



December 7, 2009

**RE: Oppose Nelson-Hatch Abortion Coverage Ban Amendment  
#2962 to the Patient Protection and Affordable Care Act of 2009**

Dear Senator:

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals, and its hundreds of thousands of members, activists, and 53 affiliates nationwide, we urge you to vote against the abortion coverage ban amendment offered by Senator Nelson (NE) and Senator Hatch (UT) to the Patient Protection and Affordable Care Act of 2009.

This amendment, like the Stupak-Pitts amendment adopted in the House, is a grievous assault on women's access to abortion care. For the reasons outlined below, it should be rejected by the Senate.

**1. The Nelson-Hatch Amendment is a direct attack on a woman's ability to make personal, private medical decisions and puts politics before a woman's health.**

- Abortion is part of basic health care for women. Although we may not all feel the same way about abortion, we should respect and support a woman's decision. Everyone's circumstances and health care needs are different; a woman facing an unintended or medically catastrophic pregnancy should be able to decide what is best for herself and her family.
- Under Nelson-Hatch, a woman who receives *no* federal assistance and chooses to participate in the *public* plan option, in order to lower her insurance cost, will not be able to get abortion coverage.
- Women who receive *any* federal subsidy under the Act cannot purchase a *private* plan that offers coverage for any abortion except those necessary to save a woman's life or where the pregnancy results from rape or incest. This is true even if the premium is paid for partly or largely through private dollars. If she wants abortion coverage, she will be required to purchase an abortion rider which may not in fact be available. In many instances, the federal government will in effect both require a woman to purchase insurance in the exchange and prohibit her from buying full coverage in the exchange.

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- If passed, the Nelson-Hatch abortion coverage ban will cause the federal government to turn its back on women who may need abortions even while it claims to improve women's access to health care.

**2. The Nelson-Hatch Amendment jeopardizes the abortion coverage millions of women currently have. The amendment could leave women in a worse position than before health care reform.**

- Initially, the insurance exchange will be open to the uninsured and underinsured, and companies with 25 or fewer employees.<sup>1</sup> Over the next several years, that number will grow to include businesses with up to 100 employees, and perhaps more, that employ millions of women.
- Today, at minimum, almost 50 percent of covered workers, and as many as 87 percent of employer-based insurance policies, currently cover abortions.<sup>2</sup>
- Insurance companies in the exchange will be able to offer plans that cover abortions only to those who receive no federal subsidy and *only* if they also offer an identical plan with no coverage for abortions. For reasons of economics, companies may well opt *not* to provide the shadow plan that covers abortion – with the result being a market with *no option* for abortion coverage
- Women would then be left unable to obtain insurance plans in the exchange with abortion coverage. This will be true even if they receive no federal health care subsidy. Women and their families would then be exposed to significant financial risk, amounting to thousands of dollars, should, for example, the woman need to terminate a pregnancy because of a severe fetal anomaly or because the fetus is not viable. The effect of Nelson-Hatch would be to force some women to continue a pregnancy, even after being informed by a doctor that the fetus will not survive, because they no longer have insurance coverage to terminate the pregnancy.

**3. The Nelson-Hatch Amendment intentionally creates disincentives for the insurance industry to provide coverage of abortion.**

- The Nelson-Hatch Amendment imposes two requirements on any plan that chooses to provide abortion coverage in the exchange: the issuer must also

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<sup>1</sup> According to the Congressional Budget Office, 30 million people will be covered through plans offered in the exchange; 3 million will receive no subsidies and 9 million will have coverage through plans purchased in the exchange by their employer. *See* Letter to Rep. John Dingell from Congressional Budget Office, November 6, 2009.

<sup>2</sup> Two major studies, by the Guttmacher Institute in 2002 and the Kaiser Family Foundation in 2003, suggest that most Americans who are insured through employer-based plans have coverage for abortion. *See* Guttmacher Institute Memo on Insurance Coverage of Abortion, July 22, 2009 (updated September 18, 2009) . Available at <http://www.guttmacher.org/media/inthenews/2009/07/22/index.html>.

offer an identical plan that does not cover abortion and it must ensure that all administrative costs and services in the two plans are kept separate.

- A recent study by the George Washington University School of Public Health<sup>3</sup> (GWU Report) confirmed the obvious impact of these two new rules. The authors concluded that the Stupak-Pitts amendment, which is substantively identical to the Nelson-Hatch amendment, will make abortion coverage economically disadvantageous and could “move the industry away from current norms of coverage.”<sup>4</sup>
- The GWU Report noted that “offering an entirely separate plan that operates according to a separate set of rules...will pose a major burden on the industry.”<sup>5</sup> Adherence to the Nelson-Hatch amendment would, for example, require plans to alter enrollment and summary plan materials, “coverage determinations and grievance and appeals procedures will have to be separately administered to respond to different coverage rules. Medical provider networks may have to be augmented...with separate negotiated payment rules.”<sup>6</sup>

**4. The Nelson-Hatch Amendment’s assertion that a woman can merely buy a separate insurance rider to obtain abortion coverage disregards the reality of women’s lives and holds out a false promise that such riders will be available to meet a woman’s needs.**

- Women do not plan unintended pregnancies nor do women plan to have medically catastrophic pregnancies. It is dismissive of women’s real life circumstances to suggest otherwise.
- Five states – Idaho, Kentucky, Missouri, North Dakota and Oklahoma – currently ban abortion coverage, with limited exceptions, in insurance plans. Abortion rider markets have not developed in those states; thus there is no evidence that such riders would be available in the exchange.
- The authors of the GWU Report concluded that “the terms and impact of the Amendment will work to defeat the development of a supplemental coverage market for medically indicated abortions. In any supplemental coverage arrangement, it is essential that the supplemental coverage be administered in conjunction with basic coverage. This intertwined administration approach is barred under Stupak/Pitts [and now Nelson-Hatch] because of the prohibition against financial comingling.”<sup>7</sup>

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<sup>3</sup> See Sara Rosenbaum et al, *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions*, The George Washington University School of Public Health and Health Services (November 16, 2009).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 1.

5. **The Nelson-Hatch Amendment invades women’s privacy.**
- The Nelson-Hatch Amendment compromises fundamental privacy rights. It forces a woman to reveal her most private reproductive health concerns and decisions: if she wants abortion coverage she must ask her employers, insurers, or her spouse or partner for the plan covering abortion or for an abortion rider.
  - We would not tolerate the government requiring men to ask for special insurance to cover erectile dysfunction or women to request special coverage for cervical cancer. We do not require or tolerate such intrusions for other sensitive and private health care. To demand women wanting abortion coverage to get it at the expense of their privacy is intolerable.
6. **The Nelson-Hatch Amendment is an improper extension and expansion of the Federal Employees Health Benefits Program (FEHBP) abortion ban.**
- The Nelson-Hatch Amendment goes well beyond the restrictions now imposed on federal employees. It extends the reach of federal bans on abortion coverage to those who are not employed by the government – including those working for private companies buying from private insurers.
  - It is egregious that, through the FEHBP abortion ban, our federal government imposes the religious viewpoint of a few lawmakers upon more than a million federal employees of diverse faiths and cultures. And it is unacceptable to intrude, in the same way, upon the privacy and autonomy of private-sector employees. This kind of ideologically-based intrusion in a significantly larger marketplace like the insurance exchange is improper.
7. **The Nelson-Hatch Amendment does not maintain the status quo and does not “merely” ensure that there is no public funding of abortion. The abortion compromise currently in the Senate bill does.**
- The Nelson-Hatch Amendment goes significantly further than longstanding federal rules against public funding of abortion. It imposes the restrictions in wholly new markets and on millions more women. In reality, the Nelson-Hatch Amendment has only one goal: to stop women from having abortions.
  - The compromise language that is in the current Senate bill maintains current federal policy on abortion and represents the status quo. The abortion compromise language provides that:
    - There will be no public funding for abortions except where the life of the woman is endangered or where the pregnancy results from rape or incest;

- Insurance companies must keep private funds separate from public dollars and only private dollars may be used to pay for abortion;
  - All state and federal laws on abortion access, notification, etc. remain unchanged;
  - There shall be no discrimination against individuals or facilities that perform abortions or those that choose not to perform abortions;
  - In every exchange, there must be one plan that provides abortion and one that does not (which provides anti-choice individuals with an option they do not have in today's insurance marketplace).
- The compromise language in the Senate bill is by no means our preferred choice. It singles out abortion care. We have long argued, in the context of health care reform, that abortion shouldn't be treated differently than any other health care service. Moreover, we believe that public funding of abortion is just and proper; the Hyde Amendment, which severely restricts Medicaid funding of abortion, is not. The government should not use its dollars to intrude on a woman's decision whether to continue or end a pregnancy and selectively withhold benefits if a woman decides to have an abortion. But the current language in the Senate bill is a compromise in that it does not extend the restrictions further.
  - The Senate language clearly prohibits federal funding for abortion, as requested by anti-choice individuals in Congress and in the general public. Anything more than this will advance an extreme anti-choice agenda that interferes in a woman's most private and personal health care decisions.

We strongly urge Senators to oppose the Nelson-Hatch amendment.

Should you have any questions, please do not hesitate to contact Vania Leveille, legislative counsel.

Sincerely,



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