

November 5, 2009

MEMORANDUM

To: Congressional staff

From: Richard Doerflinger
Secretariat of Pro-Life Activities
U.S. Conference of Catholic Bishops

Re: The Ellsworth amendment to H.R. 3962 on abortion: Initial observations

The House leadership is asking members for reactions to new abortion language proposed by Rep. Brad Ellsworth (D-IN) for H.R. 3962, the Affordable Health Care for America Act. The Ellsworth amendment (henceforth “the amendment”) is said to be a “compromise” addressing pro-life concerns raised against the current bill.

However, on examination it is not a meaningful compromise. It addresses none of the substantial criticisms offered by the Catholic bishops’ conference and other pro-life advocates for health care reform, and in one respect makes the bill worse. Details follow.

1. The Public Option

The current bill states that an “affordability credit” may not be used to pay for most abortions; the amendment adds that “no other federal funds” may be so used. Logically this should mean that the public option, the government-run health plan offered by the Secretary of HHS to compete with private plans nationwide, cannot include abortion coverage. While all funds in the public plan begin as private funds, in the pockets of taxpayers and purchasers, they all become federal funds once they are paid to the government (whether paid as taxes or premiums) -- and all abortions in the plan are paid for by the federal government. The public plan is closely modeled in various respects on Medicare¹; and as in Medicare, all funds paid out for health care are federal expenditures, whether they began as tax dollars, premiums or co-pays.² Of course Medicare is a federal

¹ For example, the Secretary may assign administrative tasks to contractors, but retains the insurance risk as the entity offering the plan, as in Medicare (sec. 321 (c)); must set up an ombudsman’s office to address complaints, modeled on Medicare (sec. 321 (d)); and must follow Medicare provisions regarding access of beneficiaries to the courts to enforce their rights (sec. 321 (g)). The bill establishes an Account in the U.S. Treasury for “receipts and disbursements” involved in the operation of the public plan, beginning with \$2 billion from general tax revenues for “start-up” costs, and “receipts” going into this Account are treated in the same way as “payments or premiums” in Medicare (sec. 322 (b)). All health care providers participating in Medicare automatically become part of the provider network for the public plan, unless they follow a process for opting out (sec. 323 (b)), and the Secretary by regulation must apply relevant provisions of Medicare on “waste, fraud and abuse” to the public plan (sec. 326).

² T. Nicola and J. Shimabukuro, “Questions Related to H.R. 3200, the America’s Affordable Health Choices Act of 2009,” American Law Division of the Congressional Research Service, Memorandum to the Hon. Christopher H. Smith, October 9, 2009; www.nrlc.org/AHC/CRSpublicoptionfederalfunds.pdf.

program, and it is explicit in longstanding law that all its funds are covered by the Hyde amendment.³

But then the amendment simply ignores these facts, instead setting up an elaborate procedure for hiring contractors to “segregate” the funds paid as premiums from other amounts paid to the government -- so the former can be used to pay directly and specifically for elective abortions. Of course Medicare and other federal programs frequently work through contractors, and this in no way affects the fact that these are federal programs, the funds handled are federal funds, and the contractors are paid with federal funds. In fact the amendment reaffirms that the HHS Secretary has the same authority over this activity as she has over Medicare, and retains all the insurance risk. So this money-laundering system, aside from making the operation of the public plan more unwieldy, does nothing to address pro-life concerns. If the HHS Secretary decides to cover elective abortions in the public plan, as H.R. 3692 allows her to do,⁴ then every American purchasing the federal government’s own health plan will be forced by the government to pay directly for elective abortions, just as if the amendment did not exist.

2. Federal Subsidies for Private Health Plans

Under the amendment, the bill continues to violate longstanding federal policy against using federal funds for “health benefits coverage that includes coverage of abortion.”⁵ Federal affordability credits will be used to purchase private plans that cover elective abortions, and all Americans who purchase such plans will be forced to pay for those abortions; the federal government’s role will be to “segregate” purchasers’ premium dollars from the affordability credits, using an “actuarial estimate” of the average cost of abortion procedures, so it can be claimed that no “federal funds” are used for abortions themselves. Such a claim misses the point, as the Hyde amendment and parallel federal provisions forbid federal funding of entire benefits packages that include elective abortions. Moreover, the government’s approach of “segregating” the supposed cost of abortion into a distinct “abortion surcharge” charged to all purchasers only makes the mandatory payment for abortion in these plans even more specific and direct than if the purchaser had to pay it as part of an overall premium for health care.

³ To address any possible misunderstanding about funds in accounts such as the Medicare trust fund, the Hyde amendment states that “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, or for “health benefits coverage that includes coverage of abortion.” Sec. 507 of the Labor/HHS/Education appropriations act for FY 2009.

⁴ The bill states that the public option will provide coverage for any abortions eligible for funding under the Hyde amendment in a given year, and that “nothing in this Act” shall be construed as preventing or requiring coverage for all other abortions (sec. 222 (e)(3)). The decision whether to offer elective abortions in a health plan is left entirely to the “offering entity” for the plan (sec. 222 (e)(2)), and in the case of the public option that is the HHS Secretary (sec. 100 (c)(24)(C)).

⁵ See “Current Policy on Federal Abortion Funding: What is the Status Quo?”, at www.usccb.org/prolife/issues/healthcare/abortion_funding_102309.pdf.

The amendment does not address the bill's violation of the Hyde amendment policy against using federal funds for pro-abortion benefits packages; nor does it address the bill's provision for government collaboration with pro-abortion insurers to regulate *how* purchasers are forced to pay for other people's abortions. It only adds that the "segregation" of funds will follow formalities such as "generally accepted accounting requirements," so those who purchase health coverage from pro-abortion insurers will more clearly be forced to pay for abortions through their premiums rather than through their tax dollars as such. Again, this simply misses the point. Purchasers will be required to pay for these abortions just as much as if the amendment did not exist.

3. "One Plan Without Abortion"

H.R. 3962 requires that each rating area of the health insurance Exchange must include at least one plan that includes elective abortion coverage, and one plan that does not. The first requirement is unprecedented and totally unacceptable; no other federal program tries to *require* that every region of the country must have an abortion provider. The amendment leaves this offensive provision in place. It does, however, amend the provision regarding the one plan without elective abortions, "freezing" the Hyde amendment (solely for purposes of this provision) at its current standard. A health plan will count as the local plan without elective abortions only if it excludes (at least) abortions beyond those involving rape, incest or danger to the mother's life. Supporters suggest that the annual Hyde amendment may well be vulnerable in future years, and this change ensures that there will always be a private plan in each region that excludes most abortions.

The intent behind this change seems positive. But it would only have any effect if the Hyde amendment is rescinded. And if the Hyde amendment is rescinded, this bill will create a much more massive problem that this amendment does not address: Regardless of who the HHS Secretary is, this program will begin providing direct and potentially unlimited federal taxpayer funding for elective abortions throughout the country, in both public and private health plans. This is because the amendment does not "freeze" the Hyde amendment at its current standard on the one issue that it is actually designed to address: the use of *federal funds* for abortions and coverage including abortion. If Hyde falls, it will be small comfort that pro-life Americans may be able to retreat to one private refuge in each part of the country that does not make them pay for other people's abortions through their premiums – they will be forced by the government to pay for them anyway, through their taxes. In that event, what will be achieved?

4. "Conscience" Protection for Pro-Abortion Plans

One unambiguously positive feature of H.R. 3962 is Section 259, offered as an amendment in committee by Reps. Bart Stupak (D-MI) and Joe Pitts (R-PA). This section, modeled on the Weldon amendment that has been part of the Labor/HHS appropriations bill since 2004, prevents the federal government (and any state or local government receiving federal funds under the Act) from discriminating against a health

care entity, including a health plan, because the entity does not perform, refer for, pay for or provide coverage of abortion.

The Ellsworth amendment adds new language stating that the federal government “may not discriminate among” health plans “on the basis of their coverage of [abortion] services.” This is weaker than the language already in Section 259 of the bill, because it does not address discrimination by state or local governments, or forms of involvement in abortion other than providing coverage. More notably, its only legal effect is to extend the protection against discrimination to *plans that do provide abortion coverage*, an unprecedented change in federal law. This provision actually makes the bill worse on abortion.

In short, the Ellsworth amendment addresses no substantive criticism of H.R. 3962. It provides for federal funding of abortion, and of coverage that includes abortion, including direct federal funding of abortion procedures through the public plan. Its one provision for protecting Americans from being forced to pay premium dollars for abortion will only take effect when the government, under this bill, is forcing all Americans to pay tax dollars for such abortions instead. And its one provision on “conscience” makes the bill worse, by providing new protection for abortion providers. This is not a meaningful compromise.