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# **RULES & CALENDAR COUNCIL**

**COMMITTEE MEETING**  
**Monday, April 5, 2010**  
**8:30 P.M. – 11:59 P.M.**  
**404 HOB**

**MEETING PACKET**

Larry Cretul  
Speaker

Bill Galvano  
Chair

# Council Meeting Notice

## HOUSE OF REPRESENTATIVES

### Rules & Calendar Council

**Start Date and Time:** Monday, April 05, 2010 08:30 pm or 15 minutes upon completion of Education Policy Council

**End Date and Time:** Monday, April 05, 2010 11:59 pm

**Location:** 404 HOB

**Duration:** 3.48 hrs

**Consideration of the following bill(s):**

CS/HJR 37 Health Care Services by Health Care Regulation Policy Committee, Plakon, Workman, Ray

Set Special Order Calendar(s)

**NOTICE FINALIZED on 04/01/2010 16:01 by Williams.Tanesha**

House Joint Resolution

A joint resolution proposing the creation of Section 28 of Article I of the State Constitution, relating to health care services.

Be It Resolved by the Legislature of the State of Florida:

That the following creation of Section 28 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 28. Health care services.-

(a) To preserve the freedom of all residents of the state to provide for their own health care:

(1) A law or rule may not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.

(2) A person or employer may pay directly for lawful health care services and may not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and may not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

(b) Subject to reasonable and necessary rules that do not

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29 substantially limit a person's options, the purchase or sale of  
 30 health insurance in private health care systems shall not be  
 31 prohibited by law or rule.

32 (c) This section does not:

33 (1) Affect which health care services a health care  
 34 provider is required to perform or provide.

35 (2) Affect which health care services are permitted by  
 36 law.

37 (3) Prohibit care provided pursuant to general law  
 38 relating to workers' compensation.

39 (4) Affect laws or rules in effect as of March 1, 2010.

40 (5) Affect the terms or conditions of any health care  
 41 system to the extent that those terms and conditions do not have  
 42 the effect of punishing a person or employer for paying directly  
 43 for lawful health care services or a health care provider for  
 44 accepting direct payment from a person or employer for lawful  
 45 health care services.

46 (d) For purposes of this section:

47 (1) "Compel" includes the imposition of penalties or  
 48 finances.

49 (2) "Direct payment" or "pay directly" means payment for  
 50 lawful health care services without a public or private third  
 51 party, not including an employer, paying for any portion of the  
 52 service.

53 (3) "Health care system" means any public or private  
 54 entity whose function or purpose is the management of,  
 55 processing of, enrollment of individuals for, or payment, in  
 56 full or in part, for health care services, health care data, or

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57 health care information for its participants.

58 (4) "Lawful health care services" means any health-related  
 59 service or treatment, to the extent that the service or  
 60 treatment is permitted or not prohibited by law or regulation,  
 61 which may be provided by persons or businesses otherwise  
 62 permitted to offer such services.

63 (5) "Penalties or fines" means any civil or criminal  
 64 penalty or fine, tax, salary or wage withholding or surcharge,  
 65 or any named fee with a similar effect established by law or  
 66 rule by an agency established, created, or controlled by the  
 67 government which is used to punish or discourage the exercise of  
 68 rights protected under this section.

69 BE IT FURTHER RESOLVED that the following statement be  
 70 placed on the ballot:

71 CONSTITUTIONAL AMENDMENT

72 ARTICLE I, SECTION 28

73 HEALTH CARE SERVICES.—Proposing an amendment to the State  
 74 Constitution to prohibit laws or rules from compelling any  
 75 person, employer, or health care provider to participate in any  
 76 health care system; permit a person or employer to purchase  
 77 lawful health care services directly from a health care  
 78 provider; permit a health care provider to accept direct payment  
 79 from a person or employer for lawful health care services;  
 80 exempt persons, employers, and health care providers from  
 81 penalties and fines for paying or accepting direct payment for  
 82 lawful health care services; and permit the purchase or sale of  
 83 health insurance in private health care systems. Specifies that  
 84 the amendment does not affect which health care services a

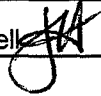
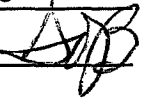
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85 health care provider is required to perform or provide; affect  
86 which health care services are permitted by law; prohibit care  
87 provided pursuant to general law relating to workers'  
88 compensation; affect laws or rules in effect as of March 1,  
89 2010; or affect the terms or conditions of any health care  
90 system to the extent that those terms and conditions do not have  
91 the effect of punishing a person or employer for paying directly  
92 for lawful health care services or a health care provider for  
93 accepting direct payment from a person or employer for lawful  
94 health care services.

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HJR 37 Health Care Services  
**SPONSOR(S):** Health Care Regulation Policy Committee; Plakon and others  
**TIED BILLS:** IDEN./SIM. BILLS: SJR 72

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Health Care Regulation Policy Committee	10 Y, 3 N, As CS	Guy	Calamas
2)	Rules & Calendar Council		Hassell 	Birtman 
3)				
4)				
5)				

**SUMMARY ANALYSIS**

Committee Substitute for House Joint Resolution 37 proposes the creation of Section 28 of Article I of the Florida Constitution relating to health care. Specifically the constitutional amendment:

- prohibits persons and employers from compelled participation in a health care system;
- allows direct payment of health care services and prohibits penalizing persons, employers and health care providers from utilizing a direct payment system;
- allows the purchase or sale of health insurance in the private market, subject to certain conditions; and
- exempts laws enacted prior to March 1, 2010, from requirements of the amendment.

The joint resolution provides definitions for certain terms and includes a ballot summary.

This joint resolution appears to have a negative, non-recurring fiscal impact on state government. The Department of State, Division of Elections, estimates a cost of approximately \$65,045 for FY 10-11. The cost is a result of placing the joint resolution on the ballot and publishing two required notices.

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.

## 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 Reform**

The U.S. Congress spent the last year debating an extensive overhaul of the national health care system with particular focus on access to affordable coverage in the private market and a reorganization of public programs. On March 21, 2010, the House passed the Senate version of federal health care reform (H.R. 3590) and President Barak Obama signed the bill into law on March 23, 2010. Key policy areas of reform include: mandated individual coverage; mandated employer offers of coverage; expansion of Medicaid; individual cost-sharing subsidies and tax penalties for non-compliance; employer tax penalties for non-compliance; health insurance exchanges; expanded regulation of the private insurance market; and revision of the Medicare and Medicaid programs.

The House also passed a "reconciliation" bill on March 21, 2010, and the Senate is currently considering amendments to the bill. Reconciliation legislation is composed entirely of revenue-related amendments to an authorizing bill. In this case, the reconciliation bill, H.R. 4872, is a series of revenue-related amendments to H.R. 3590. In the Senate, reconciliation bills only require a simple majority, 51 votes, for passage. Objections to reconciliation language consist of raising a point of order that a particular provision is not revenue-related. The Senate Parliamentary rules on points of order. The effect of a ruling is either to remove the objectionable provision from the reconciliation bill if the point of order is accepted, or to preserve the contested provision in the reconciliation bill by denial of the point of order.

The following table outlines the two bills: <sup>1</sup>

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<sup>1</sup> Information for this table is based on versions of H.R. 4872 and H.R. 3590, dated March 19, 2010. For detailed side-by-side bill comparisons, see Kaiser Family Foundation, Focus on Health Reform, at <http://www.kff.org/healthreform/sidebyside.cfm> and *House-Senate Comparison of Key Provisions*, at [www.politico.com/static/PPM136\\_100104\\_health\\_reform\\_conference.html](http://www.politico.com/static/PPM136_100104_health_reform_conference.html) (last visited March 23, 2010).



Issue	Reconciliation Bill: H.R. 4872 Health Care & Education Affordability Act of 2010	Senate Bill: H.R. 3590 Patient Protections & Affordable Care Act
Mandated individual coverage	Not defined	"minimum essential coverage" as defined in the bill
Individual penalty	The greater of \$695; up to 3X\$695=\$2,085; or 2.5% of household income Phase-in penalty through 2016	\$95-\$750 per person tax
Mandated employer offering	Same as H.R. 3590	Required for companies with more than 50 employees
Employer penalty for failure to offer	If at least one full-time employee uses the federal subsidy, then \$2,000 per full-time employee, excluding the first 30 employees tax	If one full-time employee uses the federal subsidy, then \$750 per employee tax
Other employer penalties	For employers who offer health insurance, if at least one full-time employee uses the federal subsidy, then the lesser of \$3,000 for each employee using the subsidy or \$750 per full-time employee tax	For employers who offer health insurance, if at least one full-time employee uses the federal subsidy, then \$750 per employee tax
Health insurance exchanges	Same as H.R. 3590	State-based American Health Benefits Exchanges
Individual subsidy: Exchange participation	Insurance premium credits for incomes at 133% - 400% of the Federal Poverty Level (\$29,326 - \$88,200 for a family of four) to purchase insurance through the Exchanges	Insurance premium credits for incomes at 100% - 400% of the Federal Poverty Level (\$22,050 - \$88,200 for a family of four) to purchase insurance through the Exchanges
Employer subsidy: Exchange participation	Same as H.R. 3590	The "free choice voucher" is available for employees at less than 400% of Federal Poverty Level (\$88,200 for a family of four) whose share of the insurance premium exceeds 8% but is less than 9.8%, and who choose to enroll in an Exchange  The voucher is equal to what the employer would have paid for coverage. Employers who offer the free choice voucher will not be subject to penalties for employees who participate in the Exchange
Public option	N/A	N/A
Private insurance market regulation	<ul style="list-style-type: none"> <li>• Guarantee issue and renewability</li> <li>• Grandfather existing individual and group plans but requires grandfathered plans to extend coverage to dependents until age 27; and prohibits rescissions of coverage. Grandfathered plans must meet some new benefit standards by 2014</li> <li>• Creates Health Insurance Reform Implementation Fund and allocates \$1 billion in funding</li> </ul>	<ul style="list-style-type: none"> <li>• Guarantee issue and renewability</li> <li>• New benefits standards effective in 2014</li> </ul>
Mandated state Medicaid expansion	Same as H.R. 3590	Up to 133% of the Federal Poverty Level (\$29,326 for a family of four)
CHIP	Same as H.R. 3590	CHIP block grants funded through 2015
Financing	<ul style="list-style-type: none"> <li>• Excise tax on "Cadillac" plans valued at more than \$10,200 for individuals and \$27,500 for families</li> <li>• Tax increase on HSAs</li> <li>• Impose taxes on certain health care sector segments \$2.5 - \$14.3 billion</li> </ul>	<ul style="list-style-type: none"> <li>• Excise tax on "Cadillac" plans valued at more than \$8,500 for individuals and \$23,000 for families</li> <li>• Tax increase on HSAs</li> <li>• Impose taxes on certain health care sector segments \$2.3 - \$10 billion</li> </ul>

The reconciliation bill also includes significant amendments to the Higher Education Act of 1965<sup>2</sup> by changing the structure of the student loan system.

Much of the federal health care reform debate has centered on the cost of reform measures. The Congressional Budget Office (CBO) released an estimate of the direct spending and revenue effects of the combined reconciliation and Senate bills on March 20, 2010.<sup>3</sup> Together with the education provisions, CBO estimates that federal reform will "produce a net reduction in federal deficits of \$143 billion over the 2010-2019 period."<sup>4</sup> Of that total, CBO attributes \$19 billion in savings to education

<sup>2</sup> 20 U.S.C. 1001, et al.

<sup>3</sup> Cost estimate for the amendment in the nature of a substitute for H.R. 4872, incorporating a proposed manager's amendment, Congressional Budget Office, see <http://www.cbo.gov/doc.cfm?index=11379&type=1> (last visited March 24, 2010).

<sup>4</sup> *Id.*, at 2.

provisions.<sup>5</sup> CBO estimates the cost of coverage requirements in the two bills to be \$938 billion over the 2010-2019 period.<sup>6</sup> Discretionary spending provisions include:<sup>7</sup>

Agency	Action	Cost
Internal Revenue Service	Implement eligibility determination, documentation and verification processes	\$5 - \$10 billion over 10 years
Dept of Health & Human Services and Ofc of Personnel Management	Implement changes in Medicare, Medicaid and CHIP	\$5 - \$10 billion over 10 years

Approximately 32 million nonelderly people would become insured under the bills and CBO estimates that 6 percent of the total population of nonelderly legal residents would remain uninsured.<sup>8</sup>

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.<sup>9</sup> Florida law also requires most employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.<sup>10</sup>

Approximately 20 percent of Floridians are uninsured,<sup>11</sup> or 3,665,668 persons out of a total 18,328,340.<sup>12</sup>

### 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.<sup>13</sup> 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.

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.<sup>14</sup> Cost to the individual has also

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

<sup>6</sup> *Id.*, at 22.

<sup>7</sup> *Id.*, at 11.

<sup>8</sup> *Id.*, at 9.

<sup>9</sup> s. 627.736, F.S.

<sup>10</sup> Workers' compensation insurance provisions are found in Chapter 440, F.S.

<sup>11</sup> 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](http://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.phhp.ufl.edu/publications/issue-briefs/pdf/fs04-03-2006-FIMenWomenHealthInsCoverage.pdf> (March 2006).

<sup>12</sup> U.S. Census Bureau, "Florida QuickFacts," see <http://quickfacts.census.gov/qfd/states/12000.html> (last visited March 24, 2010).

<sup>13</sup> Chapter 58 of the Acts of 2006, An Act Relating to Affordable, Quality, Accountable Health Care (April 12, 2006).

<sup>14</sup> 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.

risen as insurance premiums increased 40 percent from 2003 to 2008.<sup>15</sup> In 2008, two years after passage of reform, Massachusetts health insurance premiums for family coverage exceeded the national average by \$1,500.<sup>16</sup> When surveyed two years after implementation, Massachusetts residents still supported the mandate, but 51 percent believed their health care costs had risen as result.<sup>17</sup>

Although the uninsured rate in Massachusetts is 4.1 percent while the national average is 15.1%,<sup>18</sup> 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.<sup>19</sup> 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.<sup>20 21</sup>

### **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.<sup>22</sup> 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."<sup>23</sup>

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

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.<sup>24</sup> 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

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<sup>15</sup> 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).

<sup>16</sup> *Id.*

<sup>17</sup> Robert J. Blendon, et al., *Massachusetts Health Reform: A Public Perspective from Debate Through Implementation*, Health Affairs, 27:6, at 559, 562 (2008).

<sup>18</sup> Turner, *supra* note 11.

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

<sup>20</sup> 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](http://www.boston.com/news/local/breaking_news/2010/03/cahill_bashes_s.html) (March 16, 2010).

<sup>21</sup> 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](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](http://www.cato.org/pub_display.php?pub_id=11115) (January 20, 2010).

<sup>22</sup> Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).

<sup>23</sup> 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).

<sup>24</sup> *Helvering v. Davis*, 301 U.S. 619 (1937).

crafting of tax policy which in effect encourages and discourages behavior.<sup>25</sup> Opponents cite U.S. Supreme Court case law that prohibits “a tax to regulate conduct that is otherwise indisputably beyond [Congress’] regulatory power.”<sup>26</sup>

#### 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.”<sup>27</sup> 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.<sup>28</sup> Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.<sup>29</sup>

#### 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.”<sup>30</sup> 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.”<sup>31</sup>

#### 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.<sup>32</sup> 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.<sup>33</sup>

Nine states are currently considering statutory amendments to prohibit mandated health insurance coverage.<sup>34</sup> In March 2010, Virginia and Idaho enacted such a statutory change. In addition to 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.<sup>35</sup> Utah passed state law changes; enactment is pending gubernatorial approval.<sup>36</sup> Changes to state law failed in New Hampshire.<sup>37</sup>

<sup>25</sup> Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O’Neill Institute, at 7.

<sup>26</sup> 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.

<sup>27</sup> *Id.*

<sup>28</sup> 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).

<sup>29</sup> Hall, *supra* note 25, at 8-9.

<sup>30</sup> *New York v. United States*, 505 U.S. 144, 160 (1992).

<sup>31</sup> Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

<sup>32</sup> 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).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Chapter Law 46, Idaho Health Freedom Act, effective date June 1, 2010.

<sup>36</sup> *Id.*

<sup>37</sup> National Conference of State Legislatures, *supra* note 32.

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."<sup>38</sup>

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:<sup>39</sup>

- 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/HJR 37 proposes the creation of Section 28 of 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
- Any health care system terms and conditions that do not provide punitive measures against persons, employers or health care providers for direct payment.

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.

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<sup>38</sup>Florida Attorney General Bill McCollum, Letter to Congressional Leaders, dated January 19, 2010.

<sup>39</sup> Complaint, McCollum v. Sebelius, No. 3:10-cv-91 (N.D. Fla., filed March 23, 2010).

- “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.

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 the bill will cost approximately \$\$65,045.16 in non-recurring General Revenue for publication costs. 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.<sup>40</sup> 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 HJR 37 is 687 words X \$94.68 = \$65,045.16.

<sup>40</sup> Fla. Const., art. XI, s. 5(d).  
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 DATE: 4/1/2010

### 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:

The joint resolution does not contain an express exemption for required Personal Injury Protection coverage. If statutory changes are made to PIP in the future they may conflict with the voter-approved joint resolution.

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. This analysis reflects the committee substitute.