

*New Federal Initiatives Project*

**Comparison of Conscience Provisions in Health  
Care Reform Bill**

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Both the House-passed and the Senate-passed health care reform bills include language that protects from discrimination health care providers who are unwilling to participate in abortions. However, the House language is broader in scope than the Senate language. Also, both bills have non-preemption clauses for federal conscience laws, but not for state conscience laws. Finally, neither bill includes conscience protection that would cover other controversial practices, such as the provision of emergency contraception or performance of sterilizations.

The Senate bill includes a provision prohibiting discrimination against health care entities that do not want to participate in assisted suicide (Sec. 1553), discussed separately below.

### **I. House Bill (H.R. 3962) and Abortion**

H.R. 3962,<sup>1</sup> passed in the House of Representatives on November 7, 2009, includes two conscience provisions pertaining to participation in abortions. The first provision provides that “*no exchange participating health benefits plan may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions*” (Sec. 304(d), emphasis added). This provision protects pro-life health care providers from discrimination by exchange-participating health benefits plans, which are health benefits plans that are offered through the Health Insurance Exchange created by the bill. The Exchange allows individuals and employers who meet certain criteria to have access to “a variety of choices in . . . health insurance coverage, including a public health insurance option.”<sup>2</sup>

The second provision mirrors the Hyde-Weldon language<sup>3</sup> passed annually in an appropriations bill, in that it provides that “*a Federal agency or program, and any State or local government that receives Federal financial assistance under this Act . . . may not (1) subject any individual or institutional health care entity to discrimination; or (2) require any health plan created or regulated under this Act . . . to subject any individual or institutional health care entity to discrimination, on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions*” (Sec. 259(a), emphasis added). The provision broadly defines the term “health care entity” and provides that The Office for Civil Rights of the Department of Health and Human Services will receive complaints of discrimination and coordinate an investigation of such complaints (Sec. 259(b) and (c)).

This provision ensures that government entities cannot subject or require insurance plans to subject health care providers to discrimination on the basis that they do not want to participate in abortions.

### **II. Senate Bill (H.R. 3590) and Abortion**

H.R. 3590,<sup>4</sup> passed in the Senate on December 24, 2009, contains one conscience provision pertaining to participation in abortions. The provision provides that “*no qualified health plan offered through an Exchange may discriminate against any individual health care*

provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions” (Sec. 1303(b)(4)).

This provision was part of Majority Leader Harry Reid’s Manager’s Amendment and replaced the ambiguous conscience language originally found in the underlying Senate bill. It is virtually identical to Section 304(d) in the House bill, which was discussed above; however, the Senate bill does not include a prohibition against discrimination by government entities comparable to Section 259(a) in the House bill, also discussed above. Also, there are no definitions of “health care provider” or “health care facility,” and there is no designation of who will receive complaints. Without specific definitions of “health care provider” and “health care facility,” administrative agencies or courts are arguably free to interpret the terms narrowly. Both the Hyde Amendment and the House health care bill broadly define “health care entity” to include direct providers of care, such as physicians and hospitals, as well as insurance companies and HMOs.

### **III. Conscience and Assisted Suicide**

The Senate bill includes a conscience provision which provides that “*the Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act . . . or any health plan created under this Act . . .* may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing” (Sec. 1553).

This provision prohibits discrimination against health care providers on the basis that they refuse to conduct an activity that is currently illegal in all but three states. In the vast majority of states, it should be clear that such discrimination is already prohibited, because the underlying activity is prohibited.

In contrast, the House bill does not include conscience protection for health care providers who do not want to participate in assisted suicide. This could be problematic for health care providers in states where assisted suicide is legal. While the House bill purports to prohibit “promot[ing] suicide, assisted suicide, euthanasia, or mercy killing” through the provision of advance directives, the bill fails to define “assisted suicide” (See Sec. 240(a)(3) and (b)(3)).

Both Oregon and Washington argue that the “death with dignity” allowed by their states is not “assisted suicide.” Therefore, in Washington and Oregon – and any state that may similarly allow assisted suicide by another name – advanced directives can be used to promote what amounts to assisted suicide without violating the House bill, and health care providers in those states will not be protected from discrimination based on an unwillingness to use advanced directives to promote assisted suicide.

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## **Related Links**

The Obama Administration Signals Intent to Change Conscience Clause Rule, May 4, 2009  
[http://www.fed-soc.org/publications/pubid.1356/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1356/pub_detail.asp)

H.R. 3962 (House Bill)  
[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3962pcs.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3962pcs.txt.pdf)

H.R. 3590 (Senate Bill)  
[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3590eas.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3590eas.txt.pdf)

United States conference of Catholic Bishops: Protecting Conscience Rights in Health Care: Our Voice is Needed!  
<http://usccb.org/conscienceprotection/>

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<sup>1</sup> [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3962pcs.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3962pcs.txt.pdf)

<sup>2</sup> *Id.*, at pp. 11; 162-74.

<sup>3</sup> The Hyde Amendment, as included in the Omnibus Appropriations Act, 2009 (H.R. 1105), signed into law March 11, 2009 (PL 111-8). §508(d): “None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. (2) In this subsection, the term ‘health care entity’ includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.”

<sup>4</sup> [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3590eas.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3590eas.txt.pdf)