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December 20, 2009

RE: Cloture Vote on Reid Manager's Amendment

Dear Senator:

The National Right to Life Committee (NRLC), the federation of right-to-life organizations in all 50 states, strongly opposes the "manager's amendment" (amendment no. 3276) to the Reid Substitute to H.R. 3590, and opposes cloture on the amendment. NRLC intends to include the roll call on cloture in its scorecard of key right-to-life roll calls of the 111th Congress.

Regarding abortion policy, the language of the manager's amendment is light years removed from the Stupak-Pitts Amendment that was approved by the House of Representatives on November 7 by a bipartisan vote of 240-194. The new abortion language solves none of the fundamental abortion-related problems with the underlying Senate bill, and it actually creates some new abortion-related problems. We view a vote for cloture on the amendment as a vote to advance legislation to allow the federal government to subsidize private insurance plans that cover abortion on demand, to oversee multi-state plans that cover elective abortions, and to empower federal officials to mandate that private health plans cover abortions even if they do not accept subsidized enrollees. In addition, as explained below, we object to certain other provisions of the amendment that would place substantial restrictions on the ability of Americans to spend their own money to obtain lifesaving medical care.

The abortion-related language violates the principles of the Hyde Amendment by requiring the federal government to pay premiums for private health plans that will cover any or all abortions. The federal subsidies would be subject to a convoluted bookkeeping requirement, different in detail but similar in kind to the Capps-Waxman accounting scheme that the House of Representatives rejected when it adopted the Stupak-Pitts Amendment on November 7. The manager's amendment requires that all enrollees in an abortion-covering plan make a separate payment into an account that will pay for abortions, but the amendment also contains language [Section 1303 (b)(3)(A) and (b)(3)(B)] that is apparently intended to prevent or discourage any insurer from explaining what this surcharge is to be used for. Moreover, there is nothing in the language to suggest that payment of the abortion charge is optional for any enrollee.

The so-called "firewall" between federal funds and private funds is merely a bookkeeping gimmick, inconsistent with the long-established principles that govern existing federal health programs, such as the Hyde Amendment. Moreover, the Reid "firewall" is made of rice paper – it exists only so long as the annual appropriations bill for the Department of Health and Human Services continues to contain the Hyde Amendment. At any future date when the congressional appropriators and/or the President decide to block renewal of the Hyde Amendment, the Reid bookkeeping requirements would automatically evaporate, and insurers could pay for elective

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abortions with the federal subsidies without even bookkeeping requirements. This is in stark contrast with the Stupak-Pitts Amendment, which would permanently prohibit the federal subsidies from paying any part of the premium of a plan that covers elective abortions (while explicitly affirming that insurers may sell, and persons may buy, through the Exchanges, plans that cover any or all abortions, as long as federal subsidies are not used to purchase such plans).

In place of the original “public option” provisions in the Reid bill, the Reid manager’s amendment establishes a new program under which the federal government (the Office of Personnel Management, OPM) would administer a program of “multi-state” health plans offered by private insurers. The amendment says (on page 56) that the OPM director “shall ensure that . . . there is at least one such plan that does not provide coverage of” abortions beyond the types of abortions that are funded under the federal Medicaid program in any given year, which is described as “assured availability of varied coverage.” This seems to envision a system under which the OPM director would administer multi-state plans that cover elective abortions, and perhaps even possess authority to require such plans to cover elective abortions, as long as the director also ensured that there was one plan that did not cover abortions (except types of abortions also funded by the federal Medicaid program). This would be a sharp break from the policy that has long governed the Federal Employees Health Benefits program, which is also administered by OPM, under which private plans are completely prohibited from covering elective abortions if they wish to participate in the program.

The amendment contains a new section [Section 1303(a)(1)] providing that 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.” The Reid Substitute already contained a clause preventing preemption of state laws relating to insurance coverage of abortion [see Section 1303 (b)(1)]. The new opt-out clause [Section 1303 (a)], in contrast, is defective in several important respects. First, it apparently would apply only to laws enacted in the future. Other new language in the amendment [Section 1303 (b)(1)(A)(ii)] might be construed to conflict with some existing state laws. Moreover, it is unclear how the state opt-out clause would be interpreted in light of other provisions in the bill, including the authority granted to the OPM director to set rules for the new federal program of multi-state plans.

The House-passed health bill contains language to prevent federal Executive Branch officials from requiring private health plans to cover abortions. However, the Senate on December 3 adopted an amendment (the Mikulski Amendment) to the Reid Substitute that could be employed by the HHS to require all private health plans to cover all abortions, simply by defining them as “preventive care.” The manager’s amendment contains language to prevent the Secretary of Health and Human Services from defining elective abortion as an “essential benefit,” but it does not remove the entirely separate authority granted by the Mikulski Amendment to mandate that all plans cover abortion as a “preventive” service. As NRLC noted in our November 30 letter to the Senate opposing the Mikulski Amendment, a number of pro-abortion authorities have already begun to classify abortion as a “preventive” service.

It should also be noted that the “conscience” protection provision for health care providers (sometimes referred to as “the Weldon language”), which was included in the House-passed health bill (H.R. 3962, Section 259), is not included in the amendment, despite some speculation in

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various published sources in recent days that it would be. However, the amendment inserts into the bill, by reference, the entire text of the Indian Health reauthorization bill (S. 1790). This language is objectionable because it does not contain an amendment (the Vitter Amendment) that was adopted by the Senate on February 26, 2008, by a vote of 52-42, during the Senate's most recent consideration of Indian health reauthorization legislation. The Vitter Amendment would permanently prohibit coverage of elective abortions in federally funded Indian health programs.

The manager's amendment also contains highly objectionable provisions on other issues of concern to the right-to-life community. Since its inception, the pro-life movement has been as concerned with protecting the lives of older people and people with disabilities from euthanasia, including the involuntary denial of treatment, food, and fluids necessary to prevent death, as it has been dedicated to protecting unborn children from abortion. The amendment contains provisions that threaten these lives, including significant limits on Americans' right to spend their own money to save their own lives. (Documentation of and further details concerning the points made below are available at: www.nrlc.org/HealthCareRationing/ManagersAmend.html)

The amendment renames and expands the authority of what the Reid Substitute called the "Independent Medicare Advisory Board." Its new title is the "Independent Payment Advisory Board" [Section 10320(b), p. 189], and it is directed to make recommendations to "slow the growth" in *private* (non-federal) "health expenditures . . . that the Secretary [of Health and Human Services] or other Federal agencies can implement administratively." Section 10320(a)(5), adding Section 1899A (o)(1)(A) of the Social Security Act, p. 188. To the extent these are effective, they will limit the ability of private citizens to spend their own money to protect their own lives, by obtaining health care or health insurance that is not rationed.

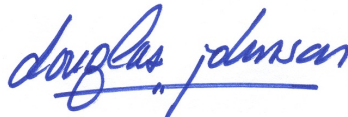
Section 10304 (p. 152) empowers the Secretary of Health and Human Services to impose "efficiency measures," in addition to the "quality measures" already provided for under the Reid Substitute, on health care providers. Much of the professional literature advocates the use of "quality of life" standards that devalue the lives of older people and people with disabilities in such "quality" and "efficiency" measures. While there are anti-discrimination limits on the use of comparative effectiveness research to justify denial of treatment based on quality of life criteria under Section 6301(c) of the Reid Substitute, the quality and efficiency measures are not made subject to these critically important anti-discrimination protections.

Thank you for your consideration of NRLC's objections to cloture on the manager's amendment.

Sincerely,



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Executive Director



Douglas Johnson
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