Executive Summary

The Patient Protection and Affordable Care Act was passed by the U.S. Congress on March 21, 2010, and signed by the President on March 23, 2010. The Health Care and Education Affordability Reconciliation Act of 2010 was passed by the U.S. Congress on March 25, 2010, and signed by the President on March 30, 2010. Combined, these two bills constitute an enormous and complex piece of federal legislation that is over 2,200 pages and imposes hundreds of new requirements on states, businesses, health care providers, non-profit entities, and individuals. The following provisions are the most relevant with regard to an analysis of the constitutionality of this federal legislation.

The Act contains an "individual mandate" that requires uninsured Americans to purchase health insurance if they do not fall within one of the individual mandate's exceptions. This mandate expressly requires U.S. citizens and legal residents to have federal government-approved "qualifying" health insurance coverage beginning in 2014. Those who refuse to purchase a government-approved health insurance plan will have to pay a tax penalty of $695 per year or 2.5% of their annual income, whichever is higher. The Act imposes numerous new requirements on the terms of health insurance policies and plans under which American citizens will be covered. Most of these requirements involve expanding the terms and conditions of health insurance plans. The Act also significantly expands Medicaid eligibility for low-income individuals.

Finally, the Act requires each state to establish an "American Health Benefit Exchange" to facilitate the purchase of federal qualifying health plans, provide for the establishment of a "Small Business Health Options Program," and meet other requirements described in the Act. To qualify to be listed on the exchange, a health benefit plan must abide by numerous federal regulations, which will be promulgated at a future date. If a state fails to establish a health benefit exchange, the Act requires the Secretary of Health and Human Services to establish and operate an exchange within that state.

In analyzing the constitutionality of the Act, it is critical to keep in mind as a legal touchstone the fundamental structural principles of the U.S. Constitution as they relate to the American system of government. More specifically, to ensure that no single government entity wields too much power, the Framers of the U.S. Constitution created vertical and horizontal separations of power. The vertical separation is between the federal and state governments and their respective powers. The horizontal separation consists of the division of authority and limited powers among the three branches of the federal government. These structural principles, which are fundamental components of the U.S. Constitution, were

adopted by the Framers to ensure the protection of the liberty interests of the American people.

The Act's individual mandate is the most troubling and constitutionally suspect component of this expansive legislation. Such a federal dictate is clearly unprecedented. Congress' own budget arm, the Congressional Budget Office, has stated that a "mandate requiring all individuals to purchase health insurance *would be an unprecedented form of federal action; [t]he government has never required people to buy any good or service as a condition of lawful residence in the United States*." Nevertheless, in the "findings" section of the Act, Congress attempts to make the case that it has the authority to require an individual mandate pursuant to its powers under the Commerce Clause of the U.S. Constitution.

While it is certainly correct that modern Supreme Court jurisprudence has greatly expanded the scope of congressional power under the Commerce Clause, it is also true that no court – and certainly not the Supreme Court – has ever authorized federal action similar to the individual mandate based on Congress' Commerce Clause authority or any other enumerated power in the Constitution. Moreover, while acknowledging Congress' expansive Commerce Clause powers, recent Supreme Court cases have also emphasized the need for limits to such powers. Without such discernable limits, Congress' Commerce Clause powers could end up nullifying and making irrelevant other fundamental components of the U.S. constitutional structure, particularly states' rights, federalism, and the individual liberty interests of the American people.

Given the unprecedented scope of the Act's individual mandate and Supreme Court jurisprudence recently emphasizing limits to Congress' Commerce Clause powers, we believe that the Supreme Court could find that the individual mandate is beyond the scope of Congress' Commerce Clause powers.

We also believe that it is not in Alaska's interest to acquiesce to the significant expansion of the federal government's power as embodied in the Act's individual mandate. History has shown that our state's interests, perhaps uniquely among states in the Union, are negatively affected by growing federal power that often disregards, or is inimical to, what is in the public interest of Alaska and our citizens. Whether one agrees with the need for comprehensive health care reform or not, such reform is not in Alaska's public interest if it is accomplished in a manner that allows for a constitutional shortcut that dramatically expands the reach of the federal government's powers at the expense of states' rights, constitutional limits on Congress, and the liberty interests of our citizens. We therefore recommend that Alaska join 20 other states in challenging the constitutionality of the Act on the grounds that the Commerce Clause and Tenth

Amendment of the U.S. Constitution do not authorize the Act's unprecedented individual mandate requirement.

In defending its authority to enact the Act's individual mandate, the federal government will likely claim that even if Congress does not have the authority for such a mandate under its Commerce Clause powers, it nevertheless has the authority pursuant to the Constitution's Tax and Spending Clause because the individual mandate entails a tax penalty. Supreme Court jurisprudence on this issue has shifted over the years with two somewhat conflicting lines of precedent. The first is an extremely broad reading of Congress' tax and spending powers that generally has upheld most congressional tax enactments as constitutional if they raise revenue. But another line of Supreme Court cases has held that Congress cannot resort to its taxing power to effectuate an end which otherwise is not within the scope of its other enumerated powers under Article I of the U.S. Constitution. These differing lines of Supreme Court precedent have never been reconciled. Thus, it is not clear how the Supreme Court would rule on the issue of whether Congress has the authority under its taxing power to enact the individual mandate even if it lacks such authority under the Commerce Clause.

Our analysis with regard to certain other claims challenging the constitutionality of the Act has resulted in similar uncertain conclusions. For example, there is a colorable claim that the individual mandate's tax penalty is a "direct tax." Under Article I, § 9, direct taxes must be apportioned, and because the individual mandate's tax penalty is not apportioned, it may be an invalid exercise of Congress' taxing authority. A claim can also be made that the Medicaid mandate exceeds Congress' power under Article I and violates the Tenth Amendment of the U.S. Constitution. However, Supreme Court jurisprudence on such issues is sparse, as is detailed factual information regarding such claims, which makes it very difficult to have definitive conclusions about the merits of such claims.

On the other hand, there have been a number of other claims challenging the constitutionality of the Act, such that various provisions violate Due Process, Privileges and Immunities, Equal Protection, and the First Amendment. We have examined many of these claims and find that in general they would be unlikely to succeed.