

MEMORANDUM

TO: Interested Parties

FROM: Douglas Johnson, NRLC Legislative Director
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RE: Why the "Hyde Amendment" will not prevent government funding of abortion under H.R. 3200, the House Democratic leadership health care bill

DATE: September 3, 2009

EXECUTIVE SUMMARY: Many members of Congress, and the President, have suggested that the Hyde Amendment will prevent federal government funding of abortion under H.R. 3200. This claim is entirely erroneous. Under H.R. 3200, the new federal insurance program (the "public option") will pay for elective abortion with federal government funds, and public funds will also directly subsidize private insurance plans that cover all abortions. However, as review of the bill language clearly demonstrates, and as the nonpartisan Congressional Research Service has confirmed in two recent memoranda cited and linked below, neither program requires any future appropriations through the annual Health and Human Services appropriations bill.

Since the Hyde Amendment applies only to funds appropriated through the annual HHS appropriations bill, the Hyde Amendment will not apply to any of the funds used to establish or operate either the "public option" or the premium-subsidy program created by H.R. 3200. Members of Congress who assert that the Hyde Amendment would prevent federal government funding of abortions under H.R. 3200 are misleading their constituents, in some cases perhaps inadvertently and in other cases perhaps by design.

It has been well established elsewhere that H.R. 3200, particularly as revised by the "Capps Amendment" (or Capps-Waxman Amendment) that was adopted in the House Energy and Commerce Committee on July 30, 2009, would (1) authorize the Secretary of Health and Human Services (HHS) to pay for elective abortions under the "public plan," and (2) allow the "affordability credits" to subsidize both the public plan and private insurance plans that cover all abortions. See, for example, the August 21, 2009 FactCheck.org analysis "[Abortion: Which Side is Fabricating](#)," and the August 13, 2009 NRLC factsheet "[What Do the 'Health Care Reform' Bills Backed by President Obama Have to Do With Abortion?](#)" The sole purpose of this memorandum is to correct the erroneous assertions that the Hyde Amendment would somehow prevent those results.

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THE SCOPE OF THE HYDE AMENDMENT

Some of those who recently have asserted that the Hyde Amendment would apply to the proposed new programs may have believed, wrongly, that the Hyde Amendment is a government-wide law. In reality, the Hyde Amendment is a limitation that is attached annually to the appropriations bill that includes funding for the Department of Health and Human Services (DHHS), and it applies only to the funds contained in that bill. (Like the annual appropriations bill itself, the Hyde Amendment expires every September 30, at the end of every federal fiscal year. The Hyde Amendment will remain in effect only for as long as the Congress and the President re-enact it for each new federal fiscal year.)

Others apparently have assumed that the public option and the premium-subsidy program created by H.R. 3200 would receive their funding through the annual HHS appropriations bill. That assumption is entirely erroneous, as the nonpartisan Congressional Research Service has confirmed in two recent memoranda. None of the sources specified in H.R. 3200 for funding the public option and the premium-subsidy program will flow through the HHS appropriations pipeline; therefore, the Hyde Amendment will not govern them.

The Hyde Amendment is sometimes referred to as a "rider," but in more correct technical terminology it is a "limitation amendment" to the annual appropriations bill that funds the Department of Health and Human Services and a number of smaller agencies. A "limitation amendment" prohibits funds contained in a particular appropriations bill from being spent for a specified purpose. The Hyde Amendment limitation prohibits the spending of funds within the HHS appropriations bill for abortions (with specified exceptions). It does not control federal funds appropriated in any of the other 11 annual appropriations bills, nor any funds appropriated by Congress outside the regular appropriations process. [However, because of an entirely separate statute enacted in 1988, the HHS policy is automatically applied as well to the Indian Health Service, as explained below.]

The limited scope of the Hyde Amendment is evident even to the non-specialist simply by reviewing the language of the amendment. What follows is not the entire Hyde Amendment, but the initial and primary component. It clearly applies only to "funds appropriated in this Act," which is to say, the HHS appropriations bill for any given year, to which it is attached.

"SEC. 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. (b) 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. . . SEC. 508. (a) The limitations established in the preceding section shall not apply to an abortion-- (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of

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death unless an abortion is performed." (from Public Law 111-8 , H.R. 1105, Division F, Title V, General Provisions, italics added for emphasis.)

The Hyde Amendment was initially approved by Congress in 1976, and initially went into effect on August 4, 1977. But federal health programs that received funds through appropriations bills other than the HHS appropriations bill were entirely unaffected by enactment of the Hyde Amendment, and continued to pay for abortions until separate laws were passed to deal with them. One example is the Indian Health Service, which receives its funds from the annual Interior appropriations bill, not the HHS appropriations. In [a 1979 letter to Congressman Henry Hyde](#) (R-II.), the agency explained as follows:

"You ask where the Indian Health Service is specifically permitted in authorizing legislation to pay for abortions. Neither abortion nor any other medical procedure or health service, nor the payment for such is specifically provided in authorizing legislation. The authorizing legislation for IHS is the Snyder Act (25 U.S.C. 13) which permits the expenditure of appropriated funds for the 'benefit, care, and assistance of the Indians throughout the United States' for a number of purposes including the 'relief of distress and conservation of health.' . . . In providing any of our health services we are governed by applicable laws, both Federal and State, court decisions and Departmental policies. All current requirements having been met, and procedures followed, we would have no basis for refusing to pay for abortions. There is, as you inferred, no restrictions on the use of appropriations for payment for abortions under the present Interior appropriations bill."

[In 1988, Congress enacted a revision to the U.S. Code (25 U.S.C. § 1676), which says that any abortion funding limitations found in the HHS appropriations measure will also apply, while in effect, to the IHS.]

THE HYDE AMENDMENT AND THE "PUBLIC OPTION"

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 then authorizes and *appropriates* \$2 billion in general Treasury revenues to start the "public option" (supposedly to be repaid within 10 years). Again quoting directly from the bill [p. 120]: "In order to provide for the establishment of the public health insurance option there is hereby appropriated to the Secretary, out of any funds in the Treasury not otherwise appropriated, \$2,000,000,000. In order to provide for initial claims reserves before the collection of premiums, there is hereby appropriated to the Secretary, out of any funds in the Treasury not otherwise appropriated, such sums as necessary to cover 90 days worth of claims reserves based on projected enrollment."

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All of these funds are *appropriated* directly by H.R. 3200; they have nothing to do with the HHS appropriations bill or the Hyde Amendment.

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"), which will be funded largely by different types of taxes; this program is discussed further in the next section. The second funding source for the public option will be payments from enrollees, referred to in the bills as "premiums." Once these funds are received by HHS, they are "federal government funds," which is to say, they are public funds. (See the CBO and GAO glossaries linked below.)

As confirmed by the Congressional Research Service (CRS) in a memorandum dated August 31, 2009, [here](#), H.R. 3200 itself provides all the legislative authority required for all of these funding sources; no appropriations in a future HHS appropriations bill will be involved. The CRS memorandum states:

"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."

Because there will be no "subsequent legislative action, such as a further appropriation," the Hyde Amendment, as a limitation to future appropriation bills, cannot possibly apply to the funds that will flow to and through the public option.

PREMIUM-SUBSIDY PROGRAM ("AFFORDABILITY CREDITS")

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*, as the term is defined in official usage by the Government Accountability Office (GAO) and the Congressional Budget Office (CBO) (see the [definition of "Budget Authority" on page 20 of the GAO document](#), and the definition of "Budget Authority" in [the alphabetical CBO glossary](#)).

The Trust Fund will be administered by the "Health Choices Commissioner," a new federal office created by the bill. (As we explain in a separate memo, none of the funds in either the public option of the affordability credits program are correctly described as "private" funds.)

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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 premiums chooses to purchase private health insurance, the subsidies will be sent from the Trust Fund to the 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. A memorandum by the Congressional Research Service, dated August 28, 2009, [here](#), explains as follows: 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.

After further discussion of the various funding provisions in H.R. 3200, the CRS memo concludes as follows:

"In summary, Section 207 of H.R. 3200 creates a Health Insurance Exchange Trust Fund, appropriates amounts to the Fund, and requires payments from the Fund. If enacted, all of these actions would be authorized without any further legislative action, such as a further appropriation in a subsequent act."

Thus, since funds for the premium-subsidy program would not flow through a future HHS appropriations bill to which the Hyde Amendment might again be attached, the Hyde Amendment cannot possibly apply to these subsidies. Therefore, the subsidies will flow freely to insurance plans that cover elective abortion.

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](#).

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](#).

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](#).

The 1979 letter from the Indian Health Service to Congressman Henry Hyde is [here](#).

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