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 Committee on Health Policy

BILL:	SM 1600
INTRODUCER:	Senator Bean
SUBJECT:	Health Insurance Tax
DATE:	April 10, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lloyd	Stovall	HP	**Favorable**
2.				
3.				
4.				
5.				
6.				

I. Summary:

SM 1600 urges the Congress of the United States to enact legislation to repeal the health insurance tax contained in sections 9010 and 10905 of the Patient Protection and Affordable Care Act and section 1406 of the Health Care and Education Reconciliation Act.

II. Present Situation:

The federal Patient Protection and Affordable Care Act (PPACA) was signed into law on March 23, 2010.[1] Among its changes to the United States health care system are expansion of Medicaid eligibility to a national threshold of 133 percent of the federal poverty level (FPL), and requirements for health insurers to make coverage available to all individuals and employers, without exclusions for pre-existing conditions and without basing premiums on any health related factors. The PPACA imposes many insurance requirements including required benefits, rating and underwriting standards, required review of rate increases, reporting of medical loss ratios and payment of rebates, covering adult dependants, internal and external appeals of adverse benefits determinations, and other requirements.[2]

Florida, along with 25 other states challenged the constitutionality of the law. In *NFIB v. Sebelius*, the Supreme Court found the enforcement provisions of the Medicaid expansion unconstitutional.[3] As a result, states could voluntarily expand their Medicaid populations to

[1] P.L. 111-148. On March 30, 2010, PPACA was amended by P.L. 111-152, the Health Care and Education Reconciliation Act of 2010. Collectively, the law is known as PPACA.

[2] Most of the insurance regulatory provisions in PPACA amend Title XXVII of the Public Health Service Act (PHSA), (42 U.S.C. 300gg et seq.).

[3] *National Federation of Independent Business v. Sebelius, 567 U.S.___(2012).*

133 percent of the FPL and receive the enhanced federal match, but could not be required to do so for the population defined as newly eligible in the law, which was interpreted to be only the adult population.[4]

In addition to the Medicaid expansion component, the federal reform law imposes a mandate on most individuals to buy insurance, or pay a penalty.[5] Currently, many uninsured individuals are eligible for Medicaid or Kidcare coverage, but are not enrolled. The existence of the federal mandate to purchase insurance could result in many eligibles coming forward and enrolling in Medicaid who had not previously chosen to do so. While these eligibles are currently entitled to Medicaid coverage, their participation will result in increased costs and would not likely have occurred without the catalyst of the federal legislation.

To obtain insurance coverage, PPACA authorized the state-based American Health Benefit Exchanges and Small Business Health Options Program (SHOP) Exchanges.[6] These exchanges are to be administered by governmental agencies or non-profit organizations and be ready to accept applications for coverage beginning October 1, 2013, for January 1, 2014 coverage dates.

The exchanges, at a minimum, must:[7]

- Certify, re-certify and de-certify plans participating on the exchange;
- Operate a toll-free hotline;
- Maintain a website;
- Provide plan information and plan benefit options;[8]
- Interact with the state's Medicaid and CHIP programs and provide information on eligibility and determination of eligibility for these programs;
- Certify individuals that gain exemptions from the individual responsibility requirement; and,
- Establish a navigator program.

The initial guidance from the Department of Health and Human Services in November 2010 set forth a number of principles and priorities for the exchanges. Further guidance was issued on May 16, 2012 detailing the proposed operations of the federally facilitated exchanges for those states that elected not to implement a state-based, separate system. On November 16, 2012, Florida Governor Rick Scott notified the Health and Human Services Secretary, Kathleen Sebelius that Florida had too many unanswered questions to commit to a state-based exchange

[4] Department of Health and Human Services, *Secretary Sebelius Letter to Governors, July 10, 2012*, http://capsules.kaiserhealthnews.org/wp-content/uploads/2012/07/Secretary-Sebelius-Letter-to-the-Governors-071012.pdf (last visited April 10, 2013).

[5] In *NFIB v. Sebelius*, the United States Supreme Court upheld the individual mandate which requires most individuals to maintain "minimum essential coverage" for health insurance coverage. For those who do not maintain such coverage and are not exempt, a shared responsibility payment or penalty will be paid to the Internal Revenue Service. The other main argument in *NFIB* concerned the directive that states expand Medicaid to 133 percent of the federal poverty level for adults. While the ruling did not overturn the mandatory Medicaid expansion, the penalty for not expanding coverage to the new minimum threshold, the loss of a state's entire Medicaid federal matching funds for not doing so, was found unconstitutional.

[6] An individual may obtain qualifying insurance coverage outside of an exchange.

[7] Centers for Medicare and Medicaid Services, Initial Guidance to States on Exchanges, November 18, 2010, http://cciio.cms.gov/resources/files/guidance_to_states_on_exchanges.html (last visited April 10, 2013).

[8] In recent weeks, the Department of Health and Human Services has reported that the SHOP exchanges may not be offering a choice of health plans to businesses in the first year.

under the PPACA for the first enrollment period on January 1, 2014.[9] Accordingly, the insurance exchanges (now referred to as marketplaces) in Florida will be the responsibility of the federal government.

Section 9010 of the PPACA provides for the assessment of an annual fee on any health insurance provider starting in 2014 with a few exceptions. The national assessment amount, pro-rated among covered entities based on revenue market share, is determined in the PPACA as $8 billion in 2014 and increases to $14.3 billion by 2018 as reflected in the chart below.[10] The amount collected after 2018 is indexed to the rate of premium growth for the preceding calendar year.[11]

Calendar Year	Applicable Amount to be Pro-Rated
2014	$8,000,000,000
2015	$11,300,000,000
2016	$11,300,000,000
2017	$13,900,000,000
2018	$14,300,000,000
After 2018	Indexed to rate of premium growth

The determination of which health insurers pay the assessment is based on whether or not the insurer meets the definition of a "covered entity" under the PPACA. In general, the PPACA defines a covered entity as any entity which provides health insurance for any United States health risk during the calendar year in which the fee is due.[12] Exclusions to this definition are also provided and include the following:[13]

- Employers who self insure.
- Any governmental entity.
- Any entity which is incorporated as a non-profit under State law and,
  - Where no part of the net earnings inures to the benefit of a private shareholder or individual;
  - Meets the limitations on lobbying and participation in political activities; and,
  - Receives more than 80 percent of the entity's gross revenues from government programs that target low-income, elderly, or disabled populations under Titles XVIII, XIX or XXI of the Social Security Act.
- Any entity described under section 501(c)(9) of the Internal Revenue Code and which is established by an entity, other than an employer or employers, for purposes of providing health care benefits.

[9] *Letter from Governor Rick Scott to Health and Human Services Secretary Kathleen Sebelius,* November 16, 2012 http://www.flgov.com/2012/11/16/letter-from-governor-rick-scott-to-u-s-secretary-of-health-and-human-services-kathleen-sebelius/ (last visited April 10, 2013).
[10] PPACA, s. 9010(e).
[11] Id.
[12] PPACA, s. 9010(c)(1).
[13] PPACA, s. 9010(c)(2); *See also* Notice of Proposed Rulemaking Published at 78 F.R. 14034, 14042, (March 4, 2013).

Health insurance premiums paid for enrollees in Medicare and Medicaid plans are not excluded from the tax.[14] According to estimates from Florida's Office of Economic and Demographic Research, the total cost of the tax for Medicaid Managed Care ranges from $31.6 million in fiscal year 2013-2014 to $471 million in fiscal year 2022-2023.[15]

The calculation of each covered entity's share of the tax is based on the entity's relative market share utilizing net premiums from the previous calendar year.[16] The amount of net premiums taken into account when determining market share; however, is subject to certain thresholds before a percentage is applied.[17] If net premiums do not exceed $25 million, then 0 percent is taken into account for this purpose.[18] For amounts greater than $25 million but less than $50 million, the percentage is 50 and for more than $50 million, the percentage is 100.[19] A covered entity may have an additional 50 percent excluded for certain activities, such as their status as public charity or a high risk insurance pool.[20]

The PPACA provision requires health insurers to report their net premiums for the calendar year to the Secretary of the Department of Health and Human Services by a date determined by the Secretary.[21] Penalties for both a failure to report and for accuracy errors are also included in the law.[22] The Notice of Proposed Rulemaking released on March 4, 2013, indicates that the Internal Revenue Service (IRS) will notify each covered entity of its preliminary fee calculation but the timing of that notice will be covered in later IRS guidance.[23]

III. Effect of Proposed Changes:

SM 1600 urges the United States Congress to repeal the health insurance tax implemented under the PPACA and further inform the President of the United States and certain members of Congress of the estimated impact the tax would have on Florida. Absent repeal, health insurers in Florida will be required to pay the health insurance tax and the state will be required to pay the tax on premiums for Medicaid recipients enrolled in Medicaid managed care plans beginning in 2014. For policyholders in Florida, it is expected that the tax paid by the insurers to the federal government will be passed along in the premium rates.

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[14] Notice of Proposed Rulemaking (NPRM) at 78 C.F.R. 14034, 14042 (Mar. 4, 2013); Definition of covered entity includes an entity that provides health insurance under Medicare Advantage, Medicare Part D or Medicaid.
[15] Office of Economic and Demographic Research (EDR), *Economic Analysis of PPACA and Medicaid Expansion*, Presentation to Select Committees on Patient Protection and Affordable Care Act (March 4, 2013), p.4, http://edr.state.fl.us/Content/presentations/affordable-care-act/EconomicAnalysisofPPACAandMedicaidExpansion.pdf (last visited April 10, 2013).
[16] PPACA, s. 9010(b).
[17] The Joint Committee on Taxation, United States Congress, *Present Law and Background Relating to the Tax-Related Provisions in the Affordable Care Act*, March 5, 2013, p. 90, https://www.jct.gov/publications.html (last visited April 10, 2013).
[18] PPACA, s. 9010(b)(2)(A).
[19] Id.
[20] PPACA, s. 9010(b)(2)(B).
[21] PPACA, s. 9010(g)(1).
[22] PPACA, s. 9010(g)(2) and (3).
[23] NPRM, *supra*, note 14 at 14045.

Other Potential Implications:

The provisions of section 9010 of the PPACA treat for-profit and not-for-profit health insurers in a disparate manner. For those covered entities that receive more than 80 percent of their gross revenues from government programs, are non-profit organizations and can meet the other qualifications, they may achieve a competitive advantage through their exclusion from the covered entity definition and therefore, the health insurance tax payment. Repeal of the health insurance tax would remove that differential treatment.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The health insurance tax is identified in the PPACA legislation as an excise tax to be paid by covered entities. This federal tax will be collected by the federal government and all revenue will belong to the federal government. Because the tax is an excise tax, it is also not deductible by the affected organizations as a business expense.[24]

B. Private Sector Impact:

The National Federation of Independent Business's (NFIB) Research Foundation has reported that the tax will result in a reduction in private sector jobs of 146,000 to 262,000 by 2022 nationwide or 6,100 in Florida by 2022, with 59 percent of those coming from small business.[25] The same report indicated that the impact further translated into a reduction of output or sales by between $19 billion to $35 billion nationwide or $2.3 billion for Florida, alone.[26]

[24] The Joint Committee on Taxation, *supra*, note 17 at 92.
[25] Press Release, National Federal of Independent Business, *Update: NFIB Research Foundation Study Now Shows Health Insurance Tax to Cost 146,000 to 262,000 Private Sector Jobs* (March 19, 2013), http://www.nfib.com/research-foundation/studies/hit-cost (last visited April 10, 2013).
[26] Id.

Regarding impact to health insurance premiums in the private sector, a study conducted by the Oliver Wyman firm on behalf of America's Health Insurance Plans (AHIP), reviewed the fees to be assessed and the estimated allocation of those fees by state. The estimated average increase, nationally, in rates due to taxes on insured plans was 1.9 percent to 2.3 percent in 2014, increasing to a range of 2.8 percent to 3.7 percent by 2023.[27]

The AHIP report's state projection of aggregate taxes per contract for Florida is based on two scenarios, one where current enrollment ratios with self-insurance do not change and one where self-insurance which is exempt from the tax, does change. The average change in taxes for family coverage when averaging the two scenarios ranged from $4,881 for an individual family contract to $7,767 for a large group family contract from 2014 to 2023.[28]

C. Government Sector Impact:

The health insurance tax applies to premiums paid both under the Medicaid and the CHIP program in Florida, unless the covered entity meets the exemption under the law as a non-profit entity with greater than 80 percent of revenues derived from low income populations funded under Titles XVIII (Medicare), XIX (Medicaid) and XXI (CHIP). Since Medicare is 100 percent federally funded, except for those dually eligible for Medicaid, those affected would be those recipients enrolled in Medicaid and CHIP under managed care plans.

The Social Services Estimating Conference last estimated that the health insurance tax under this provision would have a fiscal impact for Medicaid ranging from $31.6 million in fiscal year 2013-2014, to $471.0 million by fiscal year 2022-2023, the last year in which the Conference made estimates.[29] The state share of those costs range from $13.1 million in fiscal year 2013-2014 to $192.5 million in fiscal year 2022-2023.[30]

In a report for the Medicaid Health Plans of America, Milliman, Inc., also noted that states that contract with nonprofit managed care organizations will pay a lower health insurer fee because:[31]

- Non-profit entities that receive more than 80 percent of gross revenues from government programs that target certain populations are exempt from the fee;
- Certain covered entities can exclude 50 percent of their net premium; and,
- Nonprofit insurers are exempt from the corporate income tax.

[27] Chris Carlson, *Annual Tax on Insurers Allocated by State (November 2012)*, Oliver Wyman, p. 4, http://ahip.org/templates/Issues/documentResults.aspx?id=5775&cat=2147484864 (last visited April 10, 2013).
[28] Id at 16.
[29] EDR, *supra*, note 15.
[30] EDR, *supra*, note 15.
[31] John D. Meerschaert et al., *PPACA Health Insurer Fee: Estimated Impact on State Medicaid Programs and Medicaid Health Plans (January 31, 2012)*, Milliman, p. 13, http://www.mhpa.org/_upload/MillimanReport.pdf (last visited April 10, 2013).

Milliman cited the issue that since the health insurance tax is an excise tax and as a result, all funds accrue to the federal government, the federal government is in a sense, taxing itself on federally funded or federally matched programs.[32]

Milliman pointed out since the health insurance fee is non-deductible, every $1.00 of the health insurance fee will need to be funded at $1.54 to keep the net financial impact on the Medicaid managed care organization at zero, taking into consideration the 35 percent corporate income tax that is assessed on federal tax revenue.[33]

VI. Technical Deficiencies:

None.

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.)

None.

B. Amendments:

None.

[32] Id at 8.
[33] Meerschaert, *supra*, Note 31 at 9.