



¹THE CAPPS ABORTION AMENDMENT TO AFFORDABLE HEALTH CHOICES ACT

INTRODUCTION

The “Capps Amendment” to the “America’s Affordable Health Choices Act of 2009” (H.R. 3200) is a direct attempt to bypass the Hyde Amendment by authorizing government subsidies to go to plans that provide coverage for abortion, including abortion in the public government-run health plan.ⁱ Furthermore, although President Obama and Democrat leaders claim they want to reduce the “need for” abortion, Representative Capps’ provision will do nothing to reduce the actual demand for abortion or the number of abortions performed in the United States. This is not an amendment designed to allow private health plans to cover or not cover abortion on demand as under the current system. Rather, the Capps Amendment is an intentional attempt to subsidize plans that cover abortion both in the public health option and in private plans under new government controls.

Indeed, under the legislation new private individual insurance coverage will be prohibited, and all new policies would be required to meet federal standards established by the Health Benefits Advisory Committee. Those plans would have to be sold on the government-run Health Insurance Exchange to be overseen by the Health Choices Commissioner, a presidential appointee. The Exchange would include both the public option and private plans. Employer plans would also be required to meet these same federal benefit standards within five years.

The Capps Amendment may contain a provision to prevent abortion from being mandated by the Secretary of Health and Human Services (HHS) as an “essential benefit,” or prevent the Commissioner from requiring that qualified plans include abortion in order to participate in the Exchange. However, the remainder of the Capps Amendment would, at the same time, require several ways of covering and funding abortion in the public option and private plans in the Exchange either with or without the Hyde Amendment. What follows is background information on federal funding of abortion and how the Capps Amendment would include abortion in H.R. 3200.

HISTORY OF ABORTION FUNDING AND THE HEALTH CARE DEBATE

After the introduction of H.R. 3200 on July 14, 2009 public debate began immediately about the treatment that abortion would receive under its provisions. The history of Medicaid shows that the federal government will fund abortion unless it explicitly is excluded. After Medicaid funded about 300,000 abortions, Congress enacted the Hyde Amendment as part of the Labor, Health and Human Services (LHHS) appropriations bill in 1976.ⁱⁱ

The Hyde Amendment prevents LHHS funding from paying for abortions or paying health plans that cover abortion. However, many of the programs and mandates in the House health bill will not be subject to the LHHS appropriations bill, thereby effectively bypassing the Hyde Amendment. As such, while the term “abortion” was not in H.R. 3200, mandated categories of care such as “outpatient services” would include abortion as a covered benefit unless it explicitly is excluded.ⁱⁱⁱ

On July 30-31, 2009 a series of amendments were offered in the House Energy and Commerce Committee to clarify this matter, and all attempts explicitly to exclude abortion coverage from H.R. 3200 were defeated.^{iv} However, on July 30, the Committee did adopt an amendment to H.R. 3200, offered by Rep. Lois Capps (D-CA 23rd), by a 30-28 vote (six Democrats and all Republicans opposed it) that explicitly included abortion in the health care bill.

The Capps Amendment changes the status quo of current federal law on abortion funding as set forth by the Hyde Amendment, the Federal Employees Health Benefits Plan (FEHBP) and the State Children’s Health Insurance Plan (S-CHIP). Pursuant to these laws, federal funds cannot pay plans that reimburse for abortion services except in cases of life endangerment, rape or incest. The Capps Amendment reverses the abortion policy set forth in those laws by subsidizing health plans that include coverage of abortion on demand while using an accounting scheme to provide the illusion of precluding government payment for abortions. And even this meager accounting scheme would be removed if the Hyde Amendment were not passed by a future Congress in the annual appropriations process. The following analysis of the Capps Amendment shows how it would include abortion in the health care bill either with or without the Hyde Amendment.

ANALYSIS OF CAPPS AMENDMENT

PUBLIC INSURANCE PLAN

First, the Capps Amendment subsection (d)(3) --p. 2-- requires the public health insurance option to fund abortions that are permitted by current LHHS appropriations law, which under the current Hyde Amendment includes abortions in the case of life endangerment, rape or incest. For this paper, references to the two categories of abortions outlined by the Capps Amendment are as follows: abortions permitted under Hyde are “Hyde allowable” abortions, and those not permitted are “elective abortions.”

Second, subsection (d)(3) then states that nothing in this Act should be construed to prevent the public option from “providing for” or “prohibiting coverage of” abortions for which the appropriations funds are not permitted, e.g., elective abortions. Despite appearing to offer neutrality on the question of whether the public plan would provide for all abortions, this clause would do one of two things depending on the continued existence of the Hyde Amendment, either of which involves an expansion of governmental intrusion in promoting abortion.

If the Hyde Amendment’s provisions remain as law, this clause authorizes the Secretary of HHS to include elective abortion as a covered benefit under the public option. This means that the government is authorized to cover elective abortions. Such abortions would theoretically not be government subsidized because subsection (3) --p. 6-- “prevents” payment for elective abortions using “affordability credits.” However, this clause does not in reality prevent government funding of abortion, but is an accounting gimmick. The House health care bill creates a public plan to compete with private plans, both of which would be on the government-run Exchange.

The Exchange would provide affordability credits to the public plan for low-income individuals (though individuals not eligible for affordability credits may also purchase the government plan). These funds would go to a newly established “Account” in the U.S. Treasury for the public plan, from which the various covered services would be paid. Premiums paid by individuals in the public plan would also go to this Account. So there is no reason to believe that premium dollars will not be pooled with affordability credits in the Treasury Account to be used separately for abortion services.

However, even if the premium amounts paid by individuals to the public health plan were kept in a separate government account from the affordability credits paid to it by the Exchange Trust Fund--a big if--once those premiums go into the public plan “Account”, they become *government* funds. If the public health plan covers abortion services, it would pay for abortions out of these government funds in the Account. As such, under the Capps Amendment, if the Secretary chose to cover abortion on demand, this accounting provision that purports to prevent public funds for abortion would be meaningless because the government would, in fact, be subsidizing the public plan’s abortion coverage and paying for the abortion services out of the public plan Account. The Capps Amendment does not say that the individual must pay for the abortion service out of their pocket. Therefore, any coverage of elective abortions under the public plan would involve government funding of abortion.

If on the other hand, the Hyde Amendment is removed by a future Congress, a position President Obama strongly supported as a candidate for President,^v subsection (d)(3) --p. 2-- which requires the public plan to cover allowable abortions under the LHHS appropriations bill, would trigger an immediate *requirement* to cover elective abortions. Because Hyde would be removed, funding for all abortions would be permitted. This provision, therefore, would require coverage for all abortions under the public plan. Moreover, if the Hyde Amendment is removed, then even the accounting gimmick (3) -

-p. 6-- that supposedly “prevents” affordability credits from paying for elective abortions, becomes a moot issue. So this provision governing abortion coverage in the public plan, which at first blush seems only to require coverage for those abortions permitted under the Hyde Amendment, turns into a requirement that the public plan covers and funds all abortions if the Hyde Amendment is removed.

Even under the best-case scenario, where the Hyde Amendment is renewed by this Congress, the Capps Amendment would go well beyond the policy of the Hyde Amendment by authorizing coverage for all abortions in the public plan even if the accounting gimmick actually required individuals to pay for most of them with their own private funds (which it does not). The Capps Amendment also goes well beyond current law governing FEHBP and S-CHIP which do not allow federal subsidies for health plans that include abortion coverage. Again, if the Hyde Amendment is not renewed, the public plan would be required to cover all abortions and every single abortion would be funded with federal subsidies.

Whether the Hyde Amendment is renewed or not, the only difference with respect to coverage of abortion under the Capps Amendment is whether the public plan is *authorized* to cover and pay for all abortions or whether it is *legally required* to cover and pay for all abortions. The likelihood that this Administration would choose not to cover all abortions, given promises to abortion groups to cover “reproductive health” and “abortion,” is extremely small. The fact is that the Capps Amendment authorizes coverage of all abortion under the public health plan envisioned in the House bill. This bill is indeed the historical pass where this crucial authorizing decision is made once and for all.

PRIVATE PLANS ON THE EXCHANGE

The Capps Amendment (d)(2) --p. 1-- says that qualified health plans can choose to cover either elective abortions or Hyde allowable abortions. However, the Capps Amendment also contains subsection (e)(1) --p. 3-- which requires the Commissioner to ensure that the Exchange includes in every premium region at least one health plan that covers all abortions and one health plan that does not provide coverage for abortion other than the life, rape, and incest abortions, or any abortions at all. Even with the Hyde Amendment in place, this provision (e)(1) essentially mandates “at least one” pro-abortion plan and one pro-life plan in each region of the country. These private plans would be on the Exchange and would receive government subsidies for low-income individuals to purchase such plans. Since at least one, or maybe more, of these Exchange-participating plans must cover elective abortions, the government would be subsidizing plans that provide abortion coverage. As with the public plan, even with Hyde in place, an accounting gimmick would create the illusion that no federal subsidies can pay for elective abortion.

The provision’s subsection “segregation of funds” (e)(2) --p. 4-- requires each plan covering elective abortions to provide “assurances satisfactory to the Commissioner” that (A) affordability credits are not used for such abortions and that (B) only

premiums are used to pay for those abortions. Unlike the public health plan in which individuals' premiums would be paid to the government plan and go into the government Account, those purchasing private plans on the Exchange would pay their premiums to the private health plan, not the Exchange.

The Exchange's role would be, among other things, to pay the private plan affordability credits to cover the cost of the premiums for low-income individuals. Proponents of the Capps Amendment use this "segregation of funds" provision to claim that private premiums, not government affordability credits, would be used to pay for elective abortions. What is not clear is how, if at all, the Capps Amendment would require Exchange-participating plans that cover elective abortions to keep Exchange-issued affordability credits separate from the pool of premium funds, the pool of which would be used to pay for all other covered services.

Even if premiums were kept in a separate account from the affordability credits, the effect of this provision is that the government would still be subsidizing abortion plans in the Exchange regardless of the type of paperwork requirement. This scenario would occur with the Hyde Amendment in place, and it is a clear way around the Hyde Amendment. The Hyde Amendment prevents funding for abortions or funding for plans that cover abortion, so *clearly this provision circumvents Hyde by subsidizing private plans that include abortion coverage*. Furthermore, this provision has the effect of ensuring that everyone who pays premiums for a plan covering elective abortion will also be paying for the cost of elective abortions.

If on the other hand, the Hyde Amendment is not renewed, the government would subsidize the cost of abortion as a covered benefit in the Exchange participating plans without the paperwork requirements described above. Without Hyde, the "segregation of funds" provision becomes void since there would be no abortions under the set of abortions "not permitted" under the LHHS bill. Affordability credits could be pooled directly with premiums without any accounting gimmicks. Furthermore, if the Hyde Amendment is removed, the requirement (e)(1)(B) --p. 3-- that there be a pro-life health plan in each region would be removed since there would be no set of abortions that are not permitted. The text of this subsection states that such a plan "may" be one that does not cover Hyde allowable abortions, so if Hyde is removed, the question of whether any pro-life plans would operate in the Exchange would then be at the discretion of the Commissioner.

In short, if the Hyde Amendment remains in place the Capps Amendment mandates elective abortion-covering plans across the country and gets around the Hyde Amendment via an accounting gimmick. If the Hyde Amendment is gutted, even the accounting gimmick goes away and the government will unabashedly subsidize elective abortions.

ABORTION SURCHARGE

The Capps Amendment includes a section (b) --p. 4-- which requires the Commissioner

of the Exchange to determine the cost of elective abortions — the actuarial value — covered in both the public plan or Exchange-participating private plans, as long as the Hyde Amendment is in the LHHS bill. This amounts to an abortion surcharge which would be paid by every individual participating in either the public health plan or private health plans that cover elective abortion. The section specifically says that in estimating the cost, the Commissioner may take into account the overall cost of including such abortion coverage but may not include cost reductions resulting from a reduction in other services, such as prenatal care, delivery or postnatal care, and the cost may not be less than \$1 per enrollee per month.

This section therefore requires each plan covering elective abortion to charge at least \$12 per year, and the cost could be higher. Even if one puts the accounting gimmicks aside, everyone participating in such plans would be required to pay for those elective abortions. The accounting gimmicks, either for the public health plan or the private plans that cover elective abortion, do not change the fact that the government would be determining the cost of elective abortions, and subsidizing those plans.

SUMMARY OF CAPPS AMENDMENT ON ABORTION

In summary, with the Hyde Amendment in place, the Capps Amendment authorizes coverage for elective abortions in the public plan, mandates that at least one private plan in each premium region of the Exchange cover elective abortions, and subsidizes plans that cover elective abortion using an accounting gimmick to get around the Hyde Amendment. If the Hyde Amendment is not renewed, the public plan would be required to cover all abortions and would pay for all abortions, private plans would receive government subsidies to pay for abortion without the accounting gimmick, the requirement for pro-life plans would be relegated to the whims of the Commissioner and everyone in a private or public plan would be forced to pay for all abortions.

ADDITIONAL CAPPS PROVISIONS

PSEUDO-CONSCIENCE PROTECTION

The Capps Amendment "non-discrimination" provision in subsection (d) --p. 5-- prevents health care plans in the Exchange from discriminating against a "health care provider or health care facility because of its willingness to or unwillingness to provide, pay for, provide coverage of, or refer for abortion." This provision does not protect the health plans from any discrimination by the Federal or state governments. If a Catholic HMO wanted to participate in the Exchange, or if a group chose to establish a pro-life health plan, that plan itself would not be protected from discrimination. The lack of conscience protections for pro-life plans is exacerbated by the provision's convoluted protection for pro-abortion providers and facilities. When it says "willingness to or unwillingness to" provide abortion, this creates a right for abortion providers. It makes little sense to call a health care plan "pro-life" when it cannot exclude from its network providers and facilities that perform some or all abortions.

EFFECT ON FEDERAL AND STATE LAWS ON ABORTION

The Capps Amendment section 2 --p. 6-- purports to have no effect on Federal and state laws. It says nothing in this Act shall have any effect on Federal laws regarding “conscience protection,” “willingness or refusal to provide abortion,” and “discrimination on the basis of the willingness or refusal” to participate in abortion. Moreover, it says nothing in this Act should have any effect on state laws regarding “the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.” However, there could be an effect on Federal laws that protect health care plans that refuse to cover abortion services since such plans are not protected in the Capps Amendment from being required to include abortion providers or facilities in their network.

Regarding state laws, it is possible that state laws that indirectly reduce abortion by, for example, requiring higher health clinic standards that apply to emergency care clinics to apply to abortion clinics would be trumped, since such laws are not directly related to the abortion procedure. Moreover, if health plans covering elective abortions mandated by the Capps Amendment are based in a state that forbids such coverage as part of its state health insurance program, it is less than clear how those states will participate in the Exchange or continue to provide Medicaid free of abortion coverage.

CONCLUSION

FRC opposed the Capps Amendment because it is pro-abortion and dramatically shifts government support to health plans that cover abortion on demand. FRC supported amendments to exclude mandates for abortion coverage and to prevent federal funding for abortion services or plans that cover abortion. Such amendments failed in both House and Senate Committees, while the Capps Amendment passed in the House Committee. In response to those who claim that the Capps Amendment merely allows private plans to cover abortion, the response is that the Amendment includes a direct break with current government funding policy enforced by the Hyde Amendment, the FEHBP provision, or as codified under S-CHIP. These laws prevent government funding for abortion or plans that cover abortion.

To those who claim that the health care bills are silent on the issue of abortion, the Capps Amendment lays that argument to rest. The history of government funding in health care demonstrates that abortion on demand will be funded unless explicitly excluded. The Democrat-controlled Congress has thus far rejected multiple amendments to maintain current policy on government-subsidized abortions and has now adopted an amendment to explicitly include abortion in health care reform.

Real conscience protections offered by Reps. Bart Stupak (D-Mich.) and Joe Pitts (R-Penn.) were adopted in the House Energy and Commerce Committee, but a similar amendment offered by Senator Tom Coburn (R-Okla.) was rejected in the Senate

Health, Education, Labor and Pensions Committee. Conscience protections alone would do little to assuage pro-life patients and health care providers if the America's Affordable Health Choices Act passes in any of its current forms, because under these bills the government would subsidize abortion on demand. Pro-life individuals and organizations unequivocally should oppose passage of these bills, because they would substantially increase the number of abortions and bring about taxpayers' complicity in a new wave of abortion on demand.

ⁱ Capps Amendment:

http://energycommerce.house.gov/Press_111/20090730/hr3200_capps_1.pdf.

ⁱⁱ First enacted in 1976, the Hyde Amendment is a provision barring the use of federal funds to pay for abortions or plans that cover abortion. To act as law, the Hyde Amendment must be passed annually as an amendment to the Labor/Health and Human Services (HHS)/Education appropriations bill. The U.S. Supreme Court held that the Hyde Amendment was constitutional in the landmark case, *Harris v. McRae* (1980). The provision is named after U.S. Representative Henry Hyde (R-IL) who, as a freshman member of the House, first proposed the amendment. Rep. Hyde (1924-2007) served in the House from 1975-2007.

ⁱⁱⁱ For more information on why abortion would be covered under health care legislation if not excluded, see Health Care and Abortion backgrounder:

<http://downloads.frc.org/EF/EF09I06.pdf>, and see also, Christopher M. Gacek, "House Health Care Bill's Murky Abortion Clause," *The Washington Examiner* (Aug. 18, 2009): 20. For a Q&A on abortion and the health care legislation prior to the Capps amendment, see here: <http://downloads.frcaction.org/EF/EF09G12.pdf>.

^{iv} For more information on pro-life amendments to House and Senate versions of current health care reform legislation, see <http://downloads.frc.org/EF/EF09H48.pdf>.

^v See: <http://www.rhrealitycheck.org/blog/2007/12/21/sen-barack-obamas-reproductive-health-questionnaire>