



## **Nelson Provisions in Health-Care-Reform Law Could Jeopardize, Stigmatize Women's Access to Abortion Services**

In a last-minute deal, anti-choice Sen. Ben Nelson (D-NE) won inclusion of a number of abortion-related provisions in the Affordable Care Act (ACA), the national health-reform law passed by Congress and signed by President Barack Obama in March 2010.<sup>1</sup>

The pro-choice community believes that the right to choose should not be dependent on one's income level and that all funding bans on abortion are discriminatory and unfair. The Nelson restrictions go beyond even the Hyde amendment, and may impose serious constraints on abortion coverage that could cause women to lose ground in health reform. Following is a summary of the Nelson language, other provisions regarding abortion coverage in the health-reform law, and the executive order issued by the Obama administration regarding implementation of these provisions.

### **The Nelson Provisions Require Strict Segregation of Funds**

To separate federal funds from private dollars used for abortion-care expenses, the Nelson language requires plans offering abortion coverage in state health-insurance exchanges to establish two distinct accounting systems to process premium payments.<sup>2</sup> Health plans that offer abortion coverage must create one account solely for the deposit of private premium dollars used to pay for abortion coverage – an account into which *no* federal dollars may be deposited. Plans must create a second, separate account to process premium dollars paid for all other covered benefits. Health plans are required to use accepted accounting procedures to maintain these separate allocation accounts, confirming full segregation of funds.

### **The Nelson Language Establishes a Separate-Payment Requirement**

In addition to mandating strict separation of funds, the Nelson provisions require plans in the exchange that offer abortion coverage to collect separate payments from enrollees.<sup>3</sup> If implemented in its most restrictive iteration, this provision could force consumers who buy a plan with abortion coverage to make two separate financial transactions: one to purchase health coverage overall and another to pay for the actuarial value of abortion services specifically.

If implemented in this manner this provision would present several problems:

- It has the potential to create a major administrative burden for consumers. Requiring individuals to write two checks or to make two online transactions in order to purchase a plan that includes abortion coverage - a benefit that most plans already offer - is a new, unnecessary hassle that is likely to cause significant consumer confusion and frustration.
- It unfairly treats abortion coverage as a separate and distinct - even stigmatized - benefit. No other provision in the law requires individuals to make separate payments for other sensitive, personal health services.
- It imposes significant disincentives on insurance companies that want to offer coverage for abortion services. In requiring health plans to collect separate payments, the Nelson language requires these plans to process double the number of financial transactions and to establish parallel administrative processes to track and properly deposit multiple payments. An independent analysis found that the requirement that individuals make separate payments “could be expected to chill issuers’ willingness to sell products that cover a range of medically indicated abortions,” and that “the more logical response would be not to sell products that cover abortion services.”<sup>4</sup> In the long term, these burdens could limit severely women's ability to obtain abortion coverage in health-insurance exchanges.

While some argue that such separate payments are necessary to ensure that no federal subsidies are used indirectly to pay for abortion services, this is incorrect. First and foremost, it must be reiterated that abortion care should not be separated and stigmatized in this manner. But even if one accepts this unfair premise, segregating funds into two accounts, as is required by the health-care law, is a sufficient means of separating federal dollars from those used to cover abortion services. Many programs that receive federal funds do just this: firewalls are utilized to segregate federal dollars from private funds used for unauthorized purposes – such as covering abortion care or funding religious activities.

- For example, 17 states cover the cost of abortion services beyond those permitted under the Hyde amendment.<sup>5</sup> The Department of Health and Human Services has long recognized that states may provide this coverage by paying for it from an account that is completely separate from any federal funds or the state's Medicaid matching funds.<sup>6</sup> As long as there is no crossover between state funds used to pay for abortion coverage and federal monies, no commingling occurs.
- In addition, because the Constitution mandates separation of church and state, the federal government cannot fund sectarian activities. However, many religious organizations receive federal funding for secular, social-service activities. For example, the Catholic Church has a long history of seeking government funding, including support for Catholic schools, hospitals, and programs run by Catholic Charities.<sup>7</sup> In those arrangements, the church is able to manage funds from separate sources to ensure

that tax dollars do not finance religious practices. If separation of federal funds from private dollars works for the church hierarchy, then it also should work for women's reproductive-health care.

### **The Nelson Language Encourages and Empowers States to Block Abortion Coverage**

The Nelson language requires state insurance commissioners to determine whether health plans are in compliance with the law's requirements to segregate funds and to maintain separate allocation accounts. However:

- Absent explicit federal regulations to the contrary, this authority could allow a politically minded anti-choice commissioner to create administrative hurdles that would dissuade insurers from covering abortion or make it virtually impossible to be in compliance with the law.
- If the plans are deemed to be out of compliance, it may threaten their ability to participate in an exchange.
- The law does allow individuals and plans to appeal the commissioner's decision to a court of law. However, pursuing a lawsuit can be prohibitively expensive.

The Nelson language also includes a provision explicitly inviting states to ban abortion coverage or to enact their own, Stupak-like restrictions on such coverage in their state health-insurance exchange.<sup>8</sup> Although a few federal courts have found that states already have this power, the political intent of Sen. Nelson's language seems clear: to encourage states to ban all private insurance coverage for abortion. At the time the Nelson restrictions were adopted, six states already prohibited abortion coverage in the private insurance market: ID, KY, MO, ND, OK, RI.<sup>9</sup> (Rhode Island has two separate insurance prohibition laws; courts have declared one unconstitutional and unenforceable and the other partially unconstitutional and unenforceable.) And, as feared, passage of the Affordable Care Act with this provocative language triggered a flood of activity in state legislatures across the country. As a result, since the law's enactment, 10 more states have enacted abortion-coverage bans: AZ, FL, IN, KS, LA, MS, NE, TN, UT, VA. Additionally, Idaho, Missouri, and Oklahoma passed laws expressly extending their private-market bans to their state's health-insurance exchange. All told, now 15 states ban abortion coverage either in their health-insurance exchange or in the statewide private insurance market.<sup>10</sup>

### **Other Abortion-Coverage Provisions in the Health-Reform Law**

#### *The Nelson Provisions Ban Federal Funding for Abortion and Maintain the Hyde Amendment*

The Affordable Care Act explicitly bans federal funds from being used to pay for abortion services, except where the pregnancy threatens the life of the woman or the pregnancy is the result of rape or incest.<sup>11</sup> Section 1303(b)(1)(B)(i) of the law states: "The services described in

this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.”<sup>12</sup> This direct reference to the Hyde amendment means that the same restrictions on federal funds in Medicaid and other federal health programs will be applied to the health-insurance exchange.<sup>13</sup> Indeed, in August 2011, a federal court ruled in *Susan B. Anthony List v. Driehaus* that the Affordable Care Act does not impermissibly fund abortion services, finding that “[t]he express language of the PPACA does *not* provide for tax-payer funded abortion. That is a fact, and it is clear on its face.”<sup>14</sup>

NARAL Pro-Choice America opposes the Hyde amendment and other discriminatory current-law bans on federal funding of abortion care. Abortion is basic health care for many women, and it deserves coverage – both public and private. Restricting funding for abortion coverage, as the Hyde amendment does, jeopardizes women's health and disproportionately impacts low-income women, obstructing their access to comprehensive health care. Again, the right to choose should not be dependent on one's income level or source of health insurance.

#### *The Nelson Provisions Include Other Abortion-Related Restrictions*

The health-reform law has the following additional abortion-related provisions:

- *Sets conditions on abortion coverage in the exchange :*
  - Insurance plans participating in the exchange may determine whether or not to provide abortion coverage.<sup>15</sup>
  - As readers will recall, the law does not include a public option for health insurance. Instead, the Office of Personnel Management will administer two or more private plans. One of these plans must not provide abortion coverage. The other(s) may, at their choice.<sup>16</sup>
- *Includes refusal provisions:* The law grants broad license to individuals and facilities to refuse to provide, pay for, or refer for abortion services.<sup>17</sup>

#### **Executive Order and Model Guidelines Regarding Abortion-Coverage Provisions in the Health-Reform Law**

In order to win the support of several anti-choice lawmakers in the House, the Obama administration issued an executive order confirming that the Hyde amendment, which denies abortion care to millions of low-income Americans, remains in force under the Affordable Care Act.<sup>18</sup> Such an order was unnecessary, since the law would not have affected the enforceability of the Hyde amendment. The order also discusses plans for implementing the Nelson restrictions, including a requirement that the secretary of the Department of Health and Human Services (HHS) develop model implementation guidelines within 180 days.

Following the direction of the executive order, in September 2010, HHS and the Office of Management and Budget released model guidelines for state insurance commissioners to use in monitoring insurance-company compliance with the new law's abortion-funding restrictions.<sup>19</sup> The guidelines are intended specifically to help state insurance commissioners ensure that insurance companies separate federal funds from all private dollars that are used for abortion care.

The guidelines, which do not yet have the force of law, advise state insurance commissioners to require all health plans participating in state insurance exchanges to:

- Submit plans that detail the accounting processes they intend to use to segregate funds;
- Submit annual assurance statements declaring that they have segregated funds; and
- Include the segregation requirement as part of plans' regular, periodic financial audits.<sup>20</sup>

Final implementing regulations for the Nelson provisions will be issued by 2014. Clear and explicit federal regulatory language is necessary to ensure that state governments do not impose additional restrictions or administrative burdens on health plans that offer abortion coverage in state health-insurance exchanges.

### **Conclusion**

The Affordable Care Act takes significant steps toward bringing more than 30 million Americans into a health-care system that will include coverage for many reproductive-health services. However, the Nelson language imposes unacceptable new restrictions on abortion coverage that could result in most private health insurers deciding not to offer coverage for abortion. Improving health-care coverage for all Americans should not come at the price of restricting women's access to reproductive-health services.

January 1, 2012

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#### **Notes**

<sup>1</sup> P.L.111-148, 111th Cong. (2010).

<sup>2</sup> P.L. 111-148, 111th Cong. (2010), at § 1303(b)(2)(C).

<sup>3</sup> P.L. 111-148, 111th Cong. (2010), at § 1303(b)(2)(B).

<sup>4</sup> Sara Rosenbaum, *Abortion provisions in the Senate Managers Amendment* (Dec. 21, 2009) at <http://www.talkingpointsmemo.com/documents/2009/12/gwu-analysis-of-nelson-provision.php?page=1> (last visited Oct. 25, 2011)

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- <sup>5</sup> NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (21st ed. 2012), at [www.WhoDecides.org](http://www.WhoDecides.org).
- <sup>6</sup> Letter from Department of Health and Human Services Health Care Financing Administration to State Medicaid Directors of Feb. 12, 1998. (Re: changes to the Hyde Amendment. "If a state wishes to reimburse managed care providers or organizations to provide additional abortions, it must do so under a separate contract or arrangement using monies unrelated to Federal, state or local Medicaid matching dollars. However, this should not be construed as restricting the ability of any managed care provider to offer abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a state's or locality's contribution of Medicaid matching funds).")
- <sup>7</sup> See, e.g., Catholic Charities USA, *Annual Report 2009*, at <http://www.catholiccharitiesusa.org/NetCommunity/Document.Doc?id=2331> (last visited Oct. 25, 2010).
- <sup>8</sup> P.L. 111-148, 111th Cong. (2010), at § 1303(a)(1).
- <sup>9</sup> NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (21st ed. 2012), at [www.WhoDecides.org](http://www.WhoDecides.org).
- <sup>10</sup> NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (21st ed. 2012), at [www.WhoDecides.org](http://www.WhoDecides.org).
- <sup>11</sup> P.L. 111-148, 111th Cong. (2010), at § 1303(b)(2).
- <sup>12</sup> P.L. 111-148, 111th Cong. (2010), at §1303(b)(1)(B)(i).
- <sup>13</sup> P.L. 94-439, 94th Cong. (1976). Congress enacted the Hyde amendment, which restricts federal funding for abortion, in 1976, but the policy was litigated and did not go into effect until 1980. The Hyde amendment has blocked federal funds from covering abortion services for low-income women receiving Medicaid for more than 30 years.
- <sup>14</sup> *Susan B. Anthony List v. Driehaus*, F. Supp. 2d. (S.D. Ohio 2011).
- <sup>15</sup> P.L. 111-148, 111th Cong. (2010), at § 1303(b)(1)(a).
- <sup>16</sup> P.L. 111-148, 111th Cong. (2010) at § 1334(a)(6).
- <sup>17</sup> P.L. 111-148, 111th Cong. (2010), at § 1303(b)(4).
- <sup>18</sup> Press Release, White House, *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act* (March 21, 2010).
- <sup>19</sup> Pre-Regulatory Model Guidelines Under Section 1303 of the Affordable Care Act (PL-111-148): Issued Pursuant to Executive Order 13535 (March 24, 2010) (Sep. 20, 2010) at [http://www.whitehouse.gov/sites/default/files/omb/assets/financial\\_pdf/segregation\\_2010-09-20.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/financial_pdf/segregation_2010-09-20.pdf).
- <sup>20</sup> Pre-Regulatory Model Guidelines Under Section 1303 of the Affordable Care Act (PL-111-148): Issued Pursuant to Executive Order 13535 (March 24, 2010) (Sep. 20, 2010) at [http://www.whitehouse.gov/sites/default/files/omb/assets/financial\\_pdf/segregation\\_2010-09-20.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/financial_pdf/segregation_2010-09-20.pdf).