MEMORANDUM

TO: Ohio Manufacturers' Association
FROM: Bricker & Eckler LLP
DATE: August 5, 2011
RE: Health Care Opt-Out Amendment to Ohio Constitution

This November, Ohio voters will see on their ballots a proposed amendment to the Ohio Constitution, which purports to have Ohio opt out of the federal "Patient Protection and Affordable Health Care Act of 2010" (the "Health Care Act"), the national health care overhaul enacted last year. The following is a brief explanation of the proposed Amendment, the federal constitutional issues that arise from it, and the possible impact of the Amendment in other areas of law in the event that the Amendment passes and survives constitutional challenge.

I. The Text and Purpose of the Amendment

The Amendment certified for the Ohio ballot proposes to add Section 21 to Article I of the Ohio Constitution. The full text of the proposed constitutional amendment is as follows:

Preservation of the freedom to choose health care and health care coverage

Section 21(A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.

Section 21(B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.

Section 21(C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.

Section 21(D) This section does not affect laws or rules in effect as of March 19, 2010; affect which services a health care provider or hospital is required to perform or provide; affect terms and conditions of government employment; or affect any laws calculated to deter fraud or punish wrongdoing in the health care industry.

Section 21(E) As used in this Section,

(1) "Compel" includes the levying of penalties or fines.
(2) "Health care system" means any public or private entity or program whose function or purpose includes the management of, processing of, enrollment or individuals for, or payment for, in full or in part, health care services, health care data, or health care information for its participants.
(3) "Penalty or fine" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge or any named fee established by law or rule by a government established, created, or controlled agency that is used to punish or discourage the exercise of rights protected under this section.

The purpose of the Amendment is to essentially nullify in Ohio those features of the Health Care Act that mandate the purchase of health insurance. The Amendment would also prohibit Ohio from enacting a health care program similar to the one in Massachusetts, where the state requires a minimum level of insurance coverage.

The Potential Constitutional Challenge to the Amendment if Passed

If the Amendment passes, proponents of the federal Health Care Act will undoubtedly seek to have the Amendment declared unenforceable. The primary basis for this position will undoubtedly be the Supremacy Clause of the United States Constitution. The Supremacy Clause states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., Art. VI, cl. 2.) Any constitutional challenge to the Amendment (if passed) will undoubtedly rest on the argument that the Supremacy Clause ensures that the Health Care Act trumps any state law or state constitutional amendment that purports to nullify it. In other words, the Supremacy Clause operates to preempt the Ohio Amendment.

The success of the Supremacy Clause argument depends upon the validity of the Health Care Act. The United States Supreme Court has held that the preemptive force of a federal law under the Supremacy Clause applies only if Congress has acted within its Constitutional authority. *See e.g. Wyeth v. Levine*, 555 U.S. 555 (2009). Thus, a federal law is the "supreme Law of the Land" only if it is (1) within Congress' power to enact and (2) validly enacted pursuant to constitutional procedures. Proponents of the Amendment will argue that the Health Care Act is not entitled to Supremacy Clause preemptive force because it is itself unconstitutional.

So the effect of these two competing sides is this: the effectiveness and enforceability of the Ohio Amendment (if passed) depends upon whether the federal Health Care Act is a valid exercise of the federal Government's constitutional power. The main

constitutional arguments to attack the Health Care Act's validity are (1) the Commerce Clause and (2) the Tenth Amendment to the U.S. Constitution. As to the Commerce Clause, opponents of the Health Care Act have already argued in federal litigation that the Act exceeds Congress's enumerated Commerce Clause power. That argument has been successful in a Virginia district court case, which is on appeal to the United States Court of Appeals for the Fourth Circuit. Closer to home, however, the Sixth Circuit Court of Appeals (which covers Ohio) has recently upheld the Health Care Act against a Commerce Clause challenge. That decision has been appealed to the United States Supreme Court.

Meanwhile, there is also a potential Tenth Amendment challenge to the Health Care Act that, if successful, would also preserve the Ohio Amendment (if passed). The Tenth Amendment to the federal Constitution says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Opponents of the Health Care Act (and proponents of the Ohio Amendment) can be expected to raise the Tenth Amendment as a basis to say that the mandates included in the Health Care Act are legislative matters that belong, if anywhere, within the power of the States.

Impact of the Amendment in Unrelated Areas

By its own force, the Amendment would not appear to have broad-based impact in other areas. The Amendment is drafted with specific reference to the compelled participation in a health care system, prohibitions on purchasing health care/insurance, and penalties for the sale or purchase of health care/health insurance. And because the Amendment's language "grandfathers" preexisting laws in effect as of March 19, 2010, health care/health insurance-related laws like Medicare, Medicaid, workers' compensation, and ERISA would appear to be unaffected by the Amendment (at least as to the extent those laws existed as of March 19, 2010).

No impact on other areas of law would arise from the Amendment's passage by its own force. But there could be an indirect impact upon the potential for future laws (or state constitutional amendments) that might gain traction in the event that the Amendment survives a constitutional challenge. If the Amendment is upheld on the basis that the federal Government exceeded its enumerated power in the Health Care Act, it is possible that opponents of federal regulation could attack any number of federal laws in a variety of areas. It is unlikely, however, that federal regulation in matters that are indisputably related to interstate commerce (*e.g.*, utility regulation, insurance, transportation) could be successfully challenged by a similar Ohio constitutional amendment. In areas that involve regulation of purely intrastate activity, however, challengers to federal regulation could feel empowered to challenge federal law if the Ohio Amendment passes and survives the inevitable constitutional challenge.