

MEMORANDUM

TO: Interested Parties

FROM: Douglas Johnson, NRLC Legislative Director
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RE: the use of federal funds (public funds) to pay directly for elective abortions and to pay for insurance plans that cover elective abortion under H.R. 3200, the Obama-backed health bill (rebutting the "private funds" myth)

DATE: September 7, 2009

EXECUTIVE SUMMARY: The biggest abortion-related concerns with H.R. 3200 pertain to (1) a proposed insurance program that would be run entirely by the federal government (the "public option"); and (2) a proposed new premium-subsidy program ("affordability credits") to help tens of millions of people buy health insurance. Some supporters of the bill have claimed that any elective abortions subsidized by these two programs would occur with "private" funds, but those claims collapse under scrutiny. All of the types of funds that would be expended by both proposed federal programs would be *federal government funds* and *public funds*. Many of those who are mischaracterizing these funds as "private funds" are attempting to distort an important public policy debate by employing inaccurate terminology in a manner that would not be accepted by the news media if the question involved federal agencies and programs unrelated to abortion.

THE PURPOSE OF THIS MEMORANDUM

It is now well established that H.R. 3200, particularly as revised by the Capps Amendment (or Capps-Waxman Amendment) adopted in the House Energy and Commerce Committee on July 30, would (1) authorize the Secretary of Health and Human Services (HHS) to pay for elective abortions under the proposed "public plan," and (2) allow the proposed "affordability credits" (premium subsidy) program to subsidize private insurance plans that cover elective abortions, as well as the public plan. See, for example, the August 21 article by FactCheck.org, "[Abortion: Which Side is Fabricating](#)," and the August 13 NRLC factsheet, "[What Do the 'Health Care Reform' Bills Backed by President Obama Have to Do With Abortion?](#)"

[It has also been conclusively demonstrated that the Hyde Amendment, which is a provision of the annual appropriations bill for the Department of Health and Human Services (DHHS), will *not* apply to any of the funds that would flow into or out of the public plan or the "affordability credit" program. See the NRLC memorandum posted [here](#), and the memoranda issued by the nonpartisan Congressional Research Service that are linked therein.]

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The memorandum that you are reading is not intended to again demonstrate that the public option would cover elective abortion and that the "affordability credit" programs would subsidize private insurance plans that cover elective abortions; rather, our purpose here is (1) to examine the question of whether the funds that would be used by the public plan to pay for elective abortions are properly described as "federal funds" (public funds) or as "private funds," and (2) to address the same question for the funds that would be used to subsidize private insurance plans that cover elective abortion.

These are important questions, partly because since late July, many Democratic members of Congress, and some "factcheckers" and advocates in the news media, have asserted that the Capps Amendment (or Capps-Waxman Amendment), adopted in the House Energy and Commerce Committee on July 30, would prevent the use of "federal funds" or "public funds" for abortions in the programs created by H.R. 3200. To cite just two examples among dozens: On August 27, 2009, House Speaker Nancy Pelosi (D-Ca.) issued a "Daily Mythbuster" [press release](#) which asserted that "the latest version of the House bill . . . clearly spells out that no federal funds can be used to pay for abortions . . ." On August 11, 2009, Rep. Lois Capps (D-Ca.) issued [a letter](#) in which she asserted, "Under my amendment, no federal funds may be used to pay for abortions that are not allowed by the Hyde Amendment . . . The only funds that may be used to pay for other abortion services are private funds from the policyholders' own premiums, whether the policyholder is covered by a private plan or the public option."

However, this claim by Pelosi, Capps, and others is demonstrably erroneous. With few exceptions, funds under the control of and expended by an agency of the federal government cannot accurately be described as "private funds." Under explicit provisions of H.R. 3200, the various types of funds that would create these two new programs, and the funds that the two programs will expend, are all "federal government funds" as that term is used by the General Accountability Office (GAO) and by the Congressional Budget Office (CBO), and as the terms are used with respect to innumerable other federal programs administered by many agencies, including the Department of Health and Human Services (DHHS).

None of the types of funds that will be expended by the public option or by the "affordability credit" program can properly be described as "private funds." These funds are without question "public funds."

Some of the people who are attempting to label these funds as "private" are doing so for a transparently political purpose: To conceal the reality that H.R. 3200 would establish direct federal government funding of elective abortion by the government insurance plan, and would also result in large-scale federal subsidies for private health plans that pay for elective abortions. Both of those effects would be sharp departures from longstanding federal policy.

Those in the news media who adopt the inaccurate characterization that the funds involved are "private," or who embrace the inaccurate claim that "federal funds" will not be spent on abortions, are allowing themselves to be manipulated in a way that misleads the public regarding the important public policy issues that are at stake.

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(Many of the lawmakers, such as Pelosi, who are currently trying to snooker the public into believing that the Department of Health and Human Services would be expending "private funds" for abortion payments, probably would recoil from any suggestion that other federal agencies -- say, the CIA, or the Pentagon, or the Department of the Interior -- could expend federal Treasury funds in transactions that would be considered "private.")

WHAT CONSTITUTES FEDERAL GOVERNMENT FUNDS?

In this memorandum, we will refer to (1) the CBO's glossary [here](#); (2) the Government Accountability Office (GAO) publication titled, "A Glossary of Terms Used in the Federal Budget Process: September 2005," [here](#); (3) a Congressional Research Service memorandum, "Availability of Funds in the Health Insurance Exchange Trust Fund in Section 207 of H.R. 3200," August 28, 2009, [here](#); and (4) a Congressional Research Service memorandum, "Availability of Funds in the Public Health Insurance Option Account in Section 222(b)(1) of H.R. 3200," August 31, 2009, [here](#).

The glossary section of the Government Accountability Office (GAO) document cited above does not formally define the term "public funds," but the GAO document employs the term "public funds" (for example, in the section headed "GAO's Mission," page 178) to refer to all of the classes of funds that are under the control of agencies of the federal government.

The GAO glossary is also instructive in what constitutes "federal government funds." For example, on page 20, the GAO glossary explains that the term "Budget Authority" means: "Authority provided by federal law to enter into financial obligations that will result in immediate or future outlays involving *federal government funds*." [emphasis added] Basically, any funds that are held or expended by a federal agency in accord with provisions of law are "federal government funds." The provisions of H.R. 3200 that would create the "public option" and the "accountability credit" program would establish precisely such statutory authorities, which are summarized in the two Congressional Research Service memoranda linked above.

Likewise, [the CBO glossary](#) contains the following definition:

"budget authority: Authority provided by law to incur financial obligations that will result in immediate or future outlays of *federal government funds*. Budget authority may be provided in an appropriation act or authorization act and may take the form of borrowing authority, contract authority, entitlement authority, or authority to obligate and expend offsetting collections or receipts." [emphasis added]

(Under both the GAO and CBO glossaries, there is a technical distinction made between two different types of *accounts* in which federal government funds are held: "federal fund accounts" and "trust fund accounts." Under H.R. 3200, the "public option" would be a "federal fund account," while the accountability credits would be paid out of a "trust fund," but the distinction is not important for the points under discussion in this memorandum, because both types of accounts constitute "public funds" as the GAO employs the term, and both types contain *federal government funds*.)

CAN THE "PUBLIC OPTION" EXPEND "PRIVATE FUNDS"?

H.R. 3200, Section 222(b)(1), provides: "There is established in the Treasury of the United States an Account for the receipts and disbursements attributable to the operation of the public health insurance option, including the start-up funding . . ." [Page 119] The bill authorizes and appropriates \$2 billion in general Treasury revenues to start the "public option" (supposedly to be repaid within 10 years) [p. 120]. H.R. 3200 also appropriates to the Secretary of HHS funding to cover 90 days worth of claims reserves, out of any funds in the Treasury not otherwise appropriated [p. 120].

As the August 31 Congressional Research Service memo notes: "Section 222(b)(1) of H.R. 3200 creates in the Treasury an Account 'for the receipts and disbursements attributable to the operation of the public health insurance option, including the start-up funding' provided in Section 222(b)(2). Based on the authorities provided to the Secretary, as described in the above paragraph, it appears that the Secretary would be able to credit any premiums to the Account, and make payments from the Account, without any subsequent legislative action, such as a further appropriation in a subsequent act."

In short, tax funds will provide a major portion of the monies used to start the "public option," and all of the start-up funds are clearly federal funds.

Once the "public option" is fully underway, it will receive funding from two main sources. One of these is the proposed new federal premium-subsidy program ("affordability credits"). This program will be funded largely by different types of taxes, and it is discussed in more detail in the next section.

The second funding source will be payments from enrollees, referred to in the bill as "premiums." The distorted claim currently being propagated by many supporters of H.R. 3200 is that when DHHS spends the funds raised through "premiums," the agency will be expending "private" funds. This is, as a matter of law, absurd. For example, the funds in a citizen's bank account are private, but once he or she writes a check to the IRS to pay income taxes, the funds become federal government funds, public funds, deposited in a U.S. Treasury account. The same is true here. Once an enrollee makes a "premium" payment to DHHS, the funds are no longer "private" -- they are federal government funds, as truly and completely as the funds that the government gathers from incomes taxes, user fees, fines, and other sources.

Dennis G. Smith, formerly director of the federal Center for Medicaid and State Operations in DHHS (now Senior Fellow in Health Care Reform, Center for Health Policy Studies, the Heritage Foundation), explained it this way:

"All funds controlled by the federal government originate from its citizens. Congress must appropriate the expenditure of funds. When premiums are collected from individuals and dispensed by the federal government, the funds are considered to be federal funds. For example, consider that individuals pay Part B premiums under Medicare for physician coverage and payments are subsequently made to providers.

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Those expenditures are certainly considered to be federal funds. The same would be true of the 'premiums' expended by DHHS under the public plan." (Communication to NRLC, September 7, 2009).

Under H.R. 3200, as amended by the Capps-Waxman Amendment (see below) the public plan is explicitly authorized to cover elective abortions. Thus, abortion providers would send their bills to the Department of Health and Human Services. They would receive payment checks drawn on a federal Treasury account. The payments would be in "federal funds," both in the technical sense and in the common usage sense. *This would be direct federal government funding of elective abortions.*

WHAT THE CAPPS AMENDMENT SAYS ABOUT "PUBLIC FUNDS"

On July 30, 2009, the House Energy and Commerce Committee adopted (over the opposition of pro-life members) an amendment crafted by staff to Chairman Henry Waxman (D-Ca.) and offered by his ally, Rep. Lois Capps (D-Ca.). The complete text of the amendment is posted [here](#).

The Capps Amendment was crafted to look like a Hyde Amendment to a superficial observer (unfortunately, that includes all too many journalists and "factcheckers"), but its legal effect is really an inversion of the Hyde Amendment principle. The Capps Amendment explicitly authorizes the Secretary of HHS to pay for elective abortions under the proposed "public option." The Obama Administration would certainly do so -- not only because of Secretary Sebelius's strong pro-abortion policy views, but because Barack Obama himself directly promised Planned Parenthood in 2007 that his public plan "will provide all essential services, including reproductive services," and that such services would be "at the center, and at the heart of the plan that I propose." (He admitted, and no one disputes, that "reproductive services" includes elective abortion.) Obama has never repudiated this promise. You can watch Obama make the promises in a video clip here: <http://stoptheabortionagenda.com/> or here: <http://www.youtube.com/watch?v=Cqww8jmizug>

An otherwise insightful August 21 analysis of the Capps Amendment by FactCheck.org ("[Abortion; Which Side is Fabricating?](#)") contained one misconception. It said, "The Capps amendment does contain a statement . . . that prohibits the use of *public money* to pay for abortions, except in cases of rape, incest and to save the life of the mother. That would still allow the public plan to cover all abortions . . ." [emphasis added] Thus, FactCheck.org apparently adopted (perhaps without realizing it) the mistaken notion that DHHS will hold and expend funds in the public plan that will not be "public money."

It is true that the Capps Amendment contains a *paragraph caption* on page 6, that reads, "Prohibition of Use of Public Funds for Abortion Coverage." But this is merely a red herring -- *a paragraph caption has no legal effect*. One must look to the operative language that immediately follows the paragraph caption, which states simply, "An affordability credit may not be used for payment for [abortion] services described in section 122(d)(4)(A)." This merely means that abortions cannot be charged on the books against *one type* of public funds -- the

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"affordability credits." This is not a general prohibition on the use of "public funds" to pay for abortions. By design, the Capps Amendment leaves DHHS-run public fund completely free to fund all abortions with the federal government funds that originated with enrollees, which are just as much federal government funds and public funds as the affordability credits.

There are also two references to "public funding" in subparagraph captions on page 2 of the Capps Amendment. But these references are to Medicaid funds (which everyone admits are "public funds"), not to the funds in the public option or the affordability-credit programs. Medicaid is funded through the annual Health and Human Services appropriations bill, which currently contains the "Hyde Amendment" provision that limits funding of abortion to rare circumstances. [As demonstrated in a separate memo](#), the public option and affordability-credit programs in H.R. 3200 rely entirely on new funding streams created by H.R. 3200, and not on any funds that would pass through the HHS appropriations bill. (This conclusion is supported by memoranda issued in late August 2009 by the nonpartisan Congressional Research Service, linked below.) Thus, the Hyde Amendment will not apply to any of the funds that would be spent for abortions and for insurance plans that cover abortions under H.R. 3200.

THE PREMIUM-SUBSIDY PROGRAM ("AFFORDABILITY CREDITS") AND FEDERAL FUNDS

Aside from the public fund, H.R. 3200 creates a new premium subsidy program to help tens of millions of Americans buy health insurance, referred to as "affordability credits."

Funds for these subsidies will be kept in the "Health Insurance Exchange Trust Fund," which is an account in the U.S. Treasury, created by the bill for this purpose. The funds in the Trust Fund are federal government funds. The Trust Fund will be administered by the "Health Choices Commissioner," a new federal office created by the bill.

Under the bill, when a person who qualifies for the new subsidy enrolls in the public plan, the subsidies will be sent by the Health Choices Commissioner from the Health Insurance Exchange Trust Fund to the Secretary of HHS [see p. 129], who is the official in charge of the public option [see pp. 12, 118]. When a person who qualifies for subsidies chooses to purchase private health insurance, the subsidies will be sent from the Trust Fund to the private insurer.

H.R. 3200 provides that the "affordability credit" program will be funded entirely by general funds from the Treasury, as well as special new taxes. As the August 28 Congressional Research Service memo explains, the bill "appropriates to the Fund amounts equal to three specified taxes . . . In addition, Section 207(c)(2) appropriates to the Fund amounts equal to the difference between the payments made from the Fund . . . and the amounts from the three specified taxes." In other words, whatever amount is spent from the Fund that is not covered by the special taxes will be paid from general revenues.

Thus, all of the funds that flow into the Trust Fund are "federal government funds," as that term is used by the GAO and the CBO. Once the money is in the new Trust Fund, the funds are still "federal government funds" as the GAO defines the term.

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Dennis G. Smith, formerly director of the federal Center for Medicaid and State Operations in DHHS (now Senior Fellow in Health Care Reform, Center for Health Policy Studies, the Heritage Foundation), explained:

"The Individual Affordability Credits (premium subsidies) are clearly federal funds. An individual applies to the federal Health Choices Commissioner for the credit; the Commissioner determines the individual's eligibility; the Commissioner then pays the qualified health plan. In reality, when the Commissioner plays this role, there is no distinction between 'private' and 'public' funds, they are all public." (Communication to NRLC, September 7, 2009)

H.R. 3200 with the Capps Amendment explicitly allows the tax-generated funds in the premium subsidy program to go to private plans that cover abortion on demand. This would be a drastic departure from the status quo, because under current law, federal funds do not flow into health plans that cover abortions, except to save the life of the mother, or (in some programs) cases of rape or incest. This currently applies, for example, not only to Medicaid and military, but also to the health plans that cover members of Congress and their staffs -- as Kathleen Sebelius herself pointed out in a letter submitted to the Senate on April 2, 2009, in which she wrote, "Most private plans do not cover abortion services except in limited instances, but do cover family planning, and Congress has limited the Federal Employee Health Benefit Plan to covering abortion services only in cases of rape or incest, or when the life of the mother is in danger."

CONCLUSIONS

H.R. 3200 would create two new programs that would use federal government funds to subsidize abortions, in ways that would not be permitted under the current laws that govern the Medicaid program or other current federal health programs. It is a distortion, and factually erroneous, to claim that any of the funds used to pay for abortions in the public option, or any of the government funds used to subsidize insurance coverage of abortion, under the proposed new programs, would be "private" funds.

The government insurance plan (public option) created by H.R. 3200 would directly pay for elective abortions with federal government funds. This would be direct federal government funding of elective abortion. The Hyde Amendment does not cover these federal funds.

In addition, under H.R. 3200, the premium subsidy program would employ a federal trust fund filled with funds from general Treasury revenues and special taxes, all of which are federal funds. From this trust fund, subsidies would be paid for private insurance plans that cover elective abortions (and also to the public plan). The Hyde Amendment does not allow funds appropriated through the annual Health and Human Services appropriations bill to flow into any trust fund that covers elective abortions, but H.R. 3200 creates a new funding stream for the premium subsidy trust fund, which would not be subject to the Hyde Amendment.

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The documents linked in the memorandum above are linked again here for convenience:

The CBO's glossary is [here](#).

The Government Accountability Office (GAO) publication titled, "A Glossary of Terms Used in the Federal Budget Process: September 2005," is [here](#). (PDF document, 178 pages)

The Congressional Research Service memorandum, "Availability of Funds in the Health Insurance Exchange Trust Fund in Section 207 of H.R. 3200," August 28, 2009, is [here](#). (PDF document, one page)

The Congressional Research Service memorandum, "Availability of Funds in the Public Health Insurance Option Account in Section 222(b)(1) of H.R. 3200," August 31, 2009, is [here](#). (PDF document, one page)

The NRLC memorandum, "Why the 'Hyde Amendment' Will Not Prevent Government Funding of Abortion Under H.R. 3200," September 3, 2009, is [here](#).

The NRLC memorandum, "What do the health care bills backed by President Obama have to do with abortion?," August 13, 2009, is [here](#) (PDF document -- 11 pages)

The NRLC factsheet, "Key Points on Pro-Abortion Provisions in Obama-backed Health Care Bills," August 26, 2009, is [here](#) (PDF document -- two pages)

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