CENTER FOR REPRODUCTIVE RIGHTS

FACT SHEET

Why the Stupak-Pitts Abortion Ban Is An Unprecedented and Damaging Assault on Women's Health

The House-passed Stupak-Pitts Amendment is a serious assault on women's health, yet many remain unaware of its radical scope and dangerous implications. Below we explain:

1) How the Stupak-Pitts Amendment is far more damaging than the already-harmful Federal Employee Health Benefits program, and violates President Obama's core promise that individuals will be able to keep the insurance coverage they have now;

2) How abortion "riders" fail to work in practice, essentially constituting a ban on coverage, and that such riders raise serious privacy concerns; and

3) How the Stupak-Pitts Amendment would dramatically restrict insurance options for small businesses that employ both persons receiving subsidies and those not receiving any government subsidies.

The bottom line is simple: Stupak-Pitts would make nearly impossible for private insurance companies that participate in the new health-care reform to offer abortion services coverage to women, even when those women use their own private dollars to purchase coverage.

1)The Stupak-Pitts Amendment is far more harmful than the already punishing and restrictive abortion policy in the Federal Employees Health Benefits (FEHB) program.

Under the Federal Employees Health Benefits (FEHB) program, federal employees and their dependents are barred from having insurance coverage for abortion in cases other than life endangerment, rape, or incest.[1] In practice, this means that any health insurance company offering a plan to federal employees through the FEHB program must exclude coverage for abortion, other than in extremely limited circumstances, in that health insurance policy.

The FEHB program is a devastating blow to women's ability to access safe and legal abortion care. But the Stupak-Pitts Amendment is even more damaging to women's access than the FEHB program, simply by virtue of the fact that it will affect a much broader range of people. The restrictions of the Stupak-Pitts Amendment will affect everyone covered through the Exchange.

During the first two years that the healthcare reform plan is in effect, the Exchange will be available to people without health insurance, people who purchase their own healthcare insurance, and some small businesses; in 2015, Congress will have the option of opening the Exchange to larger employers, as well.[2] It has been estimated that, by the year 2014, nearly 130 million people will be covered through the Exchange.[3]

Moreover, unlike the FEHB program, the Stupak-Pitts Amendment affects both public and private insurance programs: it not only bars coverage for abortion under the federal government-funded public option, but also prohibits the use of public funds in connection with any private health insurance plan that provides coverage for abortion. That means that a healthcare plan participating in the Exchange cannot cover abortion if any of its insureds receive government subsidies, described in the healthcare bill as "affordability credits." Because the majority of the people participating in the Exchange will receive some level of government subsidies[4], private insurers may cater to the market forces and simply opt not to cover abortion services at all; thus the Stupak-Pitts Amendment may have the effect of banning, or at least severely limiting, the availability of private insurance coverage for abortion.

Moreover, it is unclear how the scope of a health-care provider participating in the Exchange will be defined for purposes of determining whether the limitation on abortion coverage must apply to that provider. That is, in order to lawfully offer coverage for abortion, must a healthcare provider determine that none of its beneficiaries working for a particular employer receive government subsidies; that none of its beneficiaries in a particular state receive government subsidies; or that none of its beneficiaries in any of the plans it offers across the U.S. receive government subsidies?

The language of the Stupak-Pitts Amendment leaves these questions unanswered. Faced with this level of ambiguity, it seems all too likely that healthcare providers will choose not to cover abortion across the board. In addition, this level of ambiguity leaves open the possibility that if even one person receiving government subsidies signs up for a particular insurance plan through the Exchange, that plan will be barred from providing coverage for abortion. Consequently, anti-choice advocates could strategize to have recipients of government subsidies sign up for every plan offered through the Exchange, and thereby make it impossible for those insured through the Exchange to access coverage for abortion.

The blanket insurance ban created by the Stupak-Pitts Amendment is not necessary to prevent federal funds from being spent on insurance coverage for abortion, which was one of the central objectives of the Capps Amendment, the original abortion compromise language included in the House health reform bill.[5] Indeed, there are many examples of plans that comfortably co-exist while offering separate options on abortion services coverage.

Massachusetts, which adopted a public health insurance reform in 2006, provides an apt example. Massachusetts offers two insurance exchanges: Commonwealth Care, which is designed for low-income working adults who do not qualify for Medicaid and do not receive health insurance through an employer, and Commonwealth Choice, which is aimed at adults whose income level disqualifies them for Commonwealth Care or the State Medicaid program. All of the health insurance plans offered through both Commonwealth Choice and Commonwealth Care cover abortion.

At least two of the health insurance providers participating in Commonwealth Choice – e.g., Blue Cross Blue Shield and Fallon Community Health Plan – also offer separate insurance plans specifically for federal employees, which, in keeping with the restrictions of the FEHB program, do not cover "procedures, services, drugs and supplies related to abortion, except when the life of the mother would be endangered if the fetus were carried to term or when the pregnancy is the result of an act of rape or incest."[6]

Thus the federal government already contracts with healthcare providers that cover abortion through their other plans, without concern about the commingling or unlawful use of federal funds. Similarly, while conservative Christian organization Focus on the Family does not provide its employees with insurance coverage for abortion, the health insurance company it uses, Principal, covers abortion in the healthcare plans offered to its other clients.[7] Presumably Focus on the Family does not regard its use of Principal insurance as a means of funding or endorsing abortion, which it explicitly opposes in all cases other than endangerment of a pregnant woman's life.[8]

In addition, the Stupak-Pitts Amendment raises the significant possibility that people who are currently receiving insurance coverage for abortion through their employer will lose their benefits if their employer chooses to switch to a lower-cost plan offered through the Exchange, because of the significant likelihood that most or all plans offered through the Exchange will not include coverage for abortion. **This violates the President's core promise about healthcare reform: that it will not force people to give up healthcare benefits that they currently enjoy.**

2) Requiring individuals to purchase a special "rider" in order to have coverage for abortion care is a cynical and useless false option, and raises serious privacy concerns.

It is inherently irrational to ask women to plan for an unplanned pregnancy; but by requiring women to pay for separate, supplemental coverage in order to have health insurance coverage for abortion, this is exactly what the Stupak-Pitts Amendment requires women to do.

Even if women were inclined to exercise the option to purchase an abortion "rider," it seems likely that most healthcare providers participating in the Exchange will not offer them. Currently, five states — Kentucky, Idaho, Missouri, North Dakota and Oklahoma — have laws in effect that, generally, prohibit private insurers from covering abortions other than in cases of life endangerment, rape, or incest.[9] Despite the existence of this "rider" option, however, no private insurer offers abortion riders to individuals in either North Dakota or Oklahoma.[10] (Idaho, Kentucky, and Missouri don't track the existence of abortion riders, so it's not clear whether private insurers are offering such riders in those states.[11]) In Oklahoma and Idaho, respectively, only one insurer has applied to offer a rider for abortion coverage to small groups.[12]

Similarly, out of the twelve states that restrict public insurance coverage of abortion, only one state – Ohio – allows insureds the option to purchase a supplemental abortion rider.[13] Based on preliminary research (including a review of participating providers' websites and telephone calls to participating providers), it appears that such abortion riders are not, in practice, actually available to Ohio public employees.

In addition, the proposal to require women to purchase riders for abortion coverage raises significant privacy and safety concerns. The Stupak-Pitts amendment fails to clarify who would elect to have an abortion rider – the individual woman or her employer. Thus it leaves open the possibility that an individual woman will need to notify her employer if she wishes to purchase supplemental abortion coverage, a situation which clearly compromises her right to privacy. Even if the decision is left to the individual, a woman receiving health insurance benefits as a dependent will likely have to notify her spouse or partner if she wishes to purchase supplemental insurance coverage, and thus may place herself at risk of physical, sexual, or psychological abuse from an abusive partner who opposes her choice. Thus, the Stupak-Pitts Amendment threatens to seriously compromise women's privacy and safety interests.

3) It will be particularly difficult, if not impossible, for individuals working for small businesses to access any insurance coverage for abortion care.

Under the current version of the healthcare reform bill, the Exchange will be available to small businesses, and possibly expanded to include larger employers after the year 2015.[14] It's likely that many of the small businesses who would be eligible to participate in the Exchange employ both people receiving government subsidies and individuals with relatively higher incomes who do not receive government subsidies. Because the Stupak-Pitts Amendment prohibits insurance providers from covering abortion if any of the provider's insureds receive government subsidies, it will be difficult, if not impossible, for small businesses participating in the Exchange to offer coverage for abortion to any of their employees, regardless of whether or not those employees receive government subsidies.

To begin with, the healthcare reform bill does not make clear whether the Exchange will be administered at the federal or state level, or how the scope of a healthcare provider participating in the Exchange will be defined for purposes of determining whether the plan might be available to people receiving government subsidies.[15] Given this ambiguity, it seems all too likely that healthcare providers will choose not to cover abortion across the board, in order to simplify the administration of their plans and ensure that they are complying with the restrictions on abortion coverage.

The only way that health insurance providers could ensure that they are complying with the

Stupak Amendment's restrictions on abortion coverage would be to issue entirely separate insurance coverage for persons receiving government subsidies and those not receiving government subsidies. For example, a health insurance company could create and offer two different plans to a small business, one that includes abortion coverage and is offered exclusively to people not receiving government benefits and a second that does not cover abortion and is offered exclusively to people who are receiving affordability credits.

However, it remains unclear whether restricting access to certain plans based on participants' income levels is permissible, either under the healthcare reform bill or under federal, state, and local anti-discrimination laws. For example, it's possible that the language of the Stupak-Pitts Amendment — which prohibits the use of any "funds authorized or appropriated" by the act to "cover any part of the costs of any health plan that includes coverage of abortion"— could be interpreted to prohibit the use of public funds for the administrative costs of establishing a health insurance exchange. In that case, it would be unlawful for the federal government to participate in establishing a separate Exchange for the purpose of allowing certain people to have access to insurance coverage for abortion.

Even if this would be permissible under the Stupak-Pitts Amendment, however, it is impossible at this point to determine whether either the state or federal government (whichever is ultimately responsible for administration of the Exchange) or insurance providers will be willing to undertake the administrative hurdles and related expense of establishing separate exchanges or different insurance plans in order to guarantee access to abortion coverage for people not receiving government subsidies.

Given the level of expense and complexity that would be involved in establishing such a system, it seems likely that these structures will not be put into place — and thus, that people who would otherwise be eligible for private insurance coverage for abortion will be forced to go without abortion coverage, simply because their employers choose to participate in the Exchange.

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ENDNOTES

1 Treasury, Postal Service, and General Appropriations Act, Pub. L. 104-52, November 19, 1995; Office of Personnel Management, Benefits Administration Letter re: Newly Enacted Limits on Abortion Coverage, No. 95-223, Nov. 29, 1995, *available at* http://www.opm.gov/retire/pubs/bals/1995/95-223.pdf

2 The health reform bill "creates a new Health Insurance Exchange, with a public health insurance option alongside private plans." H.R. 3962, at §100(3)(B). This Health Insurance Exchange is commonly referred to as the "Exchange."

3 The Lewin Group, Memorandum re: Analysis of the July 15 Draft of The American Affordable Health Choices Act of 2009, July 23, 2009, at p. 4, *available at* http://www.heritage.org/research/healthcare/upload/lewin_public_plan_national_all.pdf (last visited November 10, 2009) (estimating that 129.6 million people will be covered through the Exchange by 2014).

4 In the House bill, all individuals with incomes up to 400% of the federal poverty level ($88,000 for a family of four) would receive subsidies to help pay for health insurance. People participating in the Exchange whose incomes exceed that level would not qualify for government subsidies.

5 The Capps Amendment provided that no public funds could be used to pay for abortion unless the abortion was the result of rape or incest, or endangered the life of the pregnant woman – the same narrow categories for which Medicaid funds are permissible under the Hyde Amendment. The Capps Amendment also stated that private and public funds had to be kept separate, and that only private funds, collected through individuals' insurance premiums, could be used to pay for abortions.

6 Fallon Community Health Benefit Plan, 2009, at §6, available at http://www.fchp.org/NR/rdonlyres/F5899866-3BDD-4514-BB6C-68250E142525/0/FEDS2009brochure.pdf; Blue Cross and Blue Shield Service Benefit Plan, 2009, at §6, *available at* http://www.fepblue.org/benefitplans/2009-sbp/sbp2009brochure_english.htm.

7 Amy Sullivan, "Does Focus on the Family Fund Abortions?" TIME, Oct. 28, 2009, *available at* http://swampland.blogs.time.com/2009/10/28/does-focus-on-the-family-fund-abortions (last visited Nov. 11, 2009).

8 Focus on the Family, Bioethics and Sanctity of Life: Our Position (Abortion), *available at* http://www.focusonthefamily.com/socialissues/sanctity-of-life/abortion/our-position.aspx (last visited Nov. 11, 2009).

9 *See* Idaho Code §§ 41-2142, 41-2210A, 41-3439, 41-3924 (life endangerment); Ky. Rev. Stat. § 304.5-160; Mo. Rev. Stat. § 376.805; N.D. Cent. Code § 14-02.3-03; Okla. Stat. § 1-741.2 (life endangerment, rape, or incest).

10 Kaiser Foundation, "How the House Abortion Restrictions Would Work," Nov. 10, 2009, *available at* http://www.kaiserhealthnews.org/Stories/2009/November/10/abortion-explainer.aspx (last visited Nov. 11, 2009). In addition, the National Women's Law Center has conducted research in North Dakota as a case study on the availability of optional abortion riders in states with bans on private insurance coverage of abortion. On the basis of that study, the NWLC has concluded that the ban on private insurance coverage effectively rendered abortion coverage unavailable in North Dakota. Specifically, the NWLC study found that: "Blue Cross Blue Shield of North Dakota ("BCBSND"), which holds 91% of the health insurance market in the state, does not offer optional riders

for abortion coverage in either the group or individual markets. In addition, the North Dakota Department of Insurance ("the Department") reports that they have no records in their computer system (installed in 1998) of abortion riders filed by any of the leading five individual insurance companies in the state, though a filing analyst at the Department recalled possibly seeing some abortion riders filed before that time." [E-mail from Stephanie Sterling of NWLC].

11 *Id.*

12 *Id.* It has been reported that an insurance company only recently filed an application to offer an abortion rider in Oklahoma; this raises the possibility that the application was made strategically to suggest that abortion riders are available and influence the debate over the Stupak-Pitts Amendment.

13 Guttmacher Institute, "Restricting Insurance Coverage of Abortion, Nov. 1, 2009, *available at* http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf (last visited Nov. 11, 2009).

14 Companies with up to 25 employees may enter the Exchange beginning in 2013; companies with up to 100 employees may enter the Exchange by 2015; and in 2015, the federal government may decide to open the Exchange to larger employers.

15 Conversation with Prof. Stuart H. Altman, a health care economist at Brandeis University, who said that it will not be possible to answer these questions until the federal government provides more clarity about whether the Exchange will be administered at the federal or state level.