

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Budget Committee

BILL: CS/SB 2

INTRODUCER: Budget Committee, Senator Haridopolos and others

SUBJECT: Health Care Services

DATE: February 23, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Favorable
2.	Munroe	Maclure	JU	Favorable
3.	Hansen	Meyer	BC	Fav/CS
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This joint resolution proposes the creation of Section 28 of Article I of the State Constitution, to preserve the freedom of Florida residents to provide for their own health care by:

- Ensuring that any person, employer, or health care provider is not compelled to participate in any health care system;
- Authorizing a person or employer to pay directly, without using a third party such as an insurer or employer, for health care services without incurring penalties or fines; and
- Authorizing a health care provider to accept direct payment for health care services without incurring penalties or fines.

The joint resolution also does not allow a law or rule to prohibit the purchase or sale of health insurance in private health care systems and specifies certain aspects of health care that are not affected by this constitutional amendment. In addition, the joint resolution also defines terms that are used within the proposed constitutional amendment. The joint resolution includes the statement that is to be placed on the ballot at the next general election or at an earlier special election.

This joint resolution does not amend, create, or repeal any sections of the Florida Statutes.

II. Present Situation:

Federal Health Care Reform¹

On March 21, 2010, Congress enacted national health care reform under the Patient Protection and Affordable Care Act, often referred to as the Affordable Care Act (ACA).² On March 30, 2010, Congress enacted the Health Care and Education Reconciliation Act³ to amend the ACA. The new federal law will bring sweeping changes to the U.S. health care system and, among other things, it will:⁴

- **Extend health insurance coverage** to about 32 million people who currently lack it, leading to coverage of about 94 percent of nonelderly Americans.⁵ The cost of coverage expansions will total \$940 billion from fiscal 2010 to fiscal 2019.⁶ However, considering other changes made under the new federal law, it is estimated that the overhaul will reduce the deficit by a net \$138 billion over the same period.⁷
- **Create state-based exchanges**, or marketplaces, where individuals without employer-provided insurance can buy health care coverage.⁸ Federal premium subsidies will be available to help cover the cost for individuals who earn between 133 percent and 400 percent of the federal poverty level (or \$24,352 to \$73,240 for a family of three in 2010).⁹
- **Expand Medicaid eligibility** to all individuals with incomes of up to 133 percent of the federal poverty level. The ACA specifies that in all states, the federal government will cover the entire cost of coverage to newly eligible people from 2014 through 2016. In 2017, federal matching funds for all states will cover 95 percent of the costs for the newly eligible people. The rate would be 94 percent in 2018, 93 percent in 2019, and 90 percent in 2020 and afterward.¹⁰

¹ For a more detailed summary of the health insurance provisions in the federal health care reform initiatives, see the National Conference of State Legislatures website:

<http://www.ncsl.org/Default.aspx?TabID=160&tabs=831,139,1156#1156> (last visited Dec. 20, 2010).

² Pub. L. No. 111-148, 124 Stat. 119 (2010).

³ Pub. L. No. 111-152, 124 Stat. 1029 (2010).

⁴ The format for the following information was adopted from a Consumer Watchdog blog, *A summary of the health care change we got*, March 26, 2010, available at <http://www.consumerwatchdog.org/blog/summary-health-care-change-we-got> (last visited Dec. 20, 2010).

⁵ See Congressional Budget Office, *Summary of Preliminary Analysis of Health and Revenue Provisions of Reconciliation Legislation Combined with H.R. 3590 as Passed by the Senate, Table 2.*, available at <http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf>, March 18, 2010 (last visited Dec. 20, 2010).

⁶ *Id.*

⁷ *Id.* at 2.

⁸ U.S. Department of Health & Human Services HealthCare.gov, *Timeline: What's Changing When: Establishing Health Care Exchanges*, available at <http://www.healthcare.gov/law/timeline/index.html#event39-pane> (last visited Dec. 20, 2010).

⁹ See, Phil Galewitz, *Consumers Guide to Health Reform*, Kaiser Health News, April 13, 2010, available at <http://www.kaiserhealthnews.org/Stories/2010/March/22/consumers-guide-health-reform.aspx> (last visited Dec. 20, 2010). See also National Conference of State Legislatures, *American Health Benefit Exchanges*, November 18, 2010, available at <http://www.ncsl.org/IssuesResearch/Health/AMERICANHEALTHBENEFITEXCHANGES/tabid/21393/Default.aspx#basics> (last visited Dec. 20, 2010).

¹⁰ National Conference of State Legislatures, *Medicaid and CHIP Eligibility Table by State*, July 1, 2010, available at <http://www.ncsl.org/default.aspx?tabid=20044> (last visited Dec. 20, 2010).

- **Provide a one-time, \$250 rebate for Medicare beneficiaries** who fall into a prescription drug coverage gap known as the “doughnut hole” in 2010 and seek to eliminate the gap entirely within 10 years.¹¹ Starting in 2011, the overhaul creates a discount of 50 percent on brand-name drugs for beneficiaries who fall into the gap.¹² The discount will increase to 75 percent by 2020, with the government paying the rest of the cost of the drugs.¹³
- **Impose new regulations on health insurance companies.** Beginning 6 months after enactment, health insurers may rescind group or individual coverage only with clear and convincing evidence of fraud or intentional misrepresentation by an enrollee.¹⁴ Insurance plans also are required to allow parents to continue coverage for dependent children who would otherwise not have health insurance until a child reaches his or her 26th birthday.¹⁵ Insurers are barred from setting lifetime limits on the dollar value of health care and may not set any annual limits on the dollar value of health care provided, also effective 6 months after enactment.¹⁶
- **Require individuals to obtain health insurance** or failure to maintain coverage will result in a penalty that is the greater of a flat fee \$95 in 2014; \$325 in 2015; and \$695 in 2016 or the following percent of the excess household income above the threshold amount required to file a tax return – 1 percent of income in 2014; 2 percent of income in 2015; and 2.5 percent of income in 2016 and subsequent years.¹⁷
- **Penalize employers with more than 50 workers** who have employees who obtain subsidies to purchase coverage through the exchanges. In 2014, the monthly penalty assessed to the employer for each full-time employee who receives a subsidy will be one-twelfth of \$3,000 for any applicable month.¹⁸
- **Impose an excise tax on high-premium health care plans,** often referred to as “Cadillac plans,” beginning in 2018. The tax will apply to plans costing \$10,200 for individual coverage and \$27,500 for family coverage.¹⁹

¹¹ U.S. Department of Health & Human Services HealthCare.gov, *Filling the Medicare Part D “Donut Hole,”* July 7, 2010, available at <http://www.healthcare.gov/law/provisions/donuthole/donuthole.html> (last visited on Dec. 20, 2010).

¹² *Id.*

¹³ Christopher Weaver, How Medicare’s Drug ‘Doughnut Hole’ Will be Filled, Kaiser Health News, March 29, 2010, available at <http://www.mcclatchydc.com/2010/03/29/v-print/91285/how-medicare-drug-doughnut-hole.html> (last visited Jan. 3, 2010).

¹⁴ U.S. Department of Health & Human Services, *Affordable Care Act Implementation FAQs: Rescissions*, Sept. 20, 2010, available at http://www.hhs.gov/ociio/regulations/implementation_faq.html (last visited Dec. 30, 2010).

¹⁵ U.S. Department of Health & Human Services, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Businesses and Families*, available at http://www.hhs.gov/ociio/regulations/adult_child_faq.html (last visited Dec. 20, 2010).

¹⁶ HealthReform.gov, *Fact Sheet: The Affordable Care Act’s New Patient’s Bill of Rights*, June 22, 2010, available at http://www.healthreform.gov/newsroom/new_patients_bill_of_rights.html (last visited Dec. 30, 2010).

¹⁷ Joy Johnson Wilson, *WHO GOES WHERE & WHY—THE NUTS AND BOLTS OF THE NEW HEALTH LAW*, National Conference of State Legislatures, July 25, 2010, available at http://www.ncsl.org/portals/1/documents/health/HealthSum_WilsonLS10.pdf (last visited Dec. 20, 2010).

¹⁸ Hinda Chaikind et al., *Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (PPACA)*, Congressional Research Service, May 4, 2010, available at <http://www.ncsl.org/documents/health/PrivHlthIns2.pdf> (last visited Dec. 20, 2010).

¹⁹ Jenny Gold, “Cadillac” Insurance Plans Explained, Kaiser Health News, March 18, 2010, available at <http://www.kaiserhealthnews.org/Stories/2010/March/18/Cadillac-Tax-Explainer-Update.aspx> (last visited Dec. 20, 2010).

- **Increase the Medicare payroll tax** for individuals making more than \$200,000 and couples making more than \$250,000 and impose an additional 3.8 percent surtax on investment income.²⁰
- **Create a 2.3 percent excise tax on the sale of medical devices by manufacturers and importers.** The following devices are exempted from the tax: eyeglasses, contact lenses, hearing aids, and any device specified by the Secretary of the Treasury that is of a type that is generally purchased by the public at retail for individual use.²¹
- **Impose new fees on health insurers.** Beginning in 2014, an annual flat fee of \$8 billion will be levied on the industry. It rises to \$11.3 billion in 2015 and 2016, \$13.9 billion in 2017, and \$14.3 billion in 2018. In 2019, these fees will be adjusted by the same rate as the growth in health insurance premiums.²²
- **Levy an annual fee on certain manufacturers and importers of branded prescription drugs,** totaling \$2.5 billion for 2011, \$2.8 billion per year for 2012 and 2013, \$3.0 billion for 2014 through 2016, \$4.0 billion for 2017, \$4.1 billion for 2018, and \$2.8 billion for 2019 and thereafter.²³

In 2008, approximately 60 percent of the U.S. population had employment-based health insurance.²⁴ Other individuals chose to obtain coverage on their own in the nongroup market. Others qualified for health coverage through Medicare, Medicaid, and other government programs. Still others had no defined health coverage.

State Legislative and Executive Branch Implementation of ACA

As of September 27, 2010, at least 25 states have enacted or adopted legislation or taken official action to form a committee, task force, or board concerning health reform implementation.²⁵ Additionally, at least 14 governors have issued executive orders to begin the process of health reform implementation.²⁶

The following figure represents such legislative and executive branch actions.²⁷

²⁰ Tax Foundation, *Examples of Taxpayers Facing Medicare Tax Increase under Health Care Bill*, March 22, 2010, available at <http://www.taxfoundation.org/publications/show/26041.html> (last visited Dec. 20, 2010).

²¹ National Conference of State Legislatures, *Timeline/Summary of Tax Provisions in the Health Reform Laws*, 4, available at <http://www.ncsl.org/documents/health/TimelineSumTax.pdf> (last visited Dec. 30, 2010).

²² Janemarie Mulvey, *Health-Related Revenue Provisions: Changes Made by H.R. 4872, the Health Care and Education Reconciliation Act of 2010*, Congressional Research Service, Mar. 24, 2010, available at <http://www.ncsl.org/documents/health/HlthRelRevProvs.pdf> (last visited Dec. 20, 2010).

²³ *Id.* at 5.

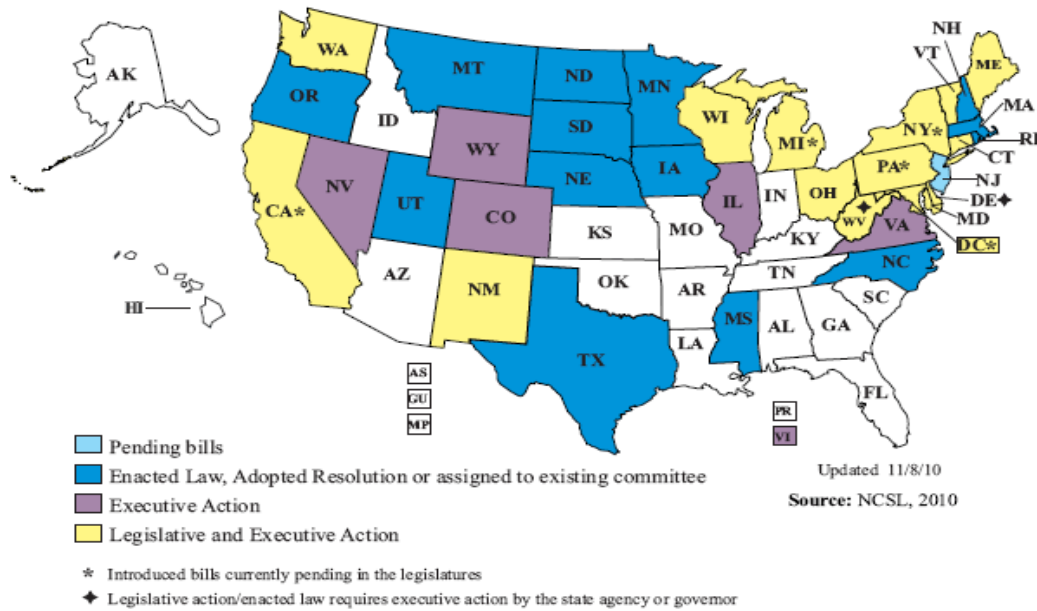
²⁴ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008*, 20 (Sept. 2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (last visited Jan 3, 2011).

²⁵ National Conference of State Legislators, *State Actions to Implement Federal Health Reform*, Nov. 22, 2010, available at <http://www.ncsl.org/default.aspx?tabid=20231#Legislative> (last visited Jan. 3, 2011).

²⁶ *Id.*

²⁷ Figure found on the National Conference of State Legislatures website. See *supra* note 25.

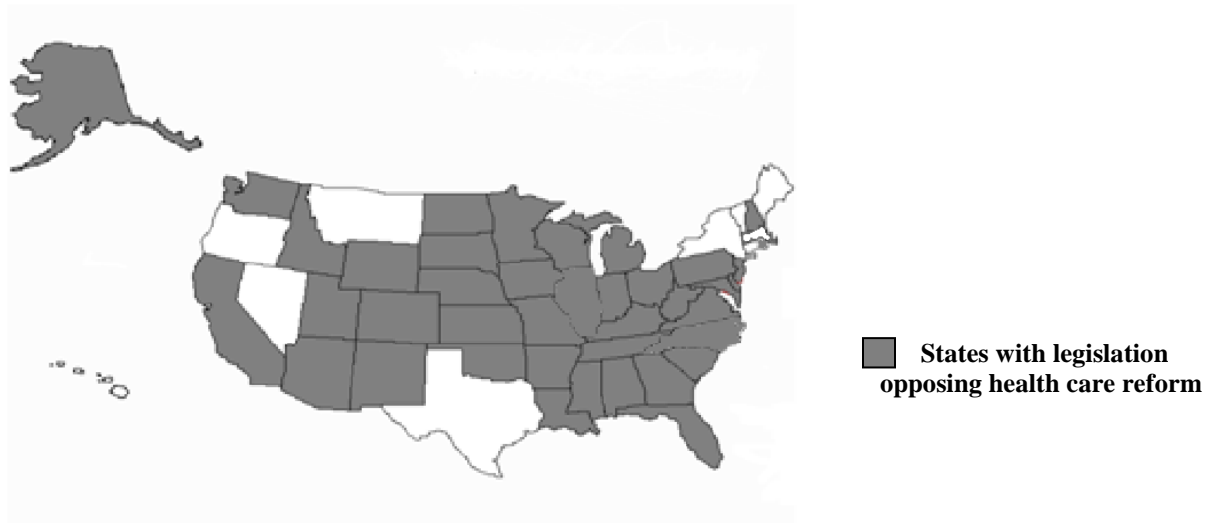
State Actions Implementing Health Reform



State Legislation Opposing Certain Health Reforms

In response to the federal health care reform, state legislators in at least 40 states have filed legislation to limit, alter, or oppose certain state or federal action, including single-payer provisions and mandates that would compel the purchase of health care insurance.²⁸ In 30 of the states, the legislation includes a proposed constitutional amendment by ballot.²⁹

The following figure represents those states introducing legislation opposing certain health care reforms.



²⁸ National Conference of State Legislatures, *State Legislation and Actions Challenging Certain Health Reforms*, 2010, Dec. 18, 2010, available at <http://www.ncsl.org/?tabid=18906> (last visited Jan. 3, 2011).

²⁹ *Id.*

The Florida Legislature, during the 2010 regular legislative session, passed House Joint Resolution 37. House Joint Resolution 37 was a proposed state constitutional amendment that sought to:

- Prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system;
- Permit a person or employer to purchase lawful health care services directly from health care provider; and
- Permit health care providers to accept direct payment from a person or employer for lawful health care services.³⁰

The proposed constitutional amendment was to appear as Amendment 9 on the November 2, 2010, state election ballot for voter approval or disapproval. However, in an order dated July 30, 2010, the Second Judicial Circuit Court struck Amendment 9 from the ballot.³¹ In doing so, the circuit court determined that the legal issues involving the ballot summary for Amendment 9 could not be distinguished from previous Florida Supreme Court decisions in which constitutional amendments were stricken from the ballot due to defective ballot summaries.³²

On appeal to the Florida Supreme Court the parties conceded that the ballot language was misleading, and the focus of the appeal was on the applicable remedy after such a determination had been made.³³ The Florida Department of State argued that “the Court should substitute the text of the proposed amendment contained in the Joint Resolution for the misleading ballot summary on the November ballot and permit the voters to determine whether the proposed amendment will become part of the Florida Constitution.”³⁴ The Florida Supreme Court has repeatedly stated that the “ballot summary should tell the voter the legal effect of the amendment, and no more.”³⁵ The Florida Supreme Court held that in this case, where the ballot summary for Amendment 9 as proposed by the Florida Legislature was deemed invalid, the proper remedy was to strike the proposal from the ballot.³⁶

State-based Federal Court Challenges

Three distinct state-based federal court challenges to the federal health reform legislation have been filed. In Florida, in *State of Florida, et al. v. U.S. Department of Health and Human Services*,³⁷ a federal district judge ruled on October 14 that two of six counts alleged in the complaint can go to trial.³⁸ The court rejected the argument by the United States that the

³⁰ CS/CS/HJR 37 (2010 Reg. Session), available at <http://www.flsenate.gov/data/session/2010/House/bills/billtext/pdf/h003703er.pdf> (last visited Jan. 3, 2011).

³¹ *Mangat v. Florida Department of State*, Case No. 2010 CA 2202 (July 30, 2010).

³² *Id.*

³³ *Florida Department of State v. Mangat*, 43 So. 3d 642, 647-48 (Fla. 2010).

³⁴ *Id.*

³⁵ *Id.* at 648 (quoting *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984)).

³⁶ *Mangat*, 43 So.3d at 651.

³⁷ Case No.3:10-cv-91-RV/EMT (N.D. Fla. Mar. 23, 2010). The case was initiated by Florida Attorney General Bill McCollum, and joined by 12 other state attorneys general).

³⁸ *Id.*

individual mandate is a tax and made it clear that he agreed with the plaintiff's argument that the power the individual mandate seeks to harness "is simply without precedent."³⁹

In the Virginia case, *Virginia ex rel. v. Sebelius*,⁴⁰ a federal district judge declined in early August to dismiss the suit and heard oral arguments in October 2010.⁴¹ Virginia challenged the federal health reform act on two grounds: that it exceeds the power granted to Congress under the Commerce and General Welfare Clause of the U.S. Constitution and, alternatively, that the federal health reform law conflicts with a Virginia statute, implicating the Tenth Amendment of the U. S. Constitution.⁴² The Federal District Court ruled that the insurance mandate required by the federal health reform act violated the U.S. Commerce Clause and would invite unbridled exercise of federal powers.⁴³

A suit was also filed in Michigan on behalf of four residents of southwest Michigan in *Thomas More Law Center v. Obama*.⁴⁴ However, the federal district judge dismissed the case, and reasoned that the health care market is unique and found that the choice to forgo obtaining health insurance is "making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance"⁴⁵ is an example of an activity that falls within the federal government's Commerce Clause powers under the U.S. Constitution.⁴⁶

The bases for these suits rely on some of the following constitutional principles.⁴⁷

Commerce Clause

Congress has the power to regulate interstate commerce under the Commerce Clause of the U.S. Constitution,⁴⁸ including local matters and things that "substantially affect" interstate commerce. Proponents of reform assert that although health care delivery is local, the sale and purchase of medical supplies and health insurance occurs across state lines, thus regulation of health care is within Commerce Clause authority. Arguing in support of an individual mandate, proponents point to insurance market destabilization caused by the large uninsured population as reason

³⁹ *Id.* at 61.

⁴⁰ *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. Aug. 2, 2010).

⁴¹ *Id.* See also, Kevin Sack, Challenging Health Care Law, Suit Advances, N.Y. Times, Oct. 14, 2010, available at <http://www.nytimes.com/2010/10/15/health/policy/15health.html> (last visited Jan. 10, 2011).

⁴² Virginia became one of the first states in the nation to enact legislation opposing certain aspects of the federal health care reform legislation. Virginia enacted a state statute entitled "Health insurance coverage not required," which became law on March 10, 2010, and was included as an additional challenge to the federal health reform law in the court complaint. See VA. CODE ANN. s. 38.2-3430.1:1 (2010).

⁴³ Memorandum Opinion, Civil Action No. 3:10-cv-188 (E.D. Va. Dec. 13, 2010).

⁴⁴ Case No. 2:10-cv-11156-GCS-RSW (E.D. Mich. Mar. 23, 2010).

⁴⁵ Order denying Plaintiff's Motion for Injunction and Dismissing Plaintiffs' First and Second Claims for Relief dated October 7, 2010 in Case No. 2:10-cv-11156-GCS-RSW (E.D. Mich. Mar. 23, 2010).

⁴⁶ *Id.* at 16-17. See also, Stipulated Order Dismissing Remaining Claims Without Prejudice, Case 2:10-cv-11156-GCS-RSW (E.D. Mich. Oct. 21, 2010).

⁴⁷ See, e.g., Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37, 64-70 (Nov. 2010), and James F. Blumstein, "State Challenges to Health Reform: A Look at the Constitutional Issues" (presentation presented at the National Conference of State Legislatures 2010 Legislative Summit on July 27, 2010), available at http://www.ncsl.org/portals/1/documents/health/PPACA_BlumsteinLS10.pdf (last visited Jan. 5, 2011).

⁴⁸ U.S. CONST. art. I, s. 8, cl. 3.

enough to authorize Congressional action under the Commerce Clause.⁴⁹ Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez*, which held that Congress is prohibited from “...unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce.”⁵⁰

Tax and Spend for the General Welfare

The Tax and Spend Clause of the U.S. Constitution⁵¹ provides Congress with taxation authority and also authorizes Congress to spend funds with the limitation that spending must be in pursuit of the general welfare of the population. To be held constitutional, Congressional action pursuant to this Clause must be reasonable.⁵² With respect to the penalty or fine on individuals who do not have health insurance, proponents suggest that Congress’ power to tax and spend for the general welfare authorizes the crafting of tax policy that in effect encourages and discourages behavior.⁵³ Opponents cite U.S. Supreme Court case law that prohibits “a tax to regulate conduct that is otherwise indisputably beyond [Congress’] regulatory power.”⁵⁴

Tenth Amendment and Anti-Commandeering Doctrine

The Tenth Amendment of the U.S. Constitution reserves to the states all power that is not expressly reserved for the federal government in the U.S. Constitution. Opponents of federal reform assert that the individual mandate violates federalism principles because the U.S. Constitution does not authorize the federal government to regulate health care. They argue, “...state governments – unlike the federal government – have greater, plenary authority and police powers under their state constitutions to mandate the purchase of health insurance.”⁵⁵ Further, opponents argue that the state health insurance exchange mandate may violate the anti-commandeering doctrine, which prohibits the federal government from requiring state officials to carry out onerous federal regulations.⁵⁶ Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.⁵⁷

⁴⁹ See, e.g., Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482, Feb. 11, 2010, available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp1000087> (last visited Dec. 1, 2010).

⁵⁰ Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an “Individual Mandate” in Health Care Reform*, The Federalist Society for Law and Public Policy, 4 (July 10, 2009).

⁵¹ U.S. CONST. art. I, s. 8, cl. 1.

⁵² *Helvering v. Davis*, 301 U.S. 619 (1937).

⁵³ Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O’Neill Institute, 7, available at http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/Individual_Mandates.pdf (last visited Jan. 5, 2010).

⁵⁴ David B. Rivkin and Lee A. Casey, *Illegal Health Reform*, Washington Post, August 22, 2009, A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html> (last visited Jan. 5, 2010). Rivkin and Casey cite to *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922), a Commerce Clause case which held that Congress does not have the authority to tax as a means of controlling conduct.

⁵⁵ *Id.*

⁵⁶ Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, The Annals of the American Academy of Policy and Social Science, 574, at 158 (March 2001).

⁵⁷ Hall, *supra* note 53, at 8-9.

Florida Health Insurance

Florida law does not require state residents to have health insurance coverage. However, Florida law does require drivers to carry Personal Injury Protection (PIP), which includes certain health care coverage, as a condition of receiving a state driver's license.⁵⁸ Additionally, Florida law requires most employers to carry workers' compensation insurance, which includes certain health care provisions for injured workers.⁵⁹

The average number of uninsured Floridians from 2007 through 2009 was almost 21 percent of the state population, or approximately 3,795,000 persons out of a total 18,176,000.⁶⁰

Constitutional Amendments

Section 1, Article XI of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.⁶¹ Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.⁶²

III. Effect of Proposed Changes:

The joint resolution creates Section 28 in Article I of the Florida Constitution relating to health care services. Several terms are defined in the resolution, including the following:

- "Compel" includes the imposition of penalties or fines;
- "Direct payment" or "pay directly" means payment for lawful health care services without a public or private third party, not including any employer, paying for any portion of the service;
- "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or health care information for its participants;
- "Lawful health care services" means any health-related service or treatment, to the extent that the service or treatment is permitted or not prohibited by law or regulation, which may be provided by persons or businesses otherwise permitted to offer such services; and
- "Penalties or fines" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government which is used to punish

⁵⁸ Section 627.736, F.S.

⁵⁹ Chapter 440, F.S.

⁶⁰ See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage: 2009 - Tables & Figures: Number and Percentage of People Without health Insurance Coverage by State Using 2- and 3-Year Averages: 2006-2007 and 2008-2009*, available at <http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2009/tables.html> (last visited Jan. 3, 2011).

⁶¹ FLA. CONST. art. XI, s. 5(a).

⁶² FLA. CONST. art. XI, s. 5(e).

or discourage the exercise of rights protected under this section. However, the term “rule by an agency” may not be construed to mean any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges.

The proposed constitutional amendment is intended to preserve the freedom of Florida residents to provide for their own health care by:

- Prohibiting a law or rule from compelling, directly or indirectly, any person, employer, or health care provider to participate in any health care system;
- Authorizing a person or employer to pay directly for lawful health care services without incurring penalties or fines; and
- Authorizing a health care provider to accept direct payment for lawful health care services from a person or employer without incurring penalties or fines.

The proposed constitutional amendment does not allow any law or rule to prohibit the purchase or sale of health insurance in private health care systems, unless the law or rule is reasonable and necessary and does not substantially limit a person’s options.

The proposed constitutional amendment states that it does not:

- Affect which health care services a health care provider is required to perform or provide;
- Affect which health care services are permitted by law;
- Prohibit care provided pursuant to workers’ compensation laws;
- Affect laws or rules in effect as of March 1, 2010;
- Affect health care systems, provided the health care system does not have provisions that punish a person or employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or employer for lawful health care services. However, this section may not be construed to prohibit any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges; and
- Affect any general law passed by a two-thirds vote of the membership of each house of the legislature after the effective date of this section, if the law states with specificity the public necessity that justifies an exception from this section.

The specific statement to be placed on the ballot is provided. This language summarizes the provisions in the constitutional amendment, except it omits the definitions of terms used in the amendment.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.⁶³

Other Potential Implications:

The proposed constitutional amendment does not affect laws in existence before March 1, 2010. The proposed constitutional amendment provides that it does not affect any general law passed

⁶³ FLA. CONST. art. XI, s. 5(e).

by a two-thirds vote of the membership of each house of the legislature **after** the effective date of the proposed constitutional amendment. The proposed constitutional amendment would not be effective until after the next general election or special election. Therefore, a gap in time is created, during which newly enacted laws, if any, that fall within the parameters of the constitutional amendment might be ruled unconstitutional should the proposed constitutional amendment become effective.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of the joint resolution have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the joint resolution have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of the joint resolution have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

If this proposed constitutional amendment is adopted by the voters in Florida, it will directly affect any law or rule that is enacted or adopted after March 1, 2010, by the State of Florida or a local government concerning personal freedoms related to health care coverage.

Supremacy Clause

A federal law, depending upon its nature and scope, could preempt the effect of this proposed constitutional amendment. The Supremacy Clause of the U.S. Constitution establishes federal law as the “supreme law of the land, and invalidates state laws that interfere with or are contrary to federal law.”⁶⁴ However, the Tenth Amendment to the U.S. Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Therefore, courts have consistently interpreted the Tenth Amendment to mean that “[t]he States unquestionably do retain a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”⁶⁵

⁶⁴ *ABC Charters, Inc. v. Bronson*, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007)); see also U.S. CONST., art. VI.

⁶⁵ *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.⁶⁶ There are three types of preemption:

- Express preemption;
- Field preemption; and
- Conflict preemption.

“Conflict preemption” occurs when “it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law.”⁶⁷

“Field preemption” occurs when federal regulation in a legislative field is so pervasive that Congress left no room for the states to supplement it.⁶⁸ “Express preemption” occurs when federal law explicitly expresses Congress’ intent to preempt a state law.⁶⁹

The Florida constitutional amendment could be subject to a preemption challenge if the amendment is perceived to conflict with a federal law or rule adopted after March 1, 2010, governing health care. If a court concludes that that the amendment does directly conflict with a federal law or rule adopted after March 1, 2010, the Florida constitutional provision could be deemed unconstitutional.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is \$106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department estimates that it will incur costs equal to \$93,827.76 to advertise the proposed amendment.⁷⁰

VI. Technical Deficiencies:

None.

⁶⁶ 10 FLA. JUR 2D s. 139 *Constitutional Law* (2010).

⁶⁷ *Supra* note 41, at 1301.

⁶⁸ *Id.* at 1304.

⁶⁹ *Id.* at 1298.

⁷⁰ Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

On February 23, 2011 the Senate Budget Committee considered SB2 and adopted a series of amendments to the bill which were engrossed into the committee substitute. The amendments make the following changes:

- Clarifies Subsection (a)(1) by removing the term “health care system” and making clear that its purpose is to prohibit government mandates to purchase or maintain health insurance.
- Replaces the term “penalties and fines” with “penalties and taxes.” The definition of this term is unchanged. The amendment merely ensures that our terminology reflects the distinction between penalties and taxes.
- Clarifies proposed Subsection (b). The purpose of Subsection (b) is to ensure that we never move to a government-run, single-payer system. The new language makes this clear and protects the private sector.
- Clarifies that whether a health care service is “lawful” is determined at the time the service is rendered, not at the time the joint resolution may be approved by the voters.

B. Amendments:

None.