



February 7, 2019

**BY US MAIL AND EMAIL**

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**Re: Compliance with Section 7 of the National Voter Registration Act**

Dear Directors Andino, Meacham, Baker, and Wilson:

On October 11, 2013, we sent formal notice on behalf of the League of Women Voters of South Carolina ("the League"), the South Carolina State Conference of the NAACP ("NAACP"), their members, and others similarly situated, regarding the failure of South Carolina public assistance agencies – including, but not limited to, your agencies – to provide voter registration services to public assistance clients as required by Section 7 of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20506 (formerly 42 U.S.C. § 1973gg-5). At that time, we advised you of our intent to file suit at the end of the 90-day statutory waiting period should your agencies fail to take steps to fully remedy the violations. Unfortunately, despite what appeared to be initial efforts by your agencies to incorporate voter registration into covered transactions, your agencies are failing to provide NVRA compliant voter registration services during most, if not all, covered transactions.

As we advised you in our previous notice letter, Section 7 of the NVRA requires that public assistance agencies—including, but not limited to, the Department of Social Services ("DSS"), Department of Health and Human Services ("DHHS")<sup>1</sup>, and Department of Health and Environmental Control ("DHEC")—provide voter registration opportunities whenever an individual engages in a "covered transaction" (an application, renewal, recertification, or change of address transaction). Section 7's requirements extend to all covered transactions, whether conducted in person, by telephone, by mail, or via your agencies' online portals. *See, e.g., Action NC v. Strach*, 216 F. Supp. 3d 597, 623 (M.D.N.C. 2016) (concluding, in denying defendant's motion to dismiss, that "Sections 5 and 7 of the NVRA apply equally to in person and remote covered transactions"); *Ga. State Conf. of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1329-1332 (N.D. Ga. 2012); *see also* U.S. Department of Justice, *The National Voter Registration Act of 1993 (NVRA): Questions and Answers*, Q24.

Based upon information received from the SEC and DSS pursuant to public records requests; recent visits to county public assistance offices; communications with county elections officials and agency representatives; and a review of South Carolina agency voter registration data, we have reason to believe the state's public assistance agencies are violating the NVRA in the following ways.

#### **Failure to Provide NVRA Compliant Declination Forms**

During covered transactions, the NVRA requires agencies to provide a form that asks clients if they wish to register to vote during covered transactions. *See* 52 U.S.C. § 20506(a)(6)(B). This form is often referred to as a "declination form." The NVRA prescribes

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<sup>1</sup> As we notified you in our 2013 letter, South Carolina has failed to designate DHHS as a voter registration agency. *See* S.C. Code Ann. 7-5-310 (2012). Because DHHS administers Medicaid, it is a state agency providing public assistance that must offer the voter registration services mandated by Section 7. The failure to designate DHHS as a voter registration agency is in itself a violation of the NVRA. 52 U.S.C. § 20506(a)(2)(A). That failure does not, however, relieve DHHS of its NVRA-mandated voter registration obligations.

specific language that must be used on the declination form. *Id.* In addition to several statutorily required disclaimers, the form must include the question, “If you are not registered to vote where you live now, would you like to apply to register to vote here today?” 52 U.S.C. § 20506(a)(6)(B)(i). The question must be followed by “boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote . . .” and an explanation that a failure to check “either” box will be considered a decision not to register at that time. 52 U.S.C. § 20506(a)(6)(B)(ii). This form triggers the agencies’ obligation to distribute a voter registration application during the covered transaction unless the client affirmatively declines voter registration by checking the “no” box on the declination form. *See Valdez v. Squier*, 676 F.3d 935, 945-47 (10th Cir. 2012) (citing 52 U.S.C. § 20506(a)(6)).

There are a variety of ways in which the SEC and Section 7 agencies are falling short of the requirement to provide the declination form prescribed by the NVRA during covered transactions.

*First*, DHHS does not appear to be consistently providing clients with declination forms during all covered transactions, including both remote and in-person transactions. For example, the downloadable Medicaid application does not include any information whatsoever on voter registration. Moreover, even when DHHS’s policy appears to be compliant on paper – *i.e.*, the policy requires that every in-person client be offered a Voter Registration Packet that includes a declination form and a voter registration application<sup>2</sup> – there is evidence it has not been consistently implemented. For example, during a visit to a Charleston County public assistance office on November 19, 2018, a client requesting a Medicaid application was not offered or provided with a Voter Registration Packet despite DHHS’s policy requiring that these packets be provided to clients during in-person visits. Thus, it appears that there are in-person clients who are not being provided with a declination form and the offer of voter registration services.

*Second*, even when declination forms are provided to public assistance clients, the declination forms recommended by the SEC and those used by South Carolina’s Section 7 agencies do not comply with the NVRA.

Although it is unclear if any agencies actually use the sample declination form that the SEC provides to Section 7 agencies, the SEC’s sample form is not NVRA compliant. *See* South Carolina Election Commission Voter Registration Declination Form, attached as Exhibit A. The SEC’s sample declination form does include the required disclosures and the statutorily prescribed voter registration question, but in addition to the “yes” and “no” answers, it also includes two extraneous and misleading boxes a client can check to decline voter registration. The potential for confusion created by the declination form could result in applicants being deprived of NVRA mandated voter registration opportunities.

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<sup>2</sup> *See* DHHS Medicaid Policy and Procedures Manual, Chapter 101, November 2018, p. 85, retrieved at <http://www1.scdhhs.gov/mppm/>.

Again, it is not clear which, if any, of the agencies use the SEC sample form. Some agencies, however, appear to use their own forms that elevate the confusion and undermine the purpose of the NVRA by adding even more ways for a client to say no to voter registration. For example, DSS has created its own version of a declination form that offers a total of *seven* different possible answers to the voter registration question, five of which are treated as declining to register. *See* South Carolina Department of Social Services Voter Preference Form, attached as Exhibit B. This form clearly violates the NVRA. 52 U.S.C. § 20506(a)(6)(B).

To the extent DHHS provides declination forms to clients, its declination form may likewise fail to comply with the NVRA. DHHS's Medicaid Policy and Procedures Manual outlines six different reason codes associated with a declination form that can be entered into their database suggesting that, like the SEC and DSS forms, the DHHS declination form includes multiple, confusing answers to the voter registration question. *See* DHHS Medicaid Policy and Procedures Manual, *infra*, at p. 87.

*Finally*, it is unclear what declination form, if any, is provided to DHEC clients. DHEC did not provide a copy of its declination form pursuant to a records request, and because WIC applicants must apply in person, no forms are available online. DHEC, however, reported just 27 new voter registrations statewide in the third quarter of 2018, suggesting clients are not consistently being offered voter registration. *See* South Carolina Election Commission Total Registrations/Changes During Quarter, July 1 – September 30, 2018, retrieved at <https://www.scvotes.org/cgi-bin/scsec/locations?election=Regloc2018Q3>.

### **Failure to Distribute Voter Registration Applications**

Under the NVRA, agencies must distribute a voter registration application to every client unless the client affirmatively opts out of voter registration by answering “no” to the voter registration question. 52 U.S.C. § 20506(a)(6)(A). Our recent investigation reveals that South Carolina agencies are failing to provide clients with voter registration applications as required by the NVRA, either by failing to offer voter registration services at all, or by directing clients to search for applications on their own.

Some county elections officials have said that they receive very few completed agency voter registrations when compared to the number of applicants who answered “yes” to the voter registration question at a Section 7 agency (as reflected in the number of electronic voter information records the agencies transfer to election officials for applicants who check “yes”).<sup>3</sup>

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<sup>3</sup> It is unclear if agencies are transmitting data to the SEC for clients who do not answer the voter registration question. However, these clients must also be provided with a voter registration application under the NVRA. *See Valdez v. Squier*, 676 F.3d 935, 945-47 (10th Cir. 2012) (citing 52 U.S.C. § 20506(a)(6)) (“an applicant’s failure to check either the ‘YES’ or ‘NO’ box on the voter declination form does not constitute a declination ‘in writing.’ . . . [The NVRA] requires an applicant to affirmatively, by way of writing, ‘opt out’ of receiving a voter registration form.”) In other words, to decline “in writing,” a customer must affirmatively opt out by answering “no” in response to the voter preference question.

This suggests agencies are failing to meet their NVRA obligations either by not providing voters with registration applications during covered transactions or by failing to offer sufficient assistance to applicants to allow them to complete the registration process successfully.

*First*, as discussed above, the DHHS policy manual states that a voter registration application is included as part of its Voter Registration Packet. However, as explained above, DHHS is not providing clients with the Voter Registration Packet during all covered transactions. Therefore, DHHS is failing to distribute registration forms to all clients who may desire to register to vote or update their voter registration. 52 U.S.C. § 20506(a)(6)(A).

*Second*, as previously stated, DHEC's low registration numbers suggest clients may not be getting either declination forms or voter registration applications in violation of the NVRA. 52 U.S.C. § 20506(a)(6)(A).

*Third*, DSS does not appear to distribute voter registration applications to clients who wish to register to vote. Instead, the agency either gives clients the impression that they will be registered to vote simply by answering "yes" to the voter registration question, or it instructs clients to go to the SEC's website to download a voter registration application or to register to vote online. This is because DSS's SNAP Policy Manual is confusing and may lead staff to believe that once they have entered the applicant's response to the voter preference question, "no further action is necessary by the worker" for the applicant to be registered to vote. However, because voters must still complete and submit a voter registration form, this information is inaccurate and could lead staff to fail to provide the form, fail to collect the form or transmit it to county election officials, or fail to provide assistance to applicants in completing the voter registration process. Any of these failures on its own would violate the NVRA. Together they evince a process that is wholly inadequate to ensure voters receive the voter registration opportunities to which they are entitled.

Additionally, screenshots of interviewer screens provided by DSS pursuant to a public records request show that staff are instructed to advise people who wish to register to vote to go to the SEC website. Advising clients of how they can track down a voter registration form on their own, however, does not comply with the NVRA's distribution requirement. 52 U.S.C. § 20506(a)(6)(A). Moreover, for DSS clients applying online, the only options offered for receiving a voter registration form are a downloadable form or a link to online registration. No option is provided to receive a paper registration form by mail. Not all of the low-income individuals who use DSS services can print a downloaded form, however, and not all clients are able to use online registration, which requires a driver's license. And those who can do neither do not get a meaningful option for receiving a voter registration form. Thus, DSS's online application system does not satisfy the NVRA's distribution requirement.

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Finally, if a client skips the voter registration question altogether on the online application, they have not declined in writing and must be mailed a voter registration application. *See Valdez v. Squier, supra, 676 F.3d at 945-47.* It does not appear that DSS has a process for mailing registration applications to clients in this circumstance.

#### **Failure to Provide Assistance With Completion of Voter Registration Applications**

As noted above, Section 7 requires that public assistance agencies provide the same level of assistance in completing the voter registration form as the agencies provide in completing their own forms. 52 U.S.C. § 20506(a)(6)(C). Agencies that are failing to offer voter registration at all are clearly failing to provide assistance with voter registration. Moreover, as noted above, the evidence that voters who do not decline registration are failing to complete the voter registration process suggests that insufficient assistance is being provided even when some offer of voter registration is being made.

For all of the foregoing reasons, South Carolina continues to engage in ongoing violations of the NVRA. As always, we remain available to discuss the steps you must take to achieve full NVRA compliance and to collaborate in helping you reach that goal. Our ongoing communications concerning these issues as well as our 2013 letter have provided ample notice of the violations described above. As a courtesy, however, we are providing you with notice of our intent to file suit 90 days from the date of this letter should you fail to achieve full compliance with the NVRA and provide clear, thorough documentation of the steps you have taken to ensure that all South Carolinians receive the voter registration services required by federal law and an opportunity to participate in upcoming elections.

**SIGNATURE BLOCK ON FOLLOWING PAGE**

Sincerely,



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**EXHIBIT A**



**SOUTH CAROLINA**  
**ELECTION COMMISSION**

**Voter Registration Declination Form**

If you are not registered to vote where you live now, would you like to apply to register to vote here today?

Yes

No

Already registered to vote

Will use voter registration by mail application

- Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.
- If you do not check either box, you will be considered to have decided not to register to vote at this time.
- If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private.
- If you register to vote, information regarding the office in which the application was submitted will remain confidential to be used only for voter registration purposes.
- If you decline to register to vote, that decision will remain confidential and be used only for voter registration purposes.

\_\_\_\_\_  
Signature of Applicant/ Declinee

\_\_\_\_\_  
Date

If you believe that someone has interfered with your right to register to vote or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, you may file a complaint with the following:

Executive Director  
S.C. Election Commission  
P.O. Box 5987  
Columbia, S.C. 29250  
803-734.9060

**EXHIBIT B**



South Carolina Department of Social Services  
**VOTER PREFERENCE FORM**

If you are not registered to vote where you live now, would you like to apply to register to vote?  
(Please check one)

- Yes, I would like to register to vote.
- I am registered, but not at my current address.
- No, I am registered at my current address.
- No, but I will use the Voter Registration Mail Application.
- No, I do not wish to register to vote at this time.
- No, I am not eligible to vote.
- No, I am refusing to register.

**IF YOU DO NOT CHECK A BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.**

\_\_\_\_\_  
Signature of Applicant/Declinee

\_\_\_\_\_  
Date

**Important Notices**

- Applying to register or declining to register to vote **will not** affect the amount of assistance that you will be provided by this agency.
- If you would like help in filling out the voter registration application, we will help you. The decision whether to seek or accept help is yours. For assistance in completing the voter registration application form outside our office, call 1-800-616-1309.
- If you do register to vote, the location where your application was submitted will remain confidential. If you decline to register to vote, this fact will remain confidential. Applying to register or declining to register to vote will be used **only** for voter registration purposes.
- If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party preference or other political preference, you may file a complaint with the following:

Executive Director  
**South Carolina State Election Commission**  
 1122 Lady Street, Suite 500  
 P.O. Box 5987  
 Columbia, SC 29205  
 Main: (803) 734-9060 Fax: (803) 734-9366  
 Email: [elections@elections.sc.gov](mailto:elections@elections.sc.gov)