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To: The Honorable Paul Stam, Majority Leader, N.C. House of Representatives

From: Tim Hovis, Shawn Parker, Amy Jo Johnson, Staff Attorneys, Research Division, N.C. General Assembly

Date: February 28, 2011

Re: Analysis of House Bill 2 in response to Letter/Memo from the Office of the Attorney General

On February 23, 2011, House Bill 2- An Act to Protect the Freedom to Choose Health Care and Health Insurance was ratified by the General Assembly. On that same date Attorney General Roy Cooper sent a letter to Governor Beverly Perdue, copying the Speaker of the House, President Pro Tempore of the Senate, and the House Majority Leader, indicating the law is unenforceable as to the provisions that directly contradict federal law and including a memorandum drafted by the Solicitor General identifying specific issues of concern. The Research Division has received a request to analyze the issues raised in the Attorney General's letter. This memorandum examines (1) the General Assembly's position, as provided in House Bill 2, that no law or rule shall compel a person to provide for their health care services or contract with a health care system or insurance plan, (2) the General Assembly's direction to the Attorney General in House Bill 2 to bring or defend a suit in State or federal court to enforce its position, and (3) alternate interpretations of certain public policy concerns raised by the Solicitor General.

I. Application of Supremacy Clause to House Bill 2

House Bill 2 prohibits any law or rule from requiring a person to provide for health care services or medical treatments for that person. The Act also prohibits any law or rule from requiring a person to participate, contract with, or enroll in a public or private insurance plan or health care system. Section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-1152, 124 Stat. 1029 (March 30, 2010) (collectively "the ACA") creates an affirmative obligation on individuals to purchase health insurance beginning in 2014 or face the payment of a penalty. As

noted by the Congressional Budget Office, Congress has "never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994). The non-partisan Congressional Research Service reached the same conclusion indicating that "it is a novel issue whether Congress may use the Commerce Clause to require an individual to purchase a good or service." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 3.

As legitimate arguments exist on both sides of the issue, this Division cannot speak to whether the individual mandate is or is not constitutional. Nevertheless, strong arguments support the position of the General Assembly, as stated in House Bill 2, that Congress acted outside its Commerce Clause powers when creating the individual mandate. Article I, Section 8, Clause 3 of the US Constitution (the Commerce Clause) gives Congress the authority to regulate interstate commerce and this includes the channels of interstate commerce, the instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce (*US v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624). The Supreme Court has recognized limits to Congress's Commerce Clause authority by noting "[e]ven [our] modern-era of precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." (*U.S. v. Morrison*, 529 U.S. 598 at 608, 120 S. Ct. at 1740 at 1748-9) (quoting *Lopez*, 514 U.S. at 556-57, 115 S. Ct at 1628). In both *Morrison* and *Lopez* the bounds of the Commerce Clause were constrained. In *Lopez*, the Court found that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority. This Act made it a federal offense for any individual knowingly to possess a firearm in a school zone. The Court found that the statute itself had nothing to do with commerce and that it did not fall "under our cases upholding regulation of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631. Additionally, the Court rejected the notion that the Violence Against Women Act was a proper exercise of Commerce Clause powers despite finding by Congress that there is a serious impact of domestic violence on victims and their families. Congress was not found to possess the power to regulate noneconomic activities solely on the basis of its aggregated effect on interstate commerce. *Morrison*, 529 U.S. at 617, 120 S. Ct. at 1754.

The right of a state to challenge the constitutionality of a Congressional action is not denied simply because Congress chose to act. If this were true, no state could ever challenge an act of Congress. In fact, with regards to the ACA

specifically, several court cases are currently underway to challenge the Act's constitutionality. Two federal district courts, one in Virginia and one in Florida, have found the individual mandate in the ACA to be an improper exercise of the Commerce Clause. *See Virginia ex. rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768, 771 (E.D. Va., 2010) and *Florida ex. rel Bondi v. U.S. Dept. of Health and Human Services*, 2011 WL 285683, 40 (N.D. Fla., 2011). In the *Florida* case, 26 state plaintiffs are involved in challenging the constitutionality of the individual mandate provision, as well as of the ACA itself. As the position of 27 states is clear regarding the constitutionality of the individual mandate, House Bill 2 clarifies North Carolina's position as well.

Moreover, House Bill 2 does not stand in contradiction to the ACA. House Bill 2 will be effective when it becomes law. The individual mandate within the ACA will not take effect until 2014. A Supremacy Clause argument against House Bill 2 is premature. At this time, House Bill 2 stands as good, constitutional law without current conflict for federal law. "Every presumption favors validity of statute, and it will not be declared invalid unless its unconstitutionality is determined beyond a reasonable doubt." *Baker v. Martin*, 410 S.E.2d 887, NC 1991. Additionally, should House Bill 2 be examined by a state court, "[a] reviewing court confronting this question begins its analysis with a presumption against federal preemption". *State ex rel. Utilities Com'n v. Carolina Power & Light Co*. 359 N.C. 516, 525, 614 S.E.2d 281, 287 (N.C.,2005) citing also to *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714, 722-23 (1985) (“Where ... the field that Congress is said to have pre-empted has been traditionally occupied by the States „we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.‟ ”) (alteration in original) (citations omitted). Therefore, the Supremacy Clause as an argument for federal preemption does not apply with regards to House Bill 2 at this time.

II. Attorney General Duties Under House Bill 2.

House Bill 2's directive that the Attorney General of North Carolina "shall have to duty and standing to bring or defend a State or federal action" with regards to the matter of the individual mandate is a proper assertion of North Carolina's legislative policy power and a proper defense of the State's law that its citizens will not be compelled to purchase insurance nor be penalized for failure to do so. The North Carolina Constitution provides the policy power may be exercised in the form of state legislation and all legislative power in this State rests in the General Assembly. The

Courts have noted "'The legislative branch of government is without question „the policy-making agency of our government....‟ " *McCracken and Amick, Inc. v. Perdue,* 687 S.E.2d 690, 694 (N.C.App.,2009) (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8) (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). The North Carolina General Assembly by enacting House Bill 2 on February 23, 2011, has established that it is the position of the General Assembly that no person shall be compelled to (i) provide for health care services or medical treatment *for that person* or (ii) contract with, or enroll in, a public or private health care system or health insurance plan; no law or rule shall interfere with a person's right to pay directly for lawful health care services or medical treatment to preserve or enhance that person's life or health; nor shall any law or rule impose a penalty, tax, fee or fine on a person for (i) providing for, or failing to provide for, health care services or medical treatment *for that person* or (ii) contracting with, or enrolling in, or failing to contract with or enroll in, a public or private health care system or health insurance plan.

Additionally the bill explicitly directs the Attorney General "to bring or defend a State or federal action or proceeding on behalf of the residents of this State to enforce the provisions" of the Act. The North Carolina Constitution provides that the duties of the Attorney General shall be prescribed by law. Article III §7(2). If House Bill 2 becomes law, the duties of the Attorney to enforce its provisions will be prescribed by law in subsection (c) of G.S. 58-49A-1. In addition, the general duties assigned to the Attorney General are set forth in N.C. Gen. Stat. §114-2. It is the duty of the Attorney General "to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested. G.S. 114-2. The Attorney General also has a common law duty to prosecute all actions necessary for the protection and defense of property and revenue of the sovereign people of North Carolina. *Martin v. Thornburg,* 320 N.C. 533, 545, 359 S.E.2d 472, 479 (N.C., 1987). *See also* N.C. Gen. Stat. §114-1.1.

III. Solicitor General's Concerns Regarding State Law Under House Bill 2

The Attorney General's office has highlighted areas of concern with regards to the effects of House Bill 2 on existing State law. The contention that certain provisions of the act may have unintended financial or public policy consequences has little bearing on the legislative direction provided to the Attorney General; however there are alternative interpretations of the act and these will be addressed briefly:

Anti-fraud Provisions in Medicaid: House Bill 2 provides that no fee may be imposed on a person for "contracting with…a public or private health care system." As referenced in the Solicitor General's memo, the ACA

directs states who participate in the federal Medicaid program to collect a fee to offset the cost of increased enrollment and verification requirements. The fee is imposed to fight fraud and abuse in the Medicaid system. It is collected from providers such as hospitals, nursing homes, etc. House Bill 2 is aimed at preventing fees charged to a person for "contracting with, or enrolling in, or failing to contract with or enroll in" some sort of private or public health care system/insurance plan. It can be argued that a fee for the purposes of combatting fraud and that is not placed upon a person with regards to the choice to obtain or not obtain health insurance/participate in a health care system is not within the scope of House Bill 2.

Over-the-counter Drugs: House Bill 2 states that "a law or rule shall not…[i]mpose a…tax…on a person for providing for…health care services or medical treatment for that person…" The Solicitor General expresses concern for sales taxes on over-the-counter drugs under House Bill 2. Such a tax is levied as a sales tax for purchasing a good (over-the-counter medication) that is not exempted through statute in the State of North Carolina. Again, in contrast to the Attorney General's position, it can be argued that the tax is on the purchase of a good and is not found within the scope of providing health care services or medical treatment under House Bill 2. In his memo, the Solicitor General specifically cites the case of *Robison v. Walser,* as an interpretation of the term "medical treatment". However an argument can be made that the interpretation is not analogous to the purchase of over the counter medications. In *Robinson,* the medical treatment involved medication that could be obtained over-the-counter but was administered to a prison inmate by a health care professional. 2009 WL 6669324, 2 (E.D.N.C.). First, House Bill 2 excludes this population in contemplation of circumstances that would require medical treatment without consent of the individual. Additionally, the administering of over-the-counter medication by a healthcare professional is an act that must be distinguished from purchasing over-the-counter medication for oneself. The terms "health care services" and "medical treatment" given their ordinary meaning would imply these services and treatments are either furnished by a health care provider or in a health care setting. "Where a literal reading of a statute „will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control..." " *Taylor v. Crisp,* 286 N.C. 488, 496, 212 S.E.2d 381, 386 (N.C. 1975). (quoting *Freeland v. Orange County*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968)). The purchasing of an over-the-counter medication for oneself would not be construed as providing for health care services or medical treatments as regulated in House Bill 2.

Child Health Insurance Program (CHIP): Deductibles, copayment and various cost-sharing devices are not "fees…on a person for providing for…health care services or medical treatment for that person…" as outlined in House Bill 2. A deductible or copayment is a payment for services made to the provider based on a contractual agreement between the health care provider, insurer, and consumer. It can be argued that a deductible or a copayment is not a "penalty, tax, fee, or fine" paid to the government within the scope of House Bill 2.

Uninsured Motorist Coverage: House Bill 2 provides that "a law or rule shall not [c]ompel a person to…provide for health care services or medical treatment for that person." Although State law requires drivers to carry uninsured motorist coverage, this requirement does not fall under the prohibitions of House Bill 2. The State does not compel someone to drive a motor vehicle. Driving a motor vehicle is a privilege and if one choses to engage in the activity, the insurance must be purchased. Given the lack of a law or rule creating a compulsion upon an individual, uninsured motor coverage is outside of the scope of House Bill 2.

IV. Conclusion

House Bill 2 creates an affirmative duty for the Attorney General to defend the General Assembly's position regarding individual insurance mandates. The General Assembly's position as provided House Bill 2 is that the a law or rule shall not compel a person to provide for their health care services or contract with a health care system or insurance plan and that there shall be no penalty for failing to contract with a health care system or insurance plan. By enacting House Bill 2, the General Assembly believes that the federal law is unconstitutional and provides legislative direction to the Attorney General to challenge the ACA. Given the individual mandate found within the ACA does not take effect until 2014, any arguments that House Bill 2 is unconstitutional under the Supremacy Clause are pre-mature. Therefore, it is appropriate that the Attorney General pursue a defense of the General Assembly's position if House Bill 2 becomes law.