

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Federal Health Care Reform¹

On March 21, 2010, Congress passed national health care reform. The new health care law (PL 111-148) and the reconciliation bill (HR 4872) passed shortly thereafter will bring sweeping changes to the U.S. health care system. Among other things, it:

- **Extends health insurance coverage** to about 32 million people who currently lack it, leading to coverage of about 94 percent of Americans. The cost of coverage expansions will total \$940 billion from fiscal 2010 to fiscal 2019. But taking into account the changes to mandatory spending and tax law, the overhaul will reduce the deficit by a net \$138 billion over the same period.
- **Creates state-based exchanges**, or marketplaces, where individuals without employer-provided insurance can buy health care coverage. Federal 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).
- **Expands Medicaid eligibility** to all individuals with incomes of up to 133 percent of the federal poverty level. 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.
- **Provides a one-time, \$250 rebate for Medicare beneficiaries** who fall into a prescription drug coverage gap known as the "doughnut hole" in 2010 and seeks to eliminate the gap entirely within 10 years. Starting in 2011, the overhaul creates a discount of 50 percent on brand-name drugs for beneficiaries who fall into the gap. The discount will increase to 75 percent by 2020, with the government paying the rest of the cost of the drugs.
- **Imposes new regulations on health insurance companies.** Beginning six 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. 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. Insurers are barred from setting lifetime limits on the dollar value

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=17639>

of health care. And they also may not set any annual limits on the dollar value of health care provided, effective six months after enactment.

- **Requires individuals to obtain health insurance** or pay either \$325 or 2 percent of income, whichever is higher, in 2015. Fines will increase in subsequent years.
- **Penalizes employers with more than 50 workers** who have employees who obtain subsidies to purchase coverage through the exchanges. Companies that offer health care benefits face a penalty of either \$3,000 for each employee (full-time or part-time) who receives a subsidy or \$750 per full-time employee, whichever would be less.
- **Imposes an excise tax on high-cost health care plans** — the so-called Cadillac plans — beginning in 2018. The tax will apply to plans costing \$10,200 for individual coverage and \$27,500 for family coverage.
- **Increases the Medicare payroll tax** for individuals making more than \$200,000 and couples making more than \$250,000 and imposes an additional 3.8 percent surtax on investment income.
- **Creates a 2.9 percent tax on the sale of any taxable medical device**, excluding less invasive and risky products classified as Class I by the Food and Drug Administration. The tax also will not apply to eyeglasses, contact lenses and hearing aids.
- **Imposes 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.
- **Levies annual industrywide fees on brand-name drugs** totaling \$2.5 billion in 2011, \$3 billion from 2012 through 2016, \$3.5 billion in 2017, \$4.2 billion in 2018, and \$2.8 billion in 2019 and later years.

Prior to enactment of these bills, there was no existing requirement in federal law that individuals maintain health insurance coverage; nor did federal law require employers to provide health insurance to employees.

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.² Florida law also requires most employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.³

Approximately 20 percent of Floridians are uninsured,⁴ or 3,665,668 persons out of a total 18,328,340.⁵

Massachusetts Health Insurance Mandate

In 2006, to address rising costs, the State of Massachusetts passed a health care reform initiative which requires every Massachusetts citizen to have minimum health insurance coverage, whether from the private market or public assistance.⁶ The law requires:

- Employers with ten or more employees to offer health insurance to their employees;
- Monetary penalties to be assessed on individuals and employers for non-compliance;
- An individual to report coverage compliance on his state income tax return; and
- Subsidies for individuals and families who do not meet a certain income threshold.

The legislation directed the state to set up a health insurance exchange, the "Commonwealth Connector" from which individuals may purchase insurance. The Commonwealth Connector also regulates the private health insurance market in the state.

² s. 627.736, F.S.

³ Workers' compensation insurance provisions are found in Chapter 440, F.S.

⁴ Joanna Turner, et al., *A Preliminary Evaluation of Health Insurance Coverage in the 2008 American Community Survey*, U.S. Bureau of the Census, see www.census.gov/hhes/www/hlthins/2008ACS_healthins.pdf (September 22, 2009). Florida Health Insurance Study, *Health Insurance Coverage among Men and Women in Florida*, see <http://fcmu.phpu.ufl.edu/publications/issue-briefs/pdf/fs04-03-2006-FIMenWomenHealthInsCoverage.pdf> (March 2006).

⁵ U.S. Census Bureau, "Florida QuickFacts," see <http://quickfacts.census.gov/qfd/states/12000.html> (last visited March 24, 2010).

⁶ Chapter 58 of the Acts of 2006, An Act Relating to Affordable, Quality, Accountable Health Care (April 12, 2006).

Studies suggest that the Massachusetts health insurance mandate has not achieved projected state cost savings. State funding for the Commonwealth Connector and public assistance has increased government spending on health insurance programs by 42 percent.⁷ Cost to the individual has also risen as insurance premiums increased 40 percent from 2003 to 2008.⁸ In 2008, two years after passage of reform, Massachusetts health insurance premiums for family coverage exceeded the national average by \$1,500.⁹ When surveyed two years after implementation, Massachusetts residents still supported the mandate, but 51 percent believed their health care costs had risen as result.¹⁰

Although the uninsured rate in Massachusetts is 4.1 percent while the national average is 15.1%,¹¹ the cost of for uninsured care appears to be significant. The state's safety-net hospitals indicate that a large percentage of patients seeking care are uninsured; however reform measures reduced the level of payments to hospitals for charity care.¹² Recently, the Massachusetts State Treasurer Tim Cahill said that state health care reform "has nearly bankrupted the state" and is still operational only with the help of federal funding.^{13 14}

Congressional Authority and Constitutionality

Constitutional scholars and health care policy experts are debating the constitutionality of many of the federal health care reform provisions. The debate centers on four constitutional issues.

Commerce Clause (U.S. Const. Art. I, Sec. 8, Clause 3)

Congress has the power to regulate interstate commerce, 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 de-stabilization caused by the large uninsured population as reason enough to authorize Congressional action under the Commerce Clause.¹⁵ 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."¹⁶

Tax and Spend for the General Welfare (U.S. Const. Art. I, Sec. 8, Clause 1)

⁷ Kevin Sack, "Massachusetts Faces Costs of Big Health Plan," New York Times, see <http://www.nytimes.com/2009/03/16/health/policy/16mass.html> March 15, 2009.

⁸ Cathy Schoen, *Paying the Price: How Health Insurance Premiums are Eating Up Middle-class Incomes*, The Commonwealth Fund, see <http://www.commonwealthfund.org/Content/Publications/Data-Briefs/2009/Aug/Paying-the-Price-How-Health-Insurance-Premiums-Are-Eating-Up-Middle-Class-Incomes.aspx> (August 2009).

⁹ *Id.*

¹⁰ Robert J. Blendon, et al., *Massachusetts Health Reform: A Public Perspective from Debate Through Implementation*, Health Affairs, 27:6, at 559, 562 (2008).

¹¹ Turner, *supra* note 11.

¹² See "Some Massachusetts Safety Net Hospitals face Budget Problems because of Health Insurance Law," Kaiser Daily Health Report (March 19, 2008).

¹³ Michael Levenson, "cahill bashes state – and national – health care reform law," The Boston Globe, see http://www.boston.com/news/local/breaking_news/2010/03/cahill_bashes_s.html (March 16, 2010).

¹⁴ For detailed discussion of the Massachusetts Health Insurance Mandate, see Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the 'Massachusetts Model' Tells Us about Health Care Reform*, Briefing Paper No. 112, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=10268 (June 9, 2009). See Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain*, Policy Analysis No. 657, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=11115 (January 20, 2010).

¹⁵ Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).

¹⁶ Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an 'Individual Mandate' in Health Care Reform*, The Federalist Society for Law and Public Policy, at 4 (July 10, 2009).

The Tax and Spend Clause of the U.S. Constitution 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.¹⁷ 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 which in effect encourages and discourages behavior.¹⁸ Opponents cite U.S. Supreme Court case law that prohibits "a tax to regulate conduct that is otherwise indisputably beyond [Congress'] regulatory power."¹⁹

The Tenth Amendment and the Anti-Commandeering Doctrine (U.S. Const. Amend. 10)

The Tenth Amendment 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."²⁰ 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.²¹ Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.²²

Supremacy Clause (U.S. Const. Art. 6, Clause 2)

Supremacy Clause jurisprudence firmly establishes that the U.S. Constitution and federal law possess ultimate authority when in conflict with state law. The Supreme Court held "...the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between state and federal power."²³ Proponents cite to the Supremacy Clause as a self-evident justification for passage of federal health reform. Opponents assert that the Supremacy Clause only protects congressional actions that are based on express authority in the Constitution and "where [the action] does not impermissibly tread upon state sovereignty."²⁴

State Reaction to Federal Health Care Reform

State constitutional amendments addressing the state-federal relationship and federal health care reform are currently under consideration before 22 state legislatures, not including Florida.²⁵ Arizona passed the Freedom of Choice in Health Care Act last year and it will appear on the ballot for voter approval November 2010. Similar measures have failed in Georgia, Indiana, Mississippi and New Hampshire.²⁶

Nine states are currently considering statutory amendments to prohibit mandated health insurance coverage.²⁷ In March 2010, Virginia and Idaho enacted such a statutory change. In addition to

¹⁷ *Helvering v. Davis*, 301 U.S. 619 (1937).

¹⁸ Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O'Neill Institute, at 7.

¹⁹ David B. Rivkin and Lee A. Casey, "Illegal Health Reform" *Washington Post*, August 22, 2009, at A15. Rivkin and Lee cite to *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922), a Commerce Clause case which held that Congress has the authority to tax as a means of controlling conduct.

²⁰ *Id.*

²¹ 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).

²² Hall, *supra* note 25, at 8-9.

²³ *New York v. United States*, 505 US. 144, 160 (1992).

²⁴ Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

²⁵ National Conference of State Legislatures, *State Legislation Opposing Certain Health Reforms, 2009-2010*, see <http://www.ncsl.org/IssuesResearch/Health/StateLegislationOpposingCertainHealthReforms/tabid/18906/Default.aspx?TabId=18906#AZ08> (last visited March 23, 2010).

²⁶ *Id.*

²⁷ *Id.*

asserting the right of citizens to choose health care services without the threat of penalty from the federal government, the Idaho law directs the state's Attorney General to sue the federal government if it enacts laws that compel the purchase health insurance.²⁸ Utah passed state law changes; enactment is pending gubernatorial approval.²⁹ Changes to state law failed in New Hampshire.³⁰

In Florida, Attorney General Bill McCollum has asserted the constitutionality argument to Congress. On January 19, 2010, Attorney General McCollum sent a letter to U.S. House and Senate leadership in which he said that he would pursue legal action if the individual mandate becomes law. Attorney General McCollum then sent a letter to the president of the National Association of Attorneys General on March 16, 2010, asking other attorneys general to participate in litigation challenging the individual mandate. Attorney General McCollum argued that Congress lacks Commerce Clause authority to compel individuals to purchase health insurance: "A citizen's choice not to buy health insurance cannot rationally be construed as economic activity, or even 'activity,' to subject that inactivity to regulation under the Commerce Clause."³¹

On March 23, 2010, Attorney General McCollum, along with twelve other state Attorneys General, filed a lawsuit in the U.S. District Court, Northern District of Florida, challenging the constitutionality of H.R. 3590. The complaint contends that H.R. 3590:³²

- Exceeds Congress' legislative powers under Article I;
- Constitutes an unlawful capitation or direct tax under Article I; and
- Violates state sovereignty under the Tenth Amendment.

The Attorneys General request the court to declare H.R. 3590 unconstitutional and enjoin the Secretary of the U.S. Department of Health and Human Services, the Secretary of the U.S. Treasury and the Secretary of the U.S. Department of Labor from enforcing it. No action has yet occurred on the case.

Effect of Proposed Changes

CS/CS/HJR 37 proposes the creation of the Health Care Freedom Constitutional Amendment in Article I of the Florida Constitution relating to health care. The resolution prohibits any person, employer or health care provider from being compelled to participate in any health care system. With respect to an individual or employer mandate, this provision would allow any person or employer to opt-out of mandated insurance coverage and would allow for flexibility in any health care provider's participation in a particular health care system.

The resolution authorizes any person or employer to pay directly for health care services and provides that persons or employers shall not incur a penalty or fine for direct payment. The resolution authorizes a health care provider to accept direct payment and provides that such health care provider will not incur a penalty or fine for accepting direct payment. This provision would allow a person or employer to purchase health care services without participation in a health care system or plan.

The resolution prohibits any law or rule which prohibits private health insurance sales or purchases. The bill subjects this prohibition to reasonable and necessary rules that do not substantially limit purchase or sale options. This provision would allow the purchase or sale of private insurance to individuals regardless of a mandate requiring individuals to have health insurance coverage.

The resolution directs that its provisions do not affect:

- Required performance of services by a health care provider or hospital;
- Health care services permitted by law;
- Worker's compensation care as provided by general law;
- Laws or rules in effect as of March 1, 2010; and

²⁸ Chapter Law 46, Idaho Health Freedom Act, effective date June 1, 2010.

²⁹ *Id.*

³⁰ National Conference of State Legislatures, *supra* note 32.

³¹ Florida Attorney General Bill McCollum, Letter to Congressional Leaders, dated January 19, 2010.

³² Complaint, McCollum v. Sebelius, No. 3:10-cv-91 (N.D. Fla., filed March 23, 2010).

- Any health care system terms and conditions that do not provide punitive measures against persons, employers or health care providers for direct payment. However, the Amendment may not be construed to prohibit any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting co-payments, coinsurance, deductibles or other patient charges.

The resolution provides definitions or usage for the following terms:

- “Compel” includes the imposition of penalties or fines.
- “Direct payment” or “pay directly” means payment for health care services without the use of a public or third party, excluding any employers.
- “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 care service offered by legally authorized persons or businesses, provided that such services are permitted or not prohibited by law or regulation.
- “Penalties or fines” mean any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or any 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 or discourage the exercise of rights protected under this section.
 - “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 co-payments, coinsurance, deductibles, or other patient charges.

The resolution provides for a ballot summary which describes the provisions of the constitutional amendment in plain language.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2010 General Election, the resolution would take effect January 4, 2011.

B. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Non-recurring FY 2010-2011

The Department of State, Division of Elections estimates that the average cost of publishing a constitutional amendment is \$94.68 per word. The word count for CS/CS/HJR 37 is 959 words X \$94.68 = \$90,798.12. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.³³

Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is \$94.68 per word. The word count for CS/CS/HJR 37 is 959 words X \$94.68 = \$90,798.12.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, 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. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear how the courts will apply or construe provisions of the joint resolution if approved. It may affect other programs in a manner that is unforeseen at this time.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the House Health Care Regulation Policy Committee adopted one strike-all amendment to House Joint Resolution 37.

The strike-all amendment moves the provision from Article X, Miscellaneous, of the Florida Constitution to Article I, Bill of Rights. The amendment also changes the exemption for laws already in effect prior to the approval of the constitutional amendment to March 1, 2010.

The joint resolution was reported favorably as a Committee Substitute.

On April 19, 2010, the House Rules & Calendar Council adopted one strike-all amendment to CS/HJR 37. The Strike-all amendment provides that:

- Captions the Amendment the "Health Care Freedom Constitutional Amendment".

³³ Fla. Const., art. XI, s. 5(d).
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- The Amendment may not be construed to prohibit any negotiated provision in any insurance contract, network agreement or other provider agreement contractually limiting co-payments, coinsurance, deductibles or other patient charges.
- The Amendment does not affect any general law passed by a 2/3 vote of the membership of each house, passed after the effective date of the Amendment, provided that the law states with specificity the public necessity justifying the exception.

The analysis is drawn to the Joint Resolution as amended.