

SENATE AMENDMENT

AMENDMENT NO. _____

Hitchcock/Holt
February 25, 2014

ADOPTED	TABLED	CARRIED OVER	FAILED	RECONSIDERED

Clerk of the Senate

ADOPTION NO. _____

BILL NO: H. 3101

(Reference is to S. Printed 5/29/13--S.)

Senator DAVIS proposed the following amendment (3101R013.TD):

Amend the bill, as and if amended, by striking all after the title and inserting:

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SECTION 1. Chapter 1, Title 1 of the 1976 Code is amended by adding:

“Article 30

ACA Anti-Commandeering Act

Section 1-1-1900. This article may be cited as the ‘ACA Anti-Commandeering Act.’

Section 1-1-1905. For purposes of this article:

- (1) ‘ACA’ means the Patient Protection and Affordable Care Act, signed by President Barack Obama on March 23, 2010, and any amendments thereto.
- (2) ‘health insurance’ means any policy of insurance that meets the definition provided by Section 38-1-20.

(3) ‘health insurance exchange’ means an American Health Benefit Exchange established by the federal government, any state, or political subdivision of a state, or any other entity that may otherwise qualify to establish an exchange pursuant to the ACA.

(4) ‘public body’ means any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, and school districts.

Section 1-1-1910. The General Assembly finds:

(1) that significant portions of the ACA constitute an unprecedented overreach by the U.S. Congress and the federal government into areas of law and regulation that involve the exercise of powers and duties that are patently reserved to the States and the people themselves under the United States Constitution;

(2) that those portions of the ACA that require employers to provide and individuals to obtain health insurance are particularly offensive to the rights and freedoms of the residents of this State;

(3) that pursuant to and in furtherance of the fundamental principle of state sovereignty, the federal government may not command our State’s officers, agents, or employees to participate in the enforcement or facilitation of any federal program the General Assembly determines to be offensive to fundamental freedoms guaranteed to our State’s residents;

(4) that this right to be free from the commandeering hand of the federal government has been most notably recognized by the United States Supreme Court in *Printz v. United States* when the Court held: ‘The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program;’

(5) that the State has the duty and obligation to refuse to participate in the facilitation and enforcement of those provisions of the ACA that are patently offensive to the principle of state sovereignty and so significantly infringe upon the rights and freedom of all South Carolinians; and

(6) that the anti-commandeering principles recognized by the U.S. Supreme Court in *Printz v. United States* are predicated upon the constitutional proposition that the State has the absolute and sovereign right to interpose and refuse to assist in the enforcement of any federal program, and the prohibitions contained in this article are a full and fair exercise

of the sovereign power of this State in support of and in compliance with the anti-commandeering principles recognized by the U.S. Supreme Court in *Printz v. United States*;

(7) that expanding Medicaid as described in 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) would cost between \$600 million and \$1.9 billion of state funds between 2014 and 2020, and South Carolina should not expand under this ACA section, but should work to meet current commitments to current populations whom are the most vulnerable; and

(8) that expanding Medicaid as described in 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) does not address root causes of health issues and does not reform the health system.

Section 1-1-1915. (A) Notwithstanding any provision of law, regulation, rule, or order to the contrary, a public official, officer, or employee of a public body, or any other person or entity during the provision of services on behalf of a public body, shall not:

(1) implement or participate in the establishment of a health insurance exchange by the State or a political subdivision of the State, or assist in the enrollment of any person in any health insurance exchange, or provide any other material support, participation, or assistance, with or to a federal agency or employee, or any other person acting on behalf of, in conjunction with, or in support of, any health insurance exchange offering health insurance to employers or residents of this State in order to facilitate any portion of Section 1501 and 1513 of the ACA, commonly known as the ACA's individual mandate to purchase insurance coverage and the ACA's employer mandate to provide health insurance coverage, respectively;

(2) enforce or aid in the enforcement of Section 1501 of the ACA requiring an individual to maintain minimum essential coverage, commonly known as the ACA's individual mandate to purchase insurance coverage;

(3) enforce or aid in the enforcement of Section 1513 of the ACA imposing a shared responsibility on employers who do not provide health insurance to full-time employees, commonly known as the employer's mandate to provide health insurance coverage;

(4) utilize any assets, state funds or funds authorized or allocated by the State to any public body, in whole or in part, to engage in any activity that aids in the enforcement of any federal act, law, order, rule, or regulation intended to give effect to or facilitate the enforcement of Sections 1501 or 1513 of the ACA;

(5) apply for, seek, or receive any public or private grant, allocation, donation, or funds of any kind to be used to support the enrollment of any person in any health insurance exchange offering health insurance to employers or residents of this State in order to facilitate any portion of Section 1501 and 1513 of the ACA; and

(6) apply for or utilize any assets, state funds, or funds authorized or allocated by the State to any public body, in whole or in part, to engage in any activity that aids in the enforcement of any federal act, law, order, rule, or regulation intended to give effect to or facilitate the enforcement of any other portion of the ACA.

(B) The provisions of subsection (A) shall not apply to:

(1) those portions of the ACA that set forth standards, regulations or other requirements that must be discharged by the South Carolina Department of Health and Human Services in connection with providing Medicaid services to those who qualify for these services under the state standards that are currently in place, which do not and must not include those who would qualify under the Medicaid population expansion authorized by the ACA as set forth in 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII);

(2) those portions of the ACA which provide the South Carolina Department of Health and Human Services with flexibility in administering the Medicaid program;

(3) those portions of the ACA that set forth standards, regulations or other requirements that must be discharged by providers of Medicare and Medicaid services in order to secure Medicare and Medicaid reimbursements;

(4) those portions of the ACA that relate to or affect the discharge by the South Carolina Department of Revenue of its obligations pursuant to any shared or reciprocal programs between the State and the federal government, to include, but not limited to, the State Income Tax Levy Program; and

(5) those portions of the ACA and any enacting or subsequent standards, regulations, or other requirements that must be discharged by or have a material impact on the duties of the South Carolina Department of Insurance in connection with the regulation of the business of insurance in this State or that impact, or have the potential to impact, the regulation of the business of insurance in this State and the overall health of the health insurance marketplace, including the affordability and availability of coverage. This includes, but is not limited to, any activity resulting from the duties of the Director of Insurance, as amended by this act and promulgated under S.C. Code of Laws Section 38-3-110 and Article 21, Chapter 71 of Title 38 as it relates to the registration of navigators. This further includes activities related to consumer

education and assistance on health insurance issues as long as the department does not enroll consumers in coverage offered through the health insurance exchange as prohibited under this section.

(C) A violation of this section is considered sufficient cause to remove or terminate, as provided by law, a state officer, official, or employee.

Section 1-1-1920. Notwithstanding the prohibitions in Section 1-1-1915, a public official, officer, or employee of a public body is not prohibited by this article from complying with federal laws and relevant statutes governing their respective obligations and responsibilities, including their responsibility to administer the Medicaid program in compliance with federal statutes, regulations, and policies, nor does this Act limit the South Carolina Department of Health and Human Services' ability to apply for, request, or otherwise develop innovation waivers as set forth in Section 1332 of the ACA.

Section 1-1-1925. Notwithstanding any other provision of law, the state shall not establish, facilitate, implement, or participate in expanding Medicaid as described in 42 U.S.C. § 1396a(a)(10)(A)(VIII), which is commonly known as the expansion of the Medicaid program pursuant to the ACA.”

SECTION 2. Chapter 11, Title 11 of the 1976 Code is amended by adding:

“Article 6

The Transparency in ACA Grants and Programs Act

Section 11-11-500. This Article may be cited as the ‘Transparency in ACA Grants and Programs Act.’

Section 11-11-510. For purposes of this article:

(1) ‘ACA’ means the Patient Protection and Affordable Care Act, signed by President Barack Obama on March 23, 2010, and any amendments thereto.

(2) 'public body' means any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts.

Section 11-11-520. The General Assembly finds:

(1) that the ACA creates new grant and program funding that, if applied for and received by a state, subjects the state to certain agreements and stipulations, the full impact of which is not often readily understood;

(2) that the ACA intrudes into individual liberty, makes massive new spending commitments, assumes unrealistic future cost savings, raises taxes and fees, and increases federal control over health care, and the acceptance by a state of a grant authorized by the ACA might facilitate these undesirable public-policy outcomes; and

(3) that the General Assembly believes South Carolina must pay vigilant attention to how new ACA grants and programs will be used in the state and exercise discretion, rather than making application for every available grant and implementing every program, irrespective of the consequences.

Section 11-11-530. (A) No department of the State or any state board, commission or agency shall apply for or receive any grants from any federal agency provided for or authorized by the ACA or any other related provision, or request any dollars to implement, either purposefully or in practice, any program contained in or described by the ACA, except in a manner that complies with the procedure provided by this section. The requesting entity must post on its website on or before the date on which the Governor submits the executive budget pursuant to Section 11-11-70:

(1) a full and detailed list of each program,

(2) the amount of federal and state funds requested,

(3) every regulation, mandate, requirement or action that will result from the program's implementation or expenditure of the funds, and a description of each and every type of business and individual that would be affected by any regulation, mandate, or requirement,

(4) the authority by which the federal government directs the program,

(5) the authority by which the state directs the program,

(6) the method by which the State would receive the funds, any and all agreements, plans or documents the State would have to submit to federal authorities including the name of those authorities that would specifically sign any authorization of the State that would allow federal authorities to hold the State accountable,

(7) any and all specific reporting or implementation requirements for the State,

(8) any penalties imposed by the federal government on the State for any breach of the terms as described in writing by the public body and by federal authorities,

(9) any and all projected costs to any public body, business, or individual associated with the program, and

(10) the stated goals, expected results, and costs of the program as described in writing by the public body and by the federal authorities overseeing the program, and the specific process by which the public body will measure the results of the program each year.

(C) Any public body requesting any federal funds to implement any program contained in or described by the ACA must submit the request to the Governor as part of the public body's budget request pursuant to Section 11-11-30. The public body must post the request on the requesting body's website on or before the date on which the Governor submits the executive budget pursuant to Section 11-11-70, and the information posted must be specifically detailed and noted as being related to the ACA, and include a description of the connection to the ACA and the specific means by which the Governor will measure the results of each program.

(D) Any public body's request for federal funds to implement any program contained in or described by the ACA shall not be authorized or allowed unless it is included by the Governor in the executive budget and subsequently considered jointly by the House Ways and Means Committee and the Senate Finance Committee pursuant to the provisions of Section 11-11-90. In order to be included in the state budget, a program must receive a separate affirmative recorded vote of each house of the General Assembly.

(E) Any public official who receives any benefit from any program described in this section, whether directly or through any business with which the official has any relationship, must disclose the full nature of the relationship and the income derived on the official's annual Statement of Economic Interest, and must also include any income or benefit received by an immediate family member.

(F) In order to be included in any subsequent state budget, a program must be approved fully in the manner provided by this section."

SECTION 3. Section 38-3-110 is amended by adding an appropriately numbered new subsection to read:

“() The director must take reasonable steps and all appropriate action to limit federal intrusion into the regulation of the business of insurance in this State. This includes, but is not limited to, regulation of the insurance products offered through any exchange or other insurance marketplace operating in the State pursuant to any federal act, regulation, or action, including the Patient Protection and Affordable Care Act of 2010 and its enacting regulations.”

SECTION 4. Chapter 71, Title 38 of the 1976 Code is amended by adding:

“Article 21

Navigator Registration Act

Section 38-71-3010. This act may be cited as the ‘Navigator Registration Act.’

Section 38-71-3020. The General Assembly finds:

- (1) that the provisions of the federal Patient Protection and Affordable Care Act have caused the formation of a federal health insurance exchange, which will operate in South Carolina under federal law and employ individuals or entities whose role will be to direct individuals and companies to health insurance policies on the health insurance exchange;
- (2) that state registration of these individuals and entities, to ensure that they are trained and knowledgeable in the subject matter of individual and group health insurance coverage, is necessary to avoid substantial risk to the health, safety, and welfare of the residents of this State;
- (3) that the U.S. Congress, in the McCarran-Ferguson Act of 1945, the Gramm-Leach-Bliley Act of 1999, and in other enactments, has declared that states should regulate the business of insurance and affirmed that the continued regulation of the insurance industry by the states was in the public’s best interest;
- (4) that the federal Centers for Medicare and Medicaid Services are charged with the legal duty of implementing certain aspects of the federal Patient Protection and Affordable Care Act and has recognized, through regulations

including, but not limited to, the General Guidance on Federally-facilitated Exchanges, p. 4, CMS 2012, and 77 Fed. Reg. 18309, 18448, published March 27, 2012, the responsibility of the states' departments of insurance in the licensure and regulation of a person, commonly referred to as a 'health care navigator,' who receives grant monies from the United States Department of Health and Human Services, a state or a health insurance exchange, or private money to perform an activity or duty identified in 42 U.S.C. Section 18031(i);

(5) that the federal government providing navigators a role in the facilitation and implementation of the Patient Protection and Affordable Care Act is not absolute and does not prohibit complementary regulation of these individuals and their activities by states, and that the provisions of this article fairly balances the interests of the federal government in providing for the implementation of its program with the interests of the states in protecting their residents from fraudulent and unscrupulous acts by persons of questionable moral character.

Section 38-71-3030. For the purposes of this article:

(1) 'Department' means the South Carolina Department of Insurance.

(2) 'Navigator' means a person who is selected to perform the activities and duties identified in 42 U.S.C. Section 18031(i) and includes a person who receives grant monies from the United States Department of Health and Human Services, a state or a health insurance exchange, or private funds to perform an activity or duty identified in 42 U.S.C. Section 18031(i).

(3) 'Exchange' means an American Health Benefit Exchange established by the federal government, any state, or political subdivision of a state, as provided for in the ACA.

Section 38-71-3040. Except as otherwise provided in this title, this chapter applies to any individual or entity registered as a navigator in South Carolina. It does not apply to licensed life, accident and health insurance producers or licensed life and health insurance companies. This chapter does not apply to any individual or entity that provides assistance to consumers under, and in compliance with state or federal authority other than Section 42 U.S.C. Section 18031 to the extent the individual or entity is providing assistance consistent with that state or federal authority.

Section 38-71-3050. An individual or entity shall not act as or purport to be a navigator in this State or provide the services of a navigator unless the individual or entity registers with the department by submitting an application and paying the following registration and registration renewal fee of twenty-five dollars, if the applicant is an individual, or one hundred dollars, if the applicant is some other entity.

Section 38-71-3055. The registration fee and registration renewal fee is nonrefundable and fully earned upon payment. All fees collected from navigators are to be used by the department to implement and enforce the requirements of this article and the provisions of Title 38.

Section 38-71-3060. (A) To register as a navigator in South Carolina, an entity shall:

- (1) provide proof the entity is domiciled in the United States;
- (2) establish procedures for the handling of personally identifiable and nonpublic information;
- (3) provide the department with a copy of the entity's authority to operate in South Carolina;
- (4) designate an officer to act as the responsible party on behalf of the entity and to submit to a background check;
- (5) provide a list of individuals performing navigator services on behalf of, or under the supervision of, the entity on a form prescribed by the department;
- (6) provide proof that the individual has complied with the applicable federal education and registration requirements of the ACA and of this article;
- (7) provide and maintain on file with the department a current business address for notices and other regulatory information; and
- (8) complete and provide to the department a registration application which must be renewed biennially.

(B) To register as a navigator, an individual must:

- (1) be at least 18 years of age;
- (2) provide proof that the individual is a citizen of the United States and has complied with all state and federal laws pertaining to employment in South Carolina and the United States;
- (3) provide evidence that the individual is a person of good moral character and has not been convicted of a felony or any crime involving moral turpitude within the last ten years that is a ground for denial, suspension, or revocation;

(4) provide proof that the individual has complied with the applicable federal education and registration requirements of the ACA and of this article;

(5) provide and maintain on file with the department a current business address for notices and other regulatory information;

(6) identify the navigator entity that the individual represents or is employed or associated with; and

(7) complete and provide the department with a navigator registration application which must be renewed biennially.

(C) The department may deny, suspend or revoke the registration of a navigator registered individual or entity if:

(1) the navigator is convicted of a felony offense;

(2) the navigator is convicted of a misdemeanor offense involving fraud or dishonesty;

(3) the department, after investigation, concludes that the navigator has provided false or fraudulent information to consumers or otherwise deceived or dealt unjustly with the residents of the State of South Carolina as defined in Section 38-43-130; or

(4) the navigator has engaged in intentional or negligent conduct that has resulted in the release of a consumer's personally identifiable information.

(D) An entity registered as a navigator shall report to the department all unauthorized releases of a consumer's personally identifiable information. The entity shall report this unauthorized release of personally identifiable information to the affected individual whose personal information was released within twenty-four hours after discovering, investigating and verifying the breach.

(E) Notwithstanding another provision of law, a navigator shall not sell, solicit, or negotiate insurance in this State for any class or classes of insurance when assisting an individual with enrollment or performing any other insurance navigator activities or duties through a health insurance exchange established or operating in this State, including an exchange established or operated by the United States Department of Health and Human Services without first being licensed as a producer in accordance with applicable South Carolina law.

(F) A navigator and his administrative staff shall keep all personally identifiable information secure pursuant to Title 45, Part 155 of the Code of Federal Regulations. The department shall revoke the registration of a navigator who fails to comply with the requirements of this article.

(G) The department shall maintain a website for the purpose of providing the public with a complete list of all currently registered navigators in this State.

Section 38-71-3070. A person acting as a navigator pursuant to 42 U.S.C. Section 18031(i) on the effective date of this act shall register within ninety days after the effective date of this act with the department as provided in this article in order to continue performing the duties and activities of a navigator in this State after the effective date of this act. An entity that receives grant monies from the United States Department of Health and Human Services, a health insurance exchange, or private money to perform an activity or duty identified in 42 U.S.C. Section 18031(i) shall register within ninety days of receiving the grant monies with the department as provided in this article in order to begin performing the duties and activities of a navigator in this State.

Section 38-71-3080. An entity employing an individual as a navigator shall require that individual to register with the department within thirty days after successfully completing the federal education and registration requirements for navigators.

Section 38-71-3090. An entity employing an individual registered as a navigator shall notify the department, in writing, of any change in the status of a navigator, including but not limited to suspension, termination, or resignation, within thirty days of the status change.

Section 38-71-4000. A person who violates the provisions of this article shall be subject to the penalties and disciplinary action set forth in Section 38-2-10.

Section 38-71-4010. Unless registered with the Department as a navigator under this Article, an entity or individual may not:

- (1) use the term 'navigator' as part of an entity's name or website address or in an individual's title; or
- (2) imply or represent that the entity or individual is a navigator in advertising or outreach material.

Section 38-71-4020. The department may promulgate regulations necessary to carry out the provisions of this article.

Section 38-71-4030. The director or his designee is authorized to impose additional requirements on registrants or applicants for registration under this article through administrative action so long as those requirements are consistent with the requirements applicable to individual licensees of the department as set forth in statute or regulation.

Section 38-71-4040. If a court of competent jurisdiction holds that any provision of this article or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this article that can be given effect without the invalid provision or application.”

SECTION 5. (A) The Governor is hereby authorized and requested to communicate this act to the legislatures of the several states, to assure them that this State considers the Union was established for specified purposes, and particularly for those specified in the United States Constitution to be friendly to the peace, happiness, and prosperity of all the states; that faithful to that Constitution, according to the plain intent and meaning in which it was understood and accorded to by the several states, the State of South Carolina is sincerely anxious for its preservation; that it does also believe that to take from the states all of the powers of self-government, and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to by the States in that Constitution, is not for the peace, happiness or prosperity of the States; and that therefore, the State of South Carolina is determined, as it doubts not most of its sister states are, never to submit to un-delegated, and consequently unlimited, powers claimed to be possessed by any man or body of men.

(B) The Governor is hereby authorized and requested to call on our sister states for an expression of their sentiments on the Patient Protection and Affordable Care Act of 2010, plainly declaring whether these acts are or are not authorized by the United States Constitution; that it is the position of the State of South Carolina that the Patient Protection and Affordable Care Act of 2010 amounts to an undisguised declaration that the Constitution is not meant to be the measure of the powers of the federal government, but that it will proceed in the exercise over the State of South Carolina and its sister states of all powers whatsoever. That our sister states view this action as seizing the rights of the States and consolidating them in the hands of the federal government with a power assumed to bind the states, but in all cases whatsoever, by laws

made, not with their consent, but by others against their consent. That this would be to surrender the form of government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the sister states recurring to their natural right, will concur with the State of South Carolina in declaring the Patient Protection and Affordable Care Act of 2010 void, and of no force, and will each unite with the State of South Carolina in requesting its immediate repeal, and also pass legislation similar to this act within their own state legislatures.

SECTION 6. This act takes effect upon approval by the Governor.

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Renumber sections to conform.
Amend title to conform.