105.enr>:

² Pro-abortion lawmakers are committed to getting rid of the Hyde Amendment, and it is perhaps not cynical to see this as the first step in a two-step plan to do that. If they succeed in getting rid of the Hyde Amendment, these new federal subsidies will directly pay for any and all covered abortions.

³ Under §§1303(b)(2)(B)-(D), ALL individuals who participate in plans in the Exchange that include coverage for Hyde-prohibited (elective) abortions, even if they do so unwittingly, will directly pay part of their own premiums into an account that pays for nothing but elective abortions. The amendment provides that each and every enrollee in such a plan (or their employer on their behalf) must write a separate check for elective abortion coverage, even if that enrollee never intends to have an abortion. That amount cannot be less than \$12.00 per year. This system will no longer be necessary if Hyde is eliminated – plans in the exchanges would be free to cover all abortions.