

## MEMORANDUM

To: Interested Persons

From: Lisa J. Danetz, Legal Director, Dēmos  
Sarah Brannon, Director of Public Agency Program, Project Vote  
Lloyd Leonard, Advocacy Director, League of Women Voters of the United States

Date: August 8, 2014

Re: Voter registration duties of Health Benefits Exchanges  
under the National Voter Registration Act

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### I. Introduction

The Patient Protection and Affordable Care Act (“ACA”)<sup>1</sup> includes many mechanisms to ensure that as many Americans as possible have access to health insurance. One of those mechanisms, the unitary application system, allows any individual applying for health insurance and seeking one of the many forms of state health subsidies available under the ACA to complete a “single streamlined” application that routes the applicant to whichever program is appropriate for that individual.<sup>2</sup> Most such health insurance applications are occurring online, but paper and telephonic applications are also available.<sup>3</sup> This application system is operated by an entity called a Health Benefits Exchange (“Exchange”), which every state is required to have.<sup>4</sup> In some states, the Exchange is operated by the state itself, and in others, the federal government is operating the Exchange for the state because the state has chosen that option.<sup>5</sup>

Because Exchanges, through operation of the single streamlined application system, are administering applications for public assistance, they are subject to the National Voter Registration Act of 1993 (“NVRA”).<sup>6</sup> Section 7 of the NVRA requires “all offices in [a] State that provide public

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<sup>1</sup> Exchanges are governed by sections 1311 to 1321 of the ACA, codified as 42 U.S.C. §§ 18031-18041. The complete text of the ACA can be found at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/html/PLAW-111publ148.htm>.

<sup>2</sup> 42 U.S.C. § 18083; 45 C.F.R. § 155.405(a).

<sup>3</sup> 45 C.F.R. § 155.405(c)(2).

<sup>4</sup> 42 U.S.C. § 18041.

<sup>5</sup> *Id.*

<sup>6</sup> Pub. L. 103-31 (“NVRA”) (codified as 42 U.S.C. §§ 1973gg, et seq.).

assistance” to help certain applicants register to vote.<sup>7</sup> This memo explains why Exchanges are subject to the NVRA, and what Exchanges must do to comply with the NVRA’s requirements.

## II. All Exchanges are *mandatory* Voter Registration Agencies under the NVRA.

To understand why the Exchanges must provide voter registration opportunities as part of their administration of the ACA, we begin with an explanation of the NVRA’s requirements. Congress enacted the NVRA in 1993, recognizing that “the right of citizens of the United States to vote is a fundamental right,” and determining that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office.”<sup>8</sup> The NVRA broadly addresses voter registration and requires, *inter alia*, that states provide voter registration in three ways: “motor voter” registration at motor vehicle departments, uniform mail-in registration, and public agency registration.<sup>9</sup> Congress specifically sought to “increase the number of eligible citizens who register to vote in elections for Federal office”<sup>10</sup> — and agencies in the states administering public assistance are a key part of that effort. Section 7 of the NVRA requires that “all offices in the State that provide public assistance” must be “designate[d] as voter registration agencies [‘VRAs’].”<sup>11</sup> This provision is intended to make voter registration easier for “the poor and persons with disabilities who do not have driver’s licenses and will not come into contact with [motor vehicle agencies].”<sup>12</sup>

### A. State-Operated Exchanges

Under Section 7 of the NVRA, each state-operated Exchange is a mandatory voter registration agency because each is an “office[] in the State that provide[s] public assistance.”<sup>13</sup> Indeed, the United States Department of Health and Human Services (“HHS”), through the Centers for Medicare and Medicaid Services (“CMS”), has recognized that Health Benefits Exchanges are subject to the NVRA.<sup>14</sup>

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<sup>7</sup> 42 U.S.C. § 1973gg-5(a)(2), (4), (6).

<sup>8</sup> 42 U.S.C. § 1973gg-2(a).

<sup>9</sup> 42 U.S.C. § 1973gg.

<sup>10</sup> 42 U.S.C. § 1973gg-5(b)(1).

<sup>11</sup> 42 U.S.C. § 1973gg-5(a)(2).

<sup>12</sup> H.R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140, 144.

<sup>13</sup> The state-run Health Benefit Exchanges in Idaho and Minnesota need not be designated as voter registration agencies because those states are exempt from the NVRA pursuant to 42 U.S.C. § 1973gg-2(b).

<sup>14</sup> “According to Centers for Medicare and Medicaid Services spokesman Brian Cook, applications in the insurance marketplace must include the offer of voter registration because the law ‘requires states to offer voter registration [at] all offices that provide ‘public assistance’ (including Medicaid applications).” Juliet Eilperin and Scott Clement, “Could Obamacare add more Democrats to the voter rolls? Yup.” *The Washington Post*, Sept. 26, 2013 at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/09/26/obamacare-could-add-more-democrats-to-the-voting-rolls/>; Centers for Medicare & Medicaid Services Information Collection Activities: Proposed Collection, 77 Fed. Reg. 40061 (July

First, a state-operated Exchange is “an office in the State” because, by definition, it must be either a state “governmental agency” or a “non-profit entity established by a state” to help individuals acquire health insurance.<sup>15</sup> Case law has instructed that, to determine when a non-state actor—like a non-profit Exchange—is “an office in the State,” it is helpful to look to case law regarding state action, which addresses the similar issue of when private conduct may be “fairly attributable” to a state government.<sup>16</sup> Indeed, the case *Disabled in Action of Metropolitan New York v. Hammons*<sup>17</sup> looked to this doctrine in assessing whether the non-state entities at issue in that case were subject to the NVRA. The test for state action is whether “there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.”<sup>18</sup> “The criteria [for the close nexus test] lack rigid simplicity.”<sup>19</sup> “[T]here is no single test. . . . Rather, there are a host of facts that can bear on the fairness of an attribution of a challenged action to the state.”<sup>20</sup> For example, a “nexus of state action exists when the state exercises coercive power, is entwined in the management or control of the private actor, . . . or when the private actor operates as a willful participant in *joint* activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies.”<sup>21</sup>

Nonprofit state-operated Exchanges meet this “close nexus” test. Exchanges exist solely to fulfill government policies. They are created to perform specific duties according to a “Blueprint” developed by the state, subject to federal approval and ongoing supervision.<sup>22</sup> They collaborate as equals with other

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6, 2012), Appendix A: Data Elements for Application to Support Eligibility Determinations for Enrollment through Affordable Insurance Exchanges, Medicaid and Children’s Health Insurance Program Agencies, *available at* <http://www.medicaid.gov/State-Resource-Center/Events-and-Announcements/Events-and-Announcements.html>.

<sup>15</sup> 45 C.F.R. § 155.100(c); *cf. The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, DEPARTMENT OF JUSTICE, [http://www.justice.gov/crt/about/vot/nvra/nvra\\_faq.php](http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php) (last visited July 3, 2014) (Question 24 makes clear that states must ensure provision of voter registration services despite contracting with private entities to administer services).

<sup>16</sup> *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (regulatory enforcement action of state interscholastic athletic association deemed state action).

<sup>17</sup> 202 F.3d 110, 122-123 (2d Cir. 2000).

<sup>18</sup> *Brentwood*, 531 U.S. at 295 (quotations and citations omitted).

<sup>19</sup> *Id.*

<sup>20</sup> *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) (*quoting Horvath v. Westport Library Ass’n*, 362 F.3d 147, 151 (2d Cir. 2004)).

<sup>21</sup> *Id.* (*quoting United States v. Stein*, 541 F.3d 130, 147 (2d Cir. 2008)) (relying on public function test to hold “contract postal units” to be state actors) (emphasis added); *accord Brentwood*, 531 U.S. at 296.

<sup>22</sup> *See* 45 C.F.R. §§ 155.105(a), (c) (Ongoing supervision, blueprint), 155.200 (exchange functions), 155.110(f) (Periodic review).

state agencies in fulfillment of their duties.<sup>23</sup> They perform a variety of public functions, such as determination of applicant eligibility for qualified health plans (“QHPs”) and insurance affordability programs,<sup>24</sup> issuance of tax exemption certificates,<sup>25</sup> and QHP certification, rating and performance assessment.<sup>26</sup> They also hold a state-granted monopoly on their public functions; there may be only one Exchange per geographic area.<sup>27</sup> A non-profit Exchange is therefore “an office in the State” under the NVRA.

In addition, Health Benefits Exchanges “provide public assistance.” An office “provides public assistance,” a phrase defined broadly for purposes of the NVRA, if it administers either the application process or the payment process related to monetary assistance from the government<sup>28</sup> — and state-operated Exchanges meet this test. Among the Exchanges’ duties is to administer applications for public assistance: Exchanges must provide a “single streamlined” application for enrollment in both private QHPs and insurance affordability programs.<sup>29</sup> Beyond the single streamlined application, State Exchanges are making eligibility assessments (and in some cases, are making final eligibility *determinations*) for Medicaid and SCHIP and must “transmit[] all information provided as part of the application, update, or renewal that initiated the assessment, and any information obtained or verified by the Exchange to the State Medicaid agency or CHIP agency via secure electronic interface, promptly and without undue delay.”<sup>30</sup>

Importantly, certain insurance premium tax credits refunded to the insured and the insurance affordability programs—Medicaid, SCHIP, the Basic Health Plan, advance payment of the premium tax credit, and cost-sharing reductions<sup>31</sup>—are “public assistance.” It is well-established that the Medicaid and SCHIP programs are “public assistance.”<sup>32</sup> Beyond those programs, the cost-sharing reductions and

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<sup>23</sup> 45 C.F.R. § 155.345(a) (required data-sharing agreements with state agencies).

<sup>24</sup> 45 C.F.R. §§ 155.300-335.

<sup>25</sup> 45 C.F.R. § 155.200(b).

<sup>26</sup> 45 C.F.R. §§ 155.200(d), 155.1000-1080.

<sup>27</sup> 45 C.F.R. § 155.140(b)(1).

<sup>28</sup> *Hammons*, 202 F.3d at 123-124.

<sup>29</sup> 42 U.S.C. § 18083; 45 C.F.R. § 155.405(a).

<sup>30</sup> 42 U.S.C. § 18083(a) (The application system created for an Exchange shall allow individuals to “apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in, applicable State health subsidy programs.”); 45 C.F.R. § 155.302(b)(3). *See also*, e.g., 42 U.S.C. § 18031(d)(4)(F).

<sup>31</sup> 42 C.F.R. § 435.4 (defining insurance affordability programs).

<sup>32</sup> H.R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140, 144; *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, DEPARTMENT OF JUSTICE, [http://www.justice.gov/crt/about/vot/nvra/nvra\\_faq.php](http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php) (last visited July 3, 2014) (Question 13).

advance payment of tax credits are conceptually similar to two other well-established “public assistance” programs, SNAP and TANF, in that private vendors are reimbursed by the government for providing goods and services to low income individuals.<sup>33</sup> And, though courts have not specifically considered the ACA’s refunds of the premium tax credit,<sup>34</sup> similar tax credits under the ACA have been deemed to constitute public assistance because they—like the premium tax credit—are: (1) intended to serve as financial assistance to moderate or low-income individuals; (2) available only to filers below a certain income; and (3) refundable, i.e. could result in a credit being paid to the filer.<sup>35</sup>

However, even if some of the insurance affordability programs were not deemed to constitute “public assistance,” the Exchanges would still be subject to the NVRA’s requirements, because applicants who choose to apply for *any* insurance affordability program must apply for *all* of them together.<sup>36</sup> Because any application through an Exchange includes application to Medicaid and SCHIP—without dispute, intended to be covered by the NVRA<sup>37</sup>—each application is one for public assistance and must incorporate the required voter registration services. The requirement to provide voter registration services under the NVRA applies to persons applying for public assistance benefits, whether or not the individual is ultimately determined to be eligible.<sup>38</sup> In addition, an Exchange must ensure NVRA compliance even if it chooses to delegate administration of applications to private parties.<sup>39</sup>

## **B. Federally-Facilitated Exchanges**

Federally-Facilitated Exchanges (“FFE”) are also subject to the NVRA. There is no question that the requirements of the NVRA apply to Medicaid and SCHIP programs, which FFEs must administer. In this context, longstanding case law deems the conduct of the FFEs, in administering the

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<sup>33</sup> See H.R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140, 144; *Valdez v. Squier*, 676 F.3d 935, 938 (10th Cir. 2012) (Food Stamp Program, Temporary Assistance to Needy Families).

<sup>34</sup> 26 U.S.C. § 36B.

<sup>35</sup> *In re Johnson*, 480 B.R. 305, 312-316 (Bankr. N.D. Ill. 2012) (federal adoption tax credit as modified by the ACA constitutes “public assistance”); see also *In re James*, 406 F.3d 1340, 1344-1345 (11th Cir. 2005) (earned income tax credit constitutes “public assistance” under ordinary meaning doctrine, because enacted “to provide relief for low-income families”).

<sup>36</sup> 45 C.F.R. § 155.310(b).

<sup>37</sup> See, *supra*, n. 32.

<sup>38</sup> 42 U.S.C. § 1973gg-5(a)(6)(A).

<sup>39</sup> 45 C.F.R. § 155.110(a), (b) (Exchange may subcontract provision of its services, but remains responsible for ensuring all federal requirements are met); *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, DEPARTMENT OF JUSTICE, [http://www.justice.gov/crt/about/vot/nvra/nvra\\_faq.php](http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php) (last visited July 4, 2014) (Question 24 makes clear that states must ensure provision of voter registration services despite contracting with private entities to administer services).

Medicaid and SCHIP programs, attributable to each relevant state government because such program administration has been a function traditionally and historically performed solely by state governments. Additionally, as the U.S. Department of Justice (“DOJ”) has recognized in litigation regarding the ACA, the federal government “stands in the shoes” of a state Exchange, which, as explained above, has NVRA responsibilities.

The sole and exclusive purpose of an FFE is to carry out a *state’s* responsibilities.<sup>40</sup>

FFEs, therefore, are unlike traditional federal agencies such as the Social Security Administration, where the federal government administers federal benefits that have not traditionally been the province of state government administration. Indeed, FFEs administer the Medicaid and SCHIP programs pursuant to standards and rules set forth by state governments.

1. FFEs are state actors with respect to the operation of Medicaid and SCHIP.

The ACA *requires* all Exchanges, including the FFEs, to provide a “single streamlined” application that includes enrollment in both Medicaid and SCHIP.<sup>41</sup> Indeed, the ACA amends the Social Security Act in order to *define* the ACA application as a state’s Medicaid application.<sup>42</sup> In addition to the direct statutory requirement, the ACA’s supporting regulations also require each Exchange to provide a single-streamlined application that includes consideration for Medicaid and SCHIP. And the ACA mandates that all State Medicaid agencies execute a written agreement with the Exchange that is operating in the state (including all FFEs), addressing the delegation of the responsibility for administering Medicaid applications to the Exchanges.<sup>43</sup>

As such, FFEs are operating as “state” rather than “federal offices” with respect to their administration of Medicaid and SCHIP programs within the meaning of the NVRA. FFEs are “entwined with governmental policies” and the states are “entwined in the management or control” of the FFE.<sup>44</sup> In other words, the “state” character of the Exchange cannot be eliminated from the FFE. Specifically,

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<sup>40</sup> Section 1321(c) of the ACA provides that, in the event a state does not set up an Exchange or cannot set up an Exchange that meets certain standards, “the Secretary [of HHS] shall . . . establish and operate *such* Exchange within the State.” 2 U.S.C. § 18041(c)(1) (emphasis added).

<sup>41</sup> Section 1413 (a) of the ACA requires that the application system created for all Exchanges shall allow individuals to “apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in, applicable *State* health subsidy programs.” 42 U.S.C. § 18083(a) (emphasis added). See also Section 1413(b)(1)(A).

<sup>42</sup> 42 U.S.C. § 1396w-3(b)(3)(“The State Medicaid agency and State CHIP agency shall participate in and comply with the requirements for the [single, streamlined application] system. . . .”); 42 U.S.C. § 18083(b).

<sup>43</sup> 42 C.F.R. § 435.1200 (b)(3).

<sup>44</sup> See *Cooper v. U.S. Postal Serv.*, *supra* at n.21.

the ACA requires states to have a health benefits exchange<sup>45</sup> but allows *states* the choice to administer the Exchange itself or default to a FFE.<sup>46</sup> Thus, the ACA does not permit states to choose not to have an Exchange at all. No matter who operates the Exchange, the state government must participate because all exchanges administer Medicaid applications pursuant to a state’s Medicaid eligibility criteria.<sup>47</sup> This necessarily implicates state involvement because, although Medicaid is jointly paid for by state and federal government, Medicaid programs are administered by terms established largely by state governments.<sup>48</sup> Because the “state” cannot be disentangled from the operation of a FFE, FFEs remain “state” rather than “federal offices” with respect to their administration of Medicaid and SCHIP within the meaning of the NVRA. Therefore, FFEs must comply with the NVRA just like any other state Medicaid agency.

Ample case law establishes that an entity that is not a traditional state government agency—like a FFE—can be a state actor, and subject to liability as such.<sup>49</sup> The court in *Disabled in Action of Metropolitan New York v. Hammons* went through an analysis of whether the entities at issue in that case were state actors subject to the NVRA. The analysis in *Hammons* supports the conclusion here that FFEs must comply with the NVRA.

Most of the *Hammons* analysis regarded entities that were exclusively federal or non-governmental and that voluntarily offered Medicaid applications. For these entities, the *Hammons* court rejected the contention that they were state actors performing actions of the state government because, *based on the facts*, they did not “exhibit the kind of interdependence sufficient to constitute state action[]” and did not exercise “powers that are ‘traditionally the exclusive prerogative of the state.’”<sup>50</sup> The facts related to FFEs, however, are very different because FFEs meet the standard for state action as set forth in *Hammons*. Simply stated, FFEs *are* state actors with respect to the Medicaid and SCHIP programs because, as explained below, they do exhibit such interdependence by their required undertaking of functions traditionally reserved to state governments.

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<sup>45</sup> Section 1311(b)(1) of the ACA requires that “Each State shall . . . establish an American Health Benefit Exchange . . . .” 42 U.S.C. § 18031(b)(1).

<sup>46</sup> 42 U.S.C. § 18041(c)(1).

<sup>47</sup> 45 C.F.R. § 155.302; 42 C.F.R. § 435 et seq.; 42 C.F.R. § 457 et seq.

<sup>48</sup> See 42 U.S.C. § 1396b.

<sup>49</sup> See, e.g., *Brentwood*, 531 U.S. 288; *Cooper*, 577 F.3d 479; *Hammons*, 202 F.3d 110. See also *supra* nn. 15-21 (accompanying text).

<sup>50</sup> *Hammons*, 202 F.3d. at 122; see *id.* at 123 (“Under these facts, it cannot be said that the offices in question are state actors.”) (internal citations omitted). Specifically, the court considered that the entities were arguably acting on the applicants’ behalf rather than the state’s behalf, had no contracts or other formal agreements with the state, were not required to administer Medicaid applications, and had no power to issue or deny Medicaid assistance. *Id.* at 122-123.

There is simply no question that, in undertaking obligations related to the Medicaid and SCHIP programs, the FFEs are taking part in the administration of state programs operated by state governments.<sup>51</sup> ACA provisions regarding Medicaid make it clear that, in operating a Health Benefit Exchange, the federal government is operating a state program on behalf of the state as opposed to merely implementing a federal program. Section 1413(a) of the ACA requires that all Exchange applications allow individuals to “apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in, applicable *State* health subsidy programs. Such system shall ensure that if an individual applying to an Exchange is found through screening to be eligible for medical assistance under the *State medicaid plan* . . . , or eligible for enrollment under a *State children’s health insurance program (CHIP)* . . . , the individual is enrolled for assistance under such plan or program.”<sup>52</sup> As explained above, the FFEs must provide a “single streamlined application,” must make eligibility assessments (and in some cases, make final eligibility determinations) for Medicaid and CHIP, and must “transmit[] all information provided as part of the application, update, or renewal that initiated the assessment, and any information obtained or verified by the Exchange to the State Medicaid agency or SCHIP agency via secure electronic interface, promptly and without undue delay.”<sup>53</sup> Significantly, each state dictates whether the FFEs or the State Medicaid agency will make final eligibility determinations.<sup>54</sup> Therefore, it is at the direction of the state that FFEs are performing essential functions of the Medicaid program. In choosing to default to a Federally-Facilitated Exchange, the states have agreed to make FFEs their agents for the operation of the Medicaid and SCHIP programs.<sup>55</sup> All of these actions are clearly state functions under taken by the FFE.

Interestingly, the *Hammons* court considered an additional similar situation and remanded for further analysis of some non-state entities to evaluate whether they were mandatory offices according to the court’s holding in the case.<sup>56</sup> Among those non-state entities were non-government or federal offices

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<sup>51</sup> See *Benefit Details: Medicaid Program*, <http://www.benefits.gov/benefits/benefit-details/606> (“Medicaid is a joint Federal/state program administered by each individual state.”) (last visited July 3, 2014).

<sup>52</sup> Affordable Care Act § 1413(a), 42 U.S.C. § 18083(a) (emphasis added) (internal citations omitted). See also, e.g., Affordable Care Act § 1311(d), 42 U.S.C. § 18031(d).

<sup>53</sup> 45 C.F.R. § 155.302(b)(3); Affordable Care Act § 1413(a), 42 U.S.C. § 18083(a).

<sup>54</sup> The new regulations implementing the ACA “allow Medicaid agencies to delegate to Exchanges [the] authority to make Medicaid eligibility determinations as long as the single State Medicaid agency retains authority to issue policies, rules and regulations on program matters and to exercise discretion in the administration or supervision of the plan.” 77 FR 17144-01, 17187 (March 23, 2012) (codified at 42 C.F.R. § 431.10). See also 42 C.F.R. § 435.1200. In fact, FFEs are becoming the primary method to apply for Medicaid and SCHIP benefits and in some states, such as Tennessee, the *only* method to apply for these programs. See, [http://www.tn.gov/humanserv/adfam/afs\\_med.html](http://www.tn.gov/humanserv/adfam/afs_med.html), (last visited July 3, 2014). In such situations, Section 7 of the NVRA will be effectively nullified as to the Medicaid program unless FFEs provide voter registration services mandated by Section 7 of the NVRA.

<sup>55</sup> The federalism concerns raised by the *Hammons* court, 202 F.3d at 120, are not at issue here because the ACA, a federal statute, has mandated that the federal government participate in and operate the state programs to which the NVRA applies.

<sup>56</sup> See *Hammons*, 202 F.3d at 120.



that potentially “housed” Medicaid offices on their premises.<sup>57</sup> The court held that if these Medicaid offices were required to offer Medicaid application assistance or conduct interviews, they were mandatory voter registration agencies even if housed in a non-governmental or federal entity.<sup>58</sup> Similarly, the Medicaid and SCHIP application process housed in the FFE application system is subject to Section 7 of the NVRA and, as such, NVRA compliant voter registration services must be offered.

2. Under the ACA, the federal government “stands in the shoes” of an Exchange that a state chooses not to operate.

Furthermore, the FFEs must offer NVRA voter registration services because this is an obligation of a state-operated Exchange and the FFEs are standing in the shoes of the Exchange the state chooses not to operate. The ACA requires the federal government, in operating a FFE, to step into the shoes of a state that has defaulted on its obligations to establish and operate its own Exchange, and undertake the obligations that would otherwise be state functions. Section 1321(c) of the ACA provides that, in the event a state does not set up an Exchange or cannot set up an Exchange that meets certain standards, “the Secretary [of HHS] shall . . . establish and operate *such* Exchange *within the State*.”<sup>59</sup> The word “such” means “of a kind specified or implied,” and therefore “such Exchange within the State” means “of the kind specified” for a state.<sup>60</sup> Indeed, the DOJ—on behalf of HHS—acknowledged this to be true, stating in a case before the United States District Court for the District of Columbia, “Congress made clear that an Exchange established by the federal government stands in the shoes of the Exchange that a state chooses not to establish . . . .”<sup>61</sup> A state’s obligations in that regard include providing voter registration services pursuant to Section 7 of the NVRA.

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<sup>57</sup> *Id.* at 120.

<sup>58</sup> *Id.*

<sup>59</sup> 42 U.S.C. § 18041(c)(1) (emphasis added).

<sup>60</sup> American Heritage Dictionary of the English Language, *available at* <http://education.yahoo.com/reference/dictionary/entry/such>; *see also* Merriam Webster Online, <http://www.merriam-webster.com/dictionary/such> (last visited July 3, 2014) (defining “such” as “of the character, quality, or extent previously indicated or implied” and “of the same class, type, or sort.”). As explained in more detail *infra*, several court decisions have embraced the idea that the federal government acts as a state when operating an FFE. *See King v. Burwell*, No. 14-1158, --- F.3d ---, 2014 WL 3582800, \*7 (4th Cir. July 22, 2014) (“Given that Congress defined ‘Exchange’ as an Exchange established by the state, it makes sense to read § 1321(c)’s directive that HHS establish ‘such Exchange’ to mean that the federal government acts on behalf of the state when it establishes its own Exchange.”); *see also Halbig v. Burwell*, No. 14-5018, --- F.3d ---, 2014 WL 3579745, \*7 (D.C. Cir. July 22, 2014) (“the word ‘such’—meaning ‘aforementioned,’ . . . signifies that the Exchange the Secretary must establish is the ‘required Exchange’ that the state failed to establish. In other words, ‘such’ conveys what a federal Exchange is: the equivalent of the Exchange a state would have established had it elected to do so.”).

<sup>61</sup> Defendants’ Memorandum in Support of their Motion to Dismiss the Complaint, at 1, *Halbig v. Sebelius*, No. 13-623 (D.D.C. filed July 29, 2013), ECF No. 23-1; *See also* Brief for the Appellees, at 13-14, *Halbig v. Sebelius*, No. 14-5018 (D.C. Cir. filed Feb. 12, 2014), ECF No. 1479834 (“In other words, even where a state does not actually establish an Exchange, the federal government can create ‘an Exchange established by the State under [42 U.S.C. § 18031]’ on behalf of

Recent legal developments support the conclusion that FFEs stand in the shoes of state governments for purposes of the NVRA. In *Halbig v. Burwell*, the D.C. Circuit opined that “the requirements assigned to states by 1311(d) are transferred to the federal government if a state fails to establish an Exchange.”<sup>62</sup> The federal government is substituted for the state because the Exchange set up by the federal government when the state fails to do so is “the equivalent of the Exchange a state would have established had it elected to do so.”<sup>63</sup> As the Court noted, this conclusion is drawn from clear statutory text:

The ACA defines an “Exchange as “an American Health Benefit Exchange established under [section 1311 of the ACA].” . . . If we import that definition into the text of section 1321, the provision directs the Secretary to “establish . . . such American Health Benefit Exchange established under [section 1311 of the ACA] within the State.” This suggests not only that the Secretary is to establish the type of exchange described in section 1311, but also that when she does so, she acts under section 1311, even though her authority appears in section 1321. *Thus, section 1321 creates equivalence between state and federal Exchanges in two respects: in terms of what they are and the statutory authority under which they are established.*<sup>64</sup>

Similarly, in *King v. Burwell*,<sup>65</sup> the Fourth Circuit opined that Section 1321 suggests “that the federal government acts on behalf of the state when it establishes its own Exchange.”<sup>66</sup>

Though the *Halbig* court concluded that FFEs do not stand in the state’s shoes for purposes of receiving tax credits, this conclusion stems directly from a purported limitation in the tax credit provision. The

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that state.”); at 21-22 (“Furthermore, Congress made clear that an Exchange established by the Secretary is the Exchange that the State would otherwise have established. The Act provides that, if a State will not have the ‘required Exchange’ operational by January 1, 2014, the Secretary shall establish ‘such Exchange’ on the State’s behalf. 42 U.S.C. § 18041(c) (emphasis added). Congress thus defined the Exchange established by the Secretary to be the Exchange that the State would otherwise have established if it had elected to create an Exchange.”).

<sup>62</sup> No. 14-5018, 2014 WL 3579745, \*9 (D.C. Cir. July 22, 2014).

<sup>63</sup> *Id.* at \*7.

<sup>64</sup> *Id.* at \*7 (emphasis added; first, third, and fourth alterations in original).

<sup>65</sup> No. 14-1158, 2014 WL 3582800 (4th Cir. July 22, 2014).

<sup>66</sup> *Id.* at \*7. *Accord, id.* at \*14 (Davis, J., concurring) (“‘[E]stablished by the State’ indeed means established by the state – except when it does not, i.e., except when a state has failed to establish an Exchange and when the Secretary, charge with acting pursuant to a contingency for which Congress planned [e.g. Section 1321], . . . , establishes and operates the Exchange in place of the state.” (citation omitted)); *Halbig*, 2014 WL 3579745 at \*23 (Edwards, J., dissenting) (“when HHS creates an exchange under [Section 1321], it does so *on behalf of* the State, essentially standing in its stead.” (emphasis in original)).

ACA's tax credit provision<sup>67</sup> by its terms applies to "an Exchange *established by the State*."<sup>68</sup> The *Halbig* majority interpreted this caveat as a limiting qualification; that is, by using the phrase "established by the state," Section 36 exempted FFEs from that provision.<sup>69</sup> The D.C. Circuit's conclusion is questionable, as the dissent forcefully opined,<sup>70</sup> and the federal government moved on August 1, 2014 for *en banc* reconsideration.<sup>71</sup> In any event, even under the D.C. Circuit's current order, unless the ACA expressly limits a provision to state operated exchanges, then "section 1321 *tells* us to substitute the federal government for the state . . . ." *Id.* at \*9. The ACA does not exempt the FFEs from the obligations that trigger application of the NVRA. To the contrary, as explained herein, the ACA mandates that the FFEs perform the state functions that trigger NVRA obligations.

In accord with reasoning in these cases, the regulations implementing the ACA are clear that consumers using the Exchanges should have the same rights and opportunities from a FFE in their state as they would if there was a state-operated exchange. For example, under HHS regulations addressing the appeals processes for Medicaid denials, consumers have the same rights of appeal when their application to Medicaid is denied, whether the application and denial occurs through a FFE or a state-operated Exchange.<sup>72</sup> Indeed, this appeals process is governed by state Medicaid processes.<sup>73</sup>

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<sup>67</sup> 26 U.S.C. § 36B.

<sup>68</sup> 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

<sup>69</sup> *Halbig*, 2014 WL 3579745 at \*7.

<sup>70</sup> *See id.* at \* 19 (Edwards, J., dissenting) ("The majority opinion ignores the obvious ambiguity in the statute and claims to rest on plain meaning where there is none to be found. In so doing, the majority misapplies the applicable standard of review, refuses to give deference to the IRS's and HHS's permissible constructions of the ACA, and issues a judgment that portends disastrous consequences.").

<sup>71</sup> Petition for Rehearing En Banc, *Halbig v. Burwell*, No. 14-5018, ECF #1505583.

<sup>72</sup> Under the regulations for implementation of the ACA, Medicaid can delegate authority to conduct fair hearings of eligibility denials to the Exchange or an Exchange appeal entity. 78 Fed. Reg. 42,160-01, 42,300 (July 15, 2013) (codified at 42 C.F.R. § 431.10(c)(1)(ii)). But the regulations are intended to ensure that any delegation of the Medicaid appeals process or authority to the Exchanges "would be subject to safeguards to protect the integrity of the appeals process, such that beneficiaries receive the same due process rights and substantive review of their case as is provided in hearings conducted by the Medicaid agency." 78 Fed. Reg. 4594, 4597. When this authority is delegated, there is quality control and oversight by the Medicaid agency. 78 Fed. Reg. 42160-01, 42,301 (July 15, 2013) (codified at 42 C.F.R. § 431.10(d)); *see also* 45 C.F.R. § 155.510(b) (requiring that the Exchange appeals entity use standards and procedures consistent with Medicaid and SCHIP requirements). And to ensure that the beneficiaries receive the same due process rights from the Exchange as they would from their State Medicaid agency, the regulations give the state Medicaid agencies the option to review the fair hearing determinations regarding denials of eligibility made by the Exchange with respect to conclusions of law and interpretation of state or federal policies. 78 Fed. Reg. 42160-01, 43,301 (July 15, 2013) (codified at 42 C.F.R. § 431.10(c)(3)(iii)). All Exchange appeal entities, whether federal or state, must comply with Medicaid's fair hearings standards. 45 C.F.R. § 155.505.

<sup>73</sup> An individual whose application to Medicaid has been denied by the Exchange has the right to request a hearing before the State Medicaid agency as opposed to the exchange appeal entity and must be notified of this right. 78 Fed. Reg. 42,160-01, 42,301 (July 15, 2013) (codified at 42 C.F.R. § 431.206(d)); 45 C.F.R. 155.510(b)); *see also* 45 C.F.R. §

Moreover, the FFEs and state-operated Exchanges are indistinguishable in their undertaking of responsibilities with respect to the required offers of private insurance. According to HHS, “states continue to maintain an important responsibility with respect to qualified health plans licensed and offered in their states, regardless of whether the Exchange is Federally-Facilitated or State-Based.”<sup>74</sup> In fact, the FFEs must offer the same qualified health plans that would be available in a state-operated Exchange because the insurance must meet the state licensure and solvency requirements and be in good standing with the state.<sup>75</sup>

Finally, the ACA’s express limitation on preemption of state law indicates that state law remains in effect even as it impacts the operation of a FFE. Section 1321 of the ACA says “[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title.”<sup>76</sup> Codified state laws implementing the NVRA, which many states have adopted, do not prevent the application of the ACA. For example, Florida law defines a “voter registration agency” as any office that “provides public assistance, any office that serves persons with disabilities, any center for independent living, or any public library.”<sup>77</sup> The FFE operating within Florida is an office within the state that provides public assistance and therefore it is a voter registration agency under Florida law. Florida law requires that “each voter registration agency must provide each applicant the opportunity to register to vote or to update a voter registration record, at the time the applicant applies for services or assistance from that agency, for renewal of such services or assistance, or for a change of address required with respect to the services or assistance.”<sup>78</sup> Compliance with such a law will not prevent the application of the ACA in any way. This can clearly be seen in that a number of states, including California, Connecticut, Kentucky, Maryland, New York, Rhode Island and Vermont, have recognized their NVRA responsibilities by designating their Exchanges as voter registration agencies and/or

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155.302(b)(4)(i)(B) (allowing applicants to “[r]equest a full determination of eligibility for Medicaid and CHIP by the applicable State Medicaid and CHIP agencies.”).

<sup>74</sup> See Centers for Medicare & Medicaid Services, Frequently Asked Questions on Exchanges, Market Reforms and Medicaid 2 (Dec. 10, 2012), *available at* <http://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf> (Question 5) (last visited July 3, 2014).

<sup>75</sup> 42 U.S.C. § 18021(a)(1)(C); 45 C.F.R. § 156.200(b)(4).

<sup>76</sup> 42 U.S.C. § 18041(d); *see also* 45 C.F.R. § 155.120(b).

<sup>77</sup> Fla. Stat. Ann. § 97.021(41). In addition to Florida, NVRA implementing legislation has been adopted in at least 16 NVRA-covered states where there is a federally-facilitated Exchange, including: Alabama, Alaska, Arizona, Arkansas, Georgia, Iowa, Louisiana, Missouri, Montana, Ohio, Pennsylvania, Tennessee, Utah, and Virginia. ALA. CODE § 17-4-60; ALASKA STAT. ANN. § 15.07.055 (West); ARIZ. REV. STAT. ANN. § 16-140; ARK. CONST. amend. LI, § 5(a); GA. CODE ANN. § 21-2-222 (West); IOWA CODE ANN. § 48A.19 (West); LA. REV. STAT. ANN. § 18:116; MO. ANN. STAT. § 115.162 (West); MONT. CODE ANN. § 13-2-221; OHIO REV. CODE ANN. §§ 329.051, 3503.10 (West); 25 PA. CONS. STAT. ANN. § 1325 (West); TENN. CODE ANN. §§ 2-2-202, 2-2-204 (West); UTAH CODE ANN. § 20A-2-205 (West); VA. CODE ANN. § 24.2-411.2 (West) (effective as of July 1, 2014). The failure of the FFEs to incorporate voter registration in these states would directly conflict with their NVRA-implementing legislation, in direct contravention of the ACA’s plain language that it should not be “construed to preempt any State law that does not prevent the application of [its] provisions.” *See supra* n. 49.

<sup>78</sup> Fla. Stat. Ann. § 97.058(1).

working toward providing NVRA compliant voter registration services as part of their state-operated Exchanges.<sup>79</sup> In order to follow the ACA’s direction that state law shall not be preempted, the federal government must offer voter registration services pursuant to a state’s NVRA implementing statute.

In conclusion, it is clear that the ACA did not “federalize” the Medicaid or SCHIP programs—these remain under state control.<sup>80</sup> Therefore, like state-operated Health Benefits Exchanges, FFEs administer public assistance within the meaning of the NVRA and must provide NVRA voter registration services. This is unlike traditional federal agencies, such as the Social Security Administration or the Department of Veteran Affairs, which administer exclusively federal programs solely on behalf of the federal government. Those traditional federal agencies are not engaged in state governmental action, and, therefore, do not have the same obligations to comply with the NVRA as the FFEs. For all the reasons stated above, FFEs are subject to the requirements of the NVRA as mandatory voter registration agencies.

### **III. As a mandatory voter registration agency, an Exchange must provide specific voter registration services.**

Section 7 of the NVRA requires voter registration agencies to offer three specific voter registration services: distribution of voter registration forms; assistance in completing those forms; and transmittal of completed forms.<sup>81</sup> These mandatory voter registration services must be provided along with each application for public assistance, each renewal or recertification, and each change of address with respect to the receipt of assistance (“covered transaction”).<sup>82</sup> For an Exchange, a covered transaction occurs each time an individual applies for health insurance with consideration for insurance affordability programs (regardless of the ultimate determination of eligibility),<sup>83</sup> at the time an enrollee

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<sup>79</sup> See, e.g., *Coordination with the California Health Benefit Exchange*, CALIFORNIA SECRETARY OF STATE DEBRA BROWN, <http://www.sos.ca.gov/elections/nvra/correspondence/health-benefit-exchange.htm> (last visited July 3, 2014); *The Secretary of State Designates Vermont Health Connector as Voter Registration Agency*, The Official State Website, <http://www.vermont.gov/portal/government/article.php?news=4455> (last visited July 3, 2014).

<sup>80</sup> For example, Section 1413(a) of the ACA requires that the application system created for all Exchanges shall allow individuals to “apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in, applicable *State* health subsidy programs.” 42 U.S.C. § 18083(a) (emphasis added). And, Section 2201 of the ACA amends the Social Security Act by adding a new section 1943, which provides that, “The *State* Medicaid agency and *State* CHIP agency shall participate in and comply with the requirements for the system established under section 18083 of this title (relating to streamlined procedures for enrollment through an Exchange, Medicaid, and CHIP).” 42 U.S.C. § 1396w-3(b)(3).

<sup>81</sup> 42 U.S.C. § 1973gg-5(a)(4)(A).

<sup>82</sup> 42 U.S.C. § 1973gg-5(a)(6)(A).

<sup>83</sup> An individual applies for health insurance with consideration to determine eligibility for insurance affordability programs when the applicant answers the “triggering question.” Establishment of Exchanges and Qualified Health Plans, 77 Fed. Reg. 18,310, 18,352 (March 27, 2012) (describing likely “triggering question” implementing 45 C.F.R. § 155.310(b), which requires applicants to apply for all insurance affordability programs or none).

who is insured by a QHP and receiving public assistance toward costs of the plan (i.e. tax credits or premium adjustment) receives an annual redetermination notice to sign and return,<sup>84</sup> and at the time an enrollee who is insured by a QHP and receiving public assistance toward the costs of the plan submits a change of address (which the enrollee must do because it potentially affects eligibility).<sup>85</sup>

**A. Voter registration services must be provided whether the covered transaction occurs in person, by phone, by mail, or online.**

Section 7 of the NVRA requires that voter registration services be offered by voter registration agencies that offer public assistance even when covered transactions related to that assistance do not occur at a physical location.<sup>86</sup> The plain language of Section 7, the purpose of the NVRA, the DOJ, and all applicable case law make it clear that Section 7 applies to all covered public assistance transactions whether they occur at an office in-person or remotely, such as through a computer portal like those created by the Exchanges.

The plain language of Section 7 makes clear that voter registration must be offered to public assistance clients and applicants with “each” covered transaction, including remote transactions.<sup>87</sup> “There is no clear textual basis in the operative language of Section 7 paragraph (a)(6) for . . . limit[ing] the application of the mandatory distribution of forms to only those instances when such application, recertification, renewal, or change of address is made in person. . . . To sustain [that] position, the court would be forced to ignore the ordinary meaning of the plain language of Section 7 paragraph (a)(6)[.]”<sup>88</sup>

Section 7, and the NVRA as a whole, would be rendered meaningless if Section 7 were construed to require voter registration services only at brick and mortar offices. Congress passed the NVRA in a deliberate attempt to increase voter participation by using its “authority and responsibility to make the registration process for Federal elections as accessible as possible.”<sup>89</sup> In recent years, there has been a trend away from interactions in-person at brick and mortar offices and toward “remote

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<sup>84</sup> 45 C.F.R. § 155.335.

<sup>85</sup> 45 C.F.R. § 155.330(b)(1) (requiring reporting of changes that might impact eligibility); 45 C.F.R. § 155.305(a)(3) (including residency within eligibility standards). The renewals and any change of address transactions for individuals accepted into Medicaid or CHIP programs will be conducted by those programs as opposed to the Exchanges.

<sup>86</sup> *Georgia State Conference of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1329 (N.D. Ga. 2012); *Ferrand v. Schedler*, No. 11-926, 2012 WL 1570094, at \*12 (E.D. La. May 3, 2012). Indeed, even without a physical location, federally-facilitated Exchanges are “offices in the State” because Section 1321(c) of the ACA, codified as 42 U.S.C. § 18041(c), specifically defines them as being located “within the State.”

<sup>87</sup> *Ferrand v. Schedler*, No. 11-926, 2012 WL 1570094, at \*9.

<sup>88</sup> *Ga. NAACP v. Kemp*, 841 F. Supp. 2d at 1329.

<sup>89</sup> H.R. Rep. No. 103–9, at 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105, 107.

transactions,” *i.e.* those by telephone, Internet, or otherwise.<sup>90</sup> Many state Medicaid agencies provide public assistance to clients almost exclusively through remote transactions.<sup>91</sup>

As summarized by the DOJ in a recent amicus brief filed in the Fifth Circuit, “voter registration agencies must provide voter registration services for covered transactions done by telephone, mail and internet. The language of the statute requires this reading.”<sup>92</sup> Voter registration must be offered by all entities in a State that provide public assistance, regardless of whether a person’s interaction is remote or in-person at an actual office.

#### **B. An Exchange must distribute voter registration forms during covered transactions.**

As a mandatory voter registration agency, an Exchange must provide two different forms relating to voter registration during each covered transaction: a voter preference form and a voter registration application. First, an Exchange must “provide” a voter preference form, which includes (1) a question with mandated language asking whether the individual wants to register to vote; and (2) additional mandated language explaining that: (a) registering will not affect eligibility for assistance; (b) not answering will be considered a decision not to register; (c) the Exchange will provide assistance in filling out the registration form; and (d) the applicant can file a complaint if she or he believes that someone has interfered with his or her decision regarding voter registration, including interfering with his or her right to privacy or right to choose a political party.<sup>93</sup>

An online application should incorporate the language required by the NVRA, found at 42 U.S.C. § 1973gg-5(a)(6)(B), and any paper application must also include the language required in a voter preference form or it must be distributed with a separate voter preference form.

Of utmost importance, the Exchange also must “distribute” a voter registration application unless it is declined in writing<sup>94</sup>—which occurs only if the individual checks “no” in response to the voter registration question on the “voter preference form.” If there is no response provided to the voter

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<sup>90</sup> See, e.g., Liz Schott, *Applying Online: Using Technology to Enroll Low-Wage Workers in Public Benefits*, 4 Nw. J. L. & Soc. Pol’y 116 (2009); BETH MORROW & DAWN HORNER, *HARNESSING TECHNOLOGY TO IMPROVE MEDICAID AND SCHIP ENROLLMENT AND RETENTION PRACTICES* (The Children’s Partnership and The Kaiser Commission on Medicaid and the Uninsured eds.) (May 2007), *available at* [http://www.childrenspartnership.org/storage/documents/Publications/TCP\\_SnapshotReport\\_Final.pdf](http://www.childrenspartnership.org/storage/documents/Publications/TCP_SnapshotReport_Final.pdf).

<sup>91</sup> For example, in Florida almost all applications for public assistance are processed through an online computer portal similar to the Exchanges. See ACCESS FLORIDA, <http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash> (last visited July 3, 2014).

<sup>92</sup> Brief for the United States as Amicus Curiae In Support of Plaintiffs-Appellees and Urging Affirmance at 19, *Scott v. Schedler*, No. 13-30185 (5th Cir. May 28, 2013), ECF No. 00512255121.

<sup>93</sup> 42 U.S.C. § 1973gg-5(a)(6)(B).

<sup>94</sup> 42 U.S.C. § 1973gg-5(a)(6)(A).

registration question, a voter registration application still must be distributed to the individual.<sup>95</sup> “Distribute” means “to give out or deliver especially to members of a group.”<sup>96</sup> Thus, in the case of mail or in-person applications, unless there is a declination in writing, the voter registration application must be disseminated along with the health insurance application. Satisfying the distribution requirement in conjunction with call centers and online transactions, which constitute the majority of health insurance applications processed by an Exchange, requires more in-depth discussion because “giv[ing] out or deliver[ing]” a voter registration application means an individual must be able to actually access or receive the voter registration application. At the current time, no one mechanism (other than the mailing of a hard copy voter registration application) will provide actual access to the entire population of applicants accessing the health insurance applications through these methods.

Until existing online voter registration systems are available to all citizens, an Exchange, in order to comply with the requirements of the NVRA, should distribute voter registration applications in the following manner.

First, in states that offer online voter registration, the Exchange should allow an applicant the choice to use the online system for voter registration (and be directed to it). However, because the existing online voter registration systems in these states currently require an applicant to have a driver’s license on file, the online voter registration systems will not be fully compliant with the NVRA; some applicants will not have a driver’s license,<sup>97</sup> and thus direction to the online system will not “distribute” a voter registration application to such applicants. To ensure that voter registration opportunities are available to all who are required to receive them under the NVRA, the applicant also should be given the option to have a hard copy voter registration application mailed to him or her.

Second, in states without online voter registration, an Exchange portal should link to a printable voter registration application as a first step. However, applicants accessing the online health insurance application may not have printing capacity and therefore a simple link to a .pdf form of a voter registration application will not satisfy the requirement to “distribute” a voter registration application. As in the case of individuals who lack drivers’ licenses, the Exchange will also need to provide an option to have a voter registration application mailed to these individuals.

Individuals applying for health benefits through a call center present some similar issues.<sup>98</sup> There is no opportunity to decline voter registration in writing or to receive actual distribution of a voter

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<sup>95</sup> *Valdez*, 676 F.3d at 945.

<sup>96</sup> See *Merriam-Webster Dictionary* (definition of “distribute”), available at <http://www.merriam-webster.com/dictionary/distribute>.

<sup>97</sup> See *Harkless*, 545 F.3d at 449 (“Section 7 of the NVRA [was] designed specifically to increase the registration of ‘the poor and persons with disabilities who do not have driver’s licenses . . . .’”) (quoting H.R. Rep. No. 103-66, at 16, reprinted in 1993 U.S.C.C.A.N. 140, 144); S. Rep. No. 103-6, at 15 (noting that “50 percent of those persons who do not have a driver’s license have annual incomes of less than \$10,000”).

<sup>98</sup> See 45 C.F.R. § 155.405(c)(2)(ii) (the Exchange must allow application “by telephone through a call center”).



registration application during a telephone call. Therefore, Exchanges must mail a voter registration application to individuals applying for benefits through a call center.

Importantly, the current version of the online streamlined application does include an offer of voter registration.<sup>99</sup> The current version of the paper streamlined application also includes information about voter registration.<sup>100</sup> That is an important acknowledgment of the NVRA's applicability. At the same time, both the online and paper applications do not by themselves satisfy all the requirements of the NVRA.<sup>101</sup>

While both the online and paper applications include a voter registration question, the applications are missing the specific disclosure language required by the NVRA and provide only a link to a downloadable voter registration application. As explained above, without more, this will not satisfy the NVRA's requirement to "distribute" a voter registration application with each application for a covered transaction.

### **C. An Exchange must provide assistance with filling out voter registration forms.**

The NVRA requires an Exchange to provide assistance to applicants in filling out voter registration applications. Specifically, an Exchange must "provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance."<sup>102</sup> Federal regulations require the Exchange application process to be

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<sup>99</sup> Centers for Medicare & Medicaid Services, *Agency Information Collection Activities: Submission for OMB Review; Comment Request*, 78 Fed. Reg. 6109-02, 6110 (January 29, 2013), Appendix A: List of Questions in the Online Application to Support Eligibility Determinations for Enrollment through the Health Insurance Marketplace and for Medicaid and the Children's Health Insurance Program, at 48-49, 59 (Sections XX.D.5 and XXVIII.D.3), available at [http://waysandmeans.house.gov/uploadedfiles/pdf\\_cms\\_1\\_031313.pdf](http://waysandmeans.house.gov/uploadedfiles/pdf_cms_1_031313.pdf) (last visited July 3, 2014).

<sup>100</sup> See <http://marketplace.cms.gov/getofficialresources/publications-and-articles/marketplace-application-for-family.pdf> (last visited July 3, 2014).

<sup>101</sup> Comments of Dēmos on *Agency Information Collection Activities: Submission For OMB Review, Proposed Collection 3 (Data Collection To Support Eligibility Determinations For Insurance Affordability Programs And Enrollment Through Affordable Insurance Exchanges, Medicaid, And Children's Health Insurance Program Agencies)*, Document Identifier: CMS-10438, CMS-10439, and CMS 10440, submitted to Department of Health And Human Services, Centers for Medicare & Medicaid Services (February 28, 2013), *available from Dēmos*. See also, Comments of Project Vote on *Agency Information Collection Activities: Submission For OMB Review, Proposed Collection 3 (Data Collection To Support Eligibility Determinations For Insurance Affordability Programs And Enrollment Through Affordable Insurance Exchanges, Medicaid, And Children's Health Insurance Program Agencies)*, Document Identifier: CMS-10438, CMS-10439, and CMS 10440, submitted to Department of Health And Human Services, Centers for Medicare & Medicaid Services (February 28, 2013), *available from Project Vote*.

<sup>102</sup> 42 U.S.C. § 1973gg-5(a)(6)(C).

designed so that an applicant never has to provide duplicate information.<sup>103</sup> Because that level of assistance must also be provided for the completion of voter registration applications, the voter registration application that is provided must be pre-populated with all the relevant information that the applicant has already provided during the Exchange application process.

Moreover, the ACA requires Exchanges to provide a variety of types of assistance in filling out applications for health insurance, including, *inter alia*, foreign-language translation, toll-free phone support, a website that contains online help and guidance, and the establishment of a Navigator program in which applicants are assisted by “eligible public or private entities or individuals” who meet training standards set by the Exchange and are funded by grants from the Exchange.<sup>104</sup> Thus, in order to provide the “same degree of assistance” with voter registration forms under the NVRA, an Exchange must provide the same level of foreign language translation, must ensure that call center representatives and Navigators are trained to offer the same assistance that they offer with the Exchange’s own forms, and must ensure that any online help or guidance it offers as to its own forms is offered as to the voter registration application.

**D. An Exchange must transmit filled-out voter registration applications to the appropriate state elections officials.**

Finally, an Exchange must accept “completed voter registration application forms for transmittal to the appropriate State election official.”<sup>105</sup> This provision applies to all paper voter registration applications that might be received in person or by mail by the Exchange.<sup>106</sup> The transmittal of completed voter registration applications must occur within ten days of receipt, or within five days if the application is received within five days of a registration deadline in an election.<sup>107</sup>

#### **IV. Conclusion**

The ACA affords millions of people access to health insurance and, because of the applicability of the NVRA, to participation in the political process. All Exchanges have a legally-obligated, central role in this process. Because Exchanges are “offices in the state that provide public assistance,” the

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<sup>103</sup> “Together, these standards aim to avoid the duplication of requests for information from applicants and verification of information . . . .” See Establishment of Exchanges and Qualified Health Plans, 77 Fed. Reg. 18,310-01, 18,348 (March 27, 2012) (codified at 42 C.F.R. § 435.1200(d) and 45 C.F.R. § 155.302(b)).

<sup>104</sup> 45 C.F.R. § 155.205 (Consumer assistance tools and programs of an Exchange); 45 C.F.R. § 155.210 (Navigator program standards).

<sup>105</sup> 42 U.S.C. § 1973gg-5(a)(4)(A)(iii).

<sup>106</sup> If online voter registration is available, the collection requirement is satisfied because the online system immediately “collects” the completed voter registration application and transmits it to the state election official without any further action required.

<sup>107</sup> 42 U.S.C. § 1973gg-5(d).

NVRA requires that they distribute voter registration forms, provide assistance with filling out such forms, and transmit completed voter registration forms to state elections officials. In this way, the ACA can help fulfill the NVRA's goal of ensuring that eligible persons have opportunities for civic engagement and a voice in our democracy.