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## MEMORANDUM OF LAW

**FROM:** Bill Gausewitz<sup>1</sup>  
**RE:** California Licensure Requirements for CA Health Benefits  
Exchange Employees  
**DATE:** June 27, 2012

### QUESTION PRESENTED

Are employees of an entity that is contracted by the California Health Benefits Exchange (the Exchange) to act as a portal and to provide call center services required to be licensed as accident and health agent licensees pursuant to the California Insurance Code?

### ANSWER

Yes. Any employee of an entity contracted by the Exchange to act as the Exchange portal must be licensed as an accident and health agent licensee when performing portal or call center services pursuant to that contract, if the Exchange has certified any health insurer subject to regulation under the California Insurance Code as a “qualified plan” pursuant to California Government Code section 100502(a)<sup>2</sup>.

### FACTUAL BACKGROUND

On March 23, 2009 the United States federal government enacted the Patient Protection and Affordable Care Act<sup>3</sup> (the federal act), which, among many other changes, called upon the states to establish health benefit exchanges. These exchanges are state-sponsored entities which facilitate the purchase of individual health insurance policies and group policies for small businesses<sup>4</sup>. Pursuant to section 1311(f)(3(A) of the federal

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<sup>1</sup> This memorandum of law reflects the legal conclusions of the author on a question related to public policy. It is not to be construed as legal advice to any person, individual, or business entity.

<sup>2</sup> Licensure under the California Insurance Code is required only for individuals transacting insurance with an insurer operating pursuant to a certificate of authority issued by the Department of Insurance. Licensure by the Department of Insurance is not required for enrolling individuals in Health Care Service Plans organized under the Knox-Keene Health Care Service Plan Act of 1975 (CA Health and Safety Code section 1340 *et seq.*) or for enrolling individuals in Medi-Cal or other government health care programs. For purposes of this analysis it is assumed that at least one health insurance program which is a qualified plan within the Exchange will be a health insurer licensed by the Department of Insurance.

<sup>3</sup> Public Law 111-148

<sup>4</sup> Section 1311(b)(1) of the federal act provides as follows:

Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an “Exchange”) for the State that—

act “A State may elect to authorize an Exchange established by the State under this section to enter into an agreement with an eligible entity to carry out 1 or more responsibilities of the Exchange.”

The state of California responded to the federal act by enacting Chapter 659, Statutes of 2010, adding Title 22 to the California Government Code establishing the California Health Benefit Exchange. On January 18, 2012, the Exchange issued *Solicitation HBEX4 – Request for CalHEERS Development and Operations Services* (the RFP), by which the Exchange solicited proposals for vendors who would, by contract, provide portal services through which the Exchange would connect with consumers and small businesses seeking health insurance through the Exchange.

The RFP contemplates that the contractor will establish “call centers” which will require individual employees of the contractor to engage in verbal communication with persons who contact the Exchange portal. The RFP states that “most incoming calls are projected to fall within one of the following categories of questions: Eligibility and Enrollment Status; Premiums; Information Updates; [and] Covered benefits”. In other words, the call center employees will be expected to provide individual consumers with consumer-specific information regarding the nature, cost, benefits, and eligibility criteria of the health insurance products available through the Exchange.

The RFP specifically contemplates that the call center will enroll individuals in qualified health plans offered through the Exchange. Section 4.1 of the RFP says that “The Baseline System is to be available for *coverage enrollment* as early as July 1, 2013, but no later than September 28, 2013, and fully Operational on January 1, 2014 to meet the federally-imposed deadline for creating an Operational Exchange and *to enroll* newly eligible individuals in California’s Applicable State Health Subsidy (ASHS) Programs” (emphasis added). Enrolling individuals in health insurance plans constitutes the transaction of insurance under the California Insurance Code<sup>5</sup>.

There are specific RFP requirements for call centers to provide services which constitute the transaction of insurance under the California Insurance Code. Specifically, section 4.7.6.1 of the RFP provides that call centers must provide for “Routing of callers to specific customer service operators *based on User type and role* (i.e., Individual, Employer, Navigator, Broker, Agent, or Issuer) *for specific questions and assistance*” and that “The Call Center shall also place outbound *calls to assist new enrollees in the selection of a health plan* and physician, as appropriate, depending on the program” (emphasis added). The requirement that the Call Center provide individualized assistance to callers in the selection of an insurer constitutes the transaction of insurance under the

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- (A) facilitates the purchase of qualified health plans;
  - (B) provides for the establishment of a Small Business Health Options Program (in this title referred to as a “SHOP Exchange”) that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State.

<sup>5</sup> California Insurance Code section 35 provides as follows: “35. “Transact” as applied to insurance includes any of the following:

- (a) Solicitation.
- (b) Negotiations preliminary to execution.
- (c) Execution of a contract of insurance.
- (d) Transaction of matters subsequent to execution of the contract and arising out of it.

### California Insurance Code.

California Insurance Code section 1631<sup>6</sup> generally requires that a person who transacts insurance is required to be licensed by the California Department of Insurance. Section 1622<sup>7</sup> of the Insurance Code defines a “life licensee” as “a person authorized to act on behalf of a disability [i.e. health] insurer to transact . . . accident and health insurance.” Section 1626<sup>8</sup> defines “accident and health licensee”, a category of license which permits a licensed individual to transact health insurance.

The effect of California Insurance Code sections 1631 and 1626, taken together, is to make it unlawful for any person to transact health insurance unless that person is licensed by the California Department of Insurance as an accident and health licensee.

The federal act, as it will be implemented through the California Exchange pursuant to the RFP, will involve call centers in which individuals will have direct contact with consumers seeking health insurance. The services that will be provided to individuals through the call centers include enrolling individuals in qualified health plans and advising individuals on the selection of health plans. California Insurance Code section 1631 requires individuals engaged in the transaction of health insurance to be licensed. Advising individuals on the selection of insurance plans and enrolling individuals in health insurance plans are activities that constitute the transaction of insurance. Section 1631 of the California Insurance Code therefore requires Call Center employees to be licensed<sup>9</sup>.

### FEDERAL LAW DOES NOT PREEMPT STATE LICENSING LAW

The federal act is silent on the question of whether call center employees are required to be licensed under state law. It is not, however, silent on the relationship between state law and federal law. Section 1321(f) of the federal act provides specifically that “Nothing in this title<sup>10</sup> shall be construed to preempt any State law that does not prevent the application of the provisions of this title”. Pursuant to this provision of the federal act<sup>11</sup> California Insurance Code provisions regarding licensure are

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<sup>6</sup> Section 1631 provides, in pertinent part, that “Unless exempt by the provisions of this article, a person shall not solicit, negotiate, or effect contracts of insurance, or act in any of the capacities defined in Article 1 (commencing with Section 1621) unless the person holds a valid license from the commissioner authorizing the person to act in that capacity.

<sup>7</sup> Section 1622 provides, in full, as follows: (a) A life licensee is a person authorized to act on behalf of a life insurer or a disability insurer to transact any of the following: (1) Life insurance; (2) Accident and health insurance; (3) Life and accident and health insurance;

(b) Licenses to act as a life agent under this chapter shall be of the types set forth in Section 1626.

<sup>8</sup> Section 1626 provides, in pertinent part, that “(a) A life licensee is a person authorized to act as a life agent. Licenses to act as a life agent under this chapter shall be of the following types:

(1) . . .

(2) Accident and health, which license shall entitle the licensee to transact insurance coverage for sickness, bodily injury, or accidental death and may include benefits for disability income.

<sup>9</sup> This conclusion would also apply should the Exchange elect to refer consumers to independent agents who are not Call Center employees. Any independent agent transacting insurance on behalf of the Exchange would clearly be required to be licensed under the Insurance Code.

<sup>10</sup> The “title” referred to in this section is Title I of the federal Act, which comprises sections 1001-1563 of the federal act. This includes all of the provisions of the federal act relating to the establishment of health benefit exchanges.

<sup>11</sup> This standard is repeated in the federal regulations implementing the federal act. 45 CFR Part 155.120

applicable to call center employees unless they “prevent the application” of one of the provisions of the federal act relating to exchanges.

The federal act and the regulations implementing the federal act contain no provisions establishing criteria to be applied to employees of the portal contractor. It is therefore impossible to argue that state law creating such standards would “prevent the application” of the federal act. Stated differently, there is no aspect of the federal act which *could* be accomplished by unlicensed call center employees, but which *could not* be accomplished by licensed call center employees. It is therefore clear that the federal act does not preempt or otherwise affect the application of state licensing law under the California Insurance Code. If the duties of call center employees would require licensure under the Insurance Code when performed outside of the context of the Exchange, then they require licensure when performed for a call center contracted to act under the authority of the Exchange.

#### A LICENSE IS REQUIRED FOR ANY INDIVIDUAL WHO TRANSACTS HEALTH INSURANCE IN CALIFORNIA

California Insurance Code section 1631 requires licensure by the California Department of Insurance for any person who acts “in any of the capacities defined in Article 1 (commencing with Section 1621)”. Section 1626, which is contained in Article 1, provides that a person who “transact[s] insurance coverage for sickness, bodily injury, or accidental death” is acting in the capacity of an accident and health licensee. The effect of these two sections is that any person in California who transacts health insurance is required by the Insurance Code to be licensed by the Department of Insurance as an accident and health licensee.

The term “transact” is defined by section 35 the Insurance Code as “any of the following: (a) Solicitation; (b) Negotiations preliminary to execution; (c) Execution of a contract of insurance; (d) Transaction of matters subsequent to execution of the contract and arising out of it.” This is a very broad definition, covering any acts incidental to a consumer’s acquisition of insurance from the initial contact between the consumer and the insurer (solicitation) through the resolution of any matters arising out of the execution of the insurance contract after it is issued.

Section 1631 of the Insurance Code is explicit that licensure is required for any individual involved in the transaction of insurance unless the person is “exempt by the provisions of this article.” “This article” refers to Article 3, Chapter 5, Division 2, Part 1 of the Insurance Code, comprising sections 1631-1651 of the Code. There are two sections of Article 3 providing express exemptions from the licensing requirements. These are sections 1634<sup>12</sup> and 1635<sup>13</sup>. Neither of these sections would exempt

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provides “Nothing in parts 155, 156, or 157 of this subchapter shall be construed to preempt any State law that does not prevent the application of the provisions of title I of the Affordable Care Act.”

<sup>12</sup> CA Insurance Code section 1634: No license is required under this chapter for a person to act in any of the following capacities:

- (a) As a full-time salaried employee of a title insurer, controlled escrow company or an underwritten title company.
- (b) As a salaried solicitor or agent of a mortgage insurer or mortgage guaranty insurer provided no part of the compensation of the person is on a commission basis.

- (c) As the attorney in fact of a reciprocal or interinsurance exchange.
- (d) As a life and disability insurance analyst.
- (e) As a surplus line broker or special lines surplus line broker.
- (f) As a bail agent, bail solicitor or bail permittee.
- (g) As an employee, not paid on a commission basis, of a home protection company, including, but not limited to, soliciting, negotiating, or effecting home protection contracts by the employee.
- (h) As an employee of a creditor who secures and forwards information for the purpose of obtaining group credit life, credit disability, or involuntary unemployment insurance, or for enrolling individuals in a group credit life, credit disability, or involuntary unemployment insurance plan or issuing certificates of insurance thereunder where no commission is paid to the employee for those services.

<sup>13</sup> CA Insurance Code section 1635: No license is required under the provisions of this chapter for a person to act in the following capacities or to engage in the following activities, providing no commission is paid or allowed, directly or indirectly, by the insurer, creditor, retailer, or other person for acting in those capacities or engaging in those activities:

- (a) The business of examining, certifying, or abstracting titles to real property.
- (b) The solicitation for membership in a fraternal benefit society and other activities to the extent and as described in Sections 11013 and 11102 of this code.
- (c) As a salaried representative of a reciprocal or interinsurance exchange or of its attorney-in-fact.
- (d) Employment that does not include the solicitation, negotiation, or effecting of contracts of insurance and the signing of policies or other evidences of insurance.
- (e) As an officer of an insurer or a salaried traveling employee of the type commonly known as a special agent or as an agency supervisor, while performing duties and exercising functions that are commonly performed by a special agent or agency supervisor, if the person engaging in the activity does not do either of the following:
  - (1) Effect insurance.
  - (2) Solicit or negotiate insurance except as a part of and in connection with the business of a property broker-agent, casualty broker-agent, or life agent licensed under this chapter.
- (f) As an officer or salaried representative of a life insurer if his or her activities are limited to direct technical advice and assistance to a properly licensed person and his or her activities do not include effecting, soliciting, or negotiating insurance except as a part of and in connection with the business of a property broker-agent, casualty broker-agent, or life agent licensed under this chapter.
- (g) Employment by an insurer at its home or branch office that does not include the solicitation, negotiation, or effecting of contracts of insurance, and that may as part thereof include the signing of policies or other evidences of insurance.
- (h) The completion or delivery of a declaration or certificate of coverage under a running inland marine insurance contract evidencing coverage thereunder and including only those negotiations as are necessary to the completion or delivery if the person performing those acts or his or her employer has an insurable interest in the risk covered by the certificate or declaration.
- (i) As an employee of a licensed property broker-agent or casualty broker-agent, whose employment is one or more of the following:
  - (1) That of a regularly salaried administrative or clerical employee whose activities do not include the solicitation, negotiation, or effecting of contracts of insurance from the insuring public.
  - (2) That of a salesperson who devotes substantially all of his or her activities to selling merchandise and whose solicitation of insurance is limited only to the quoting of a premium for insurance to be included in the purchase price covering the interest retained in the merchandise by the seller.
- (j) The solicitation, negotiation, or effectuation of home protection contracts by a person licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code in connection with his or her licensed function authorized by Section 10131 or 10131.6 of the Business and Professions Code. The receipt of a payment permitted by Section 12760 shall not disqualify the recipient from the licensing exemption provided by this chapter.
- (k) Employees of an insurer whose duties are the inspection, processing, adjusting, investigation, settling of claims, conducting safety inspections, or accepting or rejecting business from licensed insurance agents or brokers.
- (l) Officers, directors, or employees of an insurer or producer whose executive, administrative, managerial, or clerical activities are only indirectly related to solicitation, negotiation, or effecting the sale of insurance,

individuals performing the activities required under the RFP from the licensure requirements of the Insurance Code<sup>14</sup>. The only express exemptions from the licensing requirements of the Insurance Code do not provide any exemption for the activities that are required to be performed under the RFP.

The precise acts that trigger the licensing requirement are further clarified in regulations adopted by the Department of Insurance. Recognizing that the definition of “transact” is broad enough to encompass minor clerical functions that may be performed in an insurance agent’s office and seeking to avoid requiring licensure from every employee of an insurance agency, the Department of Insurance adopted sections 2193 through 2193.3 of Title 10 of the California Code of Regulations. These regulations specified certain “Clerical Activities Exempt from Licensure”<sup>15</sup>. 10 CCR 2193.3<sup>16</sup> is of particular interest to this question because it defines specific activities which *do* require a license. Among these activities are “Explanations or interpretations of, and offering of opinions or recommendations on, insurance coverages, exposures, limits, premiums, rates, deductibles, payment plans, or any other insurance contract, or potential insurance contract, terms”.

It is significant that the regulation states that “explanations or interpretations of . . . insurance coverages, exposures, limits, premiums” *et cetera*, constitute activity that is not exempt from the licensure requirement. Under this regulation, it is not required that a person influence the selection of an insurance program. The simple explanation of the terms of an insurance policy is an act which requires a license.

This regulation makes it clear that transacting insurance, under the CA Insurance Code is not limited to activities involved in the actual creation of an insurance policy. A person who explains the terms of an insurance policy to a potential purchaser of that policy is acting in a capacity that requires a license under Section 1631 of the California

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provided those persons do not have direct contact with consumers in a sales or service capacity except as otherwise provided by this section.

(m) Employees whose activities are limited to making clerical changes in existing policies or providing indirect marketing and servicing support for the purpose of determining general interest in insurance products.

<sup>14</sup> It might be suggested that Insurance Code section 1635(d), which exempts “Employment that does not include the solicitation, negotiation, or effecting of contracts of insurance and the signing of policies or other evidences of insurance” would exempt Call Center employees from the licensing requirement. However, since the RFP specifically requires the contractor to enroll individuals in qualified health plans, it clearly calls for the “effecting of contracts of insurance”. Thus this exemption does not apply to activities by Call Center employees under the RFP.

<sup>15</sup> These regulations would also be applicable to the Call Center. Those Call Center employees performing “clerical activities” as defined by these regulations would not be required to be licensed.

<sup>16</sup> 10 CCR 2193.3 provides, in full, as follows: “The following activities are not exempt from licensure under Insurance Code Sections 1631 and 1635, because they are directly related to solicitation, negotiation, or effecting the sale of insurance:

(a) Explanations or interpretations of, and offering of opinions or recommendations on, insurance coverages, exposures, limits, premiums, rates, deductibles, payment plans, or any other insurance contract, or potential insurance contract, terms.

(b) Recommending, advising, or urging applicants for insurance coverage, potential applicants for insurance coverage, or policyholders to buy particular insurance policies or to insure with particular companies or insurers.

(c) Binding of insurance coverages.

Insurance Code.

THE DISTINCTION BETWEEN LICENSING REQUIREMENTS FOR  
HEALTH INSURANCE REGULATED BY THE DEPARTMENT OF INSURANCE  
AND OTHER TYPES OF CARE COVERAGE IS AN INTENDED  
ASPECT OF CALIFORNIA'S REGULATION OF HEALTH CARE

California operates under a unique regulatory scheme under which some health care coverage is provided by insurers licensed by the Department of Insurance (DOI), while other coverage is provided by Health Care Service Plans regulated by the Department of Managed Health Care (DMHC). The producer licensing requirement of Insurance Code section 1631 applies only to coverage written by DOI-regulated insurers. It is a virtual certainty that DOI-licensed insurers will become qualified health plans offered through the Exchange. The enrollment of any applicant in one of these plans requires licensure under section 1631. Thus unless Call Center employees who enroll applicants are licensed, they will not be able lawfully to enroll the applicants in all qualified health plans, as they are required to do under the RFP.

This dual-regulation system, and the resulting bifurcated agent licensing requirement, is intended by California law. The requirement that persons transacting insurance within the Exchange be licensed pursuant to Insurance Code section 1631 is limited to transactions involving disability and health insurers operating pursuant to a certificate of authority issued by the California Department of Insurance under Insurance Code section 700. Health Care Service Plans licensed by the California Department of Managed Health Care pursuant to section 1349 of the California Health and Safety Code, do not require licensure under the Insurance Code. This distinction is entirely consistent with AB 78 (Gallegos, 1999) the legislation which created the DMHC<sup>17</sup>.

In creating the DMHC, the Legislature considered and rejected the idea of merging all health insurance regulation into a single agency<sup>18</sup>. The June 2, 1999, version of AB 78 of 1999 would have removed the regulation of health insurance from the Department of Insurance and consolidated it in the newly-created DMHC. The Legislature elected not to keep the regulation of health insurers subject to the Insurance Code unchanged. AB 78 was initially amended to delete the consolidation of regulatory authority and, instead, to require a study of the feasibility of consolidating all health insurance regulation in the DMHC<sup>19</sup>. Ultimately the legislation was amended to eliminate the feasibility study and to leave the regulatory jurisdiction of the Department of Insurance completely unchanged<sup>20</sup>.

California also has a variety of health insurance programs provided directly from government agencies to consumers. These include, but are not limited to, the Medi-Cal

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<sup>17</sup> Chapter 525, Statutes of 1999.

<sup>18</sup> AB 78, as amended June 2, 1999, available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0051-0100/ab\\_78\\_cfa\\_19990707\\_105238\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0051-0100/ab_78_cfa_19990707_105238_sen_comm.html) (accessed June 13, 2012).

<sup>19</sup> AB 78, as amended 08/16/99, available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0051-0100/ab\\_78\\_bill\\_19990816\\_amended\\_sen.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0051-0100/ab_78_bill_19990816_amended_sen.html), (accessed June 13, 2012).

<sup>20</sup> AB 78, as amended 09/08/99, available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0051-0100/ab\\_78\\_bill\\_19990908\\_amended\\_sen.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0051-0100/ab_78_bill_19990908_amended_sen.html) (accessed June 13, 2012).

program (California Welfare and Institutions Code Division 9, Part 3, Chapter 7, beginning at section 14000), the California Children’s Services program (Health and Safety Code section 123800 et seq), and the Healthy Families Program (Insurance Code section 1240 et seq.) These and similar government-run programs to pay for health care received by eligible program participants also do not require licensure of individuals involved in enrolling participants in the program. Enrollment of individuals into a government run program does not constitute transacting insurance within the meaning of Insurance Code section 3521.

Enrollment in a government program is based entirely upon eligibility criteria for the program. Common eligibility criteria are the applicant’s age or income. If the applicant satisfies the criteria to receive benefits under the program, he or she is admitted to the program. This can typically be determined based only upon the answers that the applicant provides on an application form. In other words, enrollment in a government program involves none of the four elements – solicitation, negotiation, execution of a contract, or matters following execution of the contract – that are elements of transacting insurance under Insurance Code section 35. Thus the fact that licensing is not required for individuals involved in enrolling eligible people into these government programs is entirely consistent with the requirement for licensing under the Insurance Code for any person who transacts insurance.

The legislation that created the Exchange<sup>22</sup> did nothing to modify the licensing requirements of Insurance Code section 1631. It did, however, exempt the exchange itself from any requirement to be licensed by either the DOI or the DMHC<sup>23</sup>. This demonstrates that in creating the Exchange, the Legislature was clearly cognizant of state licensing requirements. The Legislature did not elect to exempt Call Center employees from otherwise applicable licensing requirements. Insurance Code section 1631 requires licensure of any employee “unless exempt by the provisions of “ Article 3 of the Insurance Code licensing law. Title 22 of the Government Code does not exempt individuals employed by the exchange from the Insurance Code licensing law. Since the Legislature was clearly aware of state licensing requirements and did not elect to exempt employees from Insurance Code licensing requirements, it follows that the licensing requirements remain effective and govern Call Center employees that transact insurance by enrolling applicants in health insurance plans subject to DOI licensure<sup>24</sup>. The Government Code exemption of the Exchange from state laws requiring entity licensing by DOI or DMHC does not modify the individual licensing requirements of the Insurance Code.

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<sup>21</sup> California Insurance Code section 35 provides, in full, as follows: “35. "Transact" as applied to insurance includes any of the following:

- (a) Solicitation.
- (b) Negotiations preliminary to execution.
- (c) Execution of a contract of insurance.
- (d) Transaction of matters subsequent to execution of the contract and arising out of it.

<sup>22</sup> AB 1602 (Perez, 2010); Chapter 655, Statutes of 2010

<sup>23</sup> CA Government Code section 100507.

<sup>24</sup> Employees of state government agencies typically must comply with licensing requirements applicable to individuals. Doctors, nurses, and attorneys employed by the state are all required to maintain individual licensure when employed in those capacities.



CALL CENTER EMPLOYEES WILL BE TRANSACTING INSURANCE  
WITHIN THE MEANING OF CA INSURANCE CODE SECTION 35 AND  
MUST THEREFORE BE LICENSED BY THE DEPARTMENT OF INSURANCE

As previously indicated, the RFP states that “most incoming calls are projected to fall within one of the following categories of questions: Eligibility and Enrollment Status; Premiums; Information Updates; [and] Covered benefits”. One job of Call Center employees will be to explain the intricacies of health insurance policies to consumers and small businesses seeking possible insurance coverage from the Exchange. These are precisely the types of activities that the Department of Insurance regulation specifies, in 10 CCR 2193.3, “are not exempt from licensure under Insurance Code Sections 1631 and 1635, because they are directly related to solicitation, negotiation, or effecting the sale of insurance”.

The RFP also specifically contemplates that the call center will enroll individuals in qualified health plans offered through the Exchange. Section 4.1 of the RFP says that “The Baseline System is to be available for *coverage enrollment* as early as July 1, 2013, but no later than September 28, 2013, and fully Operational on January 1, 2014 to meet the federally-imposed deadline for creating an Operational Exchange and *to enroll newly eligible individuals* in California’s Applicable State Health Subsidy (ASHS) Programs (emphasis added). Enrolling individuals in health insurance plans constitutes the transaction of insurance under the California Insurance Code.

The specific RFP requirements for call centers include services which constitute the transaction of insurance under the California Insurance Code. Specifically, section 4.7.6.1 of the RFP provides that call centers must provide for “Routing of callers to specific customer service operators *based on User type and role* (i.e., Individual, Employer, Navigator, Broker, Agent, or Issuer) *for specific questions and assistance*” and that “The Call Center shall also place outbound *calls to assist new enrollees in the selection of a health plan* and physician, as appropriate, depending on the program” (emphasis added). The requirement that the Call Center provide individualized assistance to callers in the selection of an insurer constitutes the transaction of insurance under the California Insurance Code.

The duties contemplated by the RFP for Call Center employees acting on behalf of the Exchange<sup>25</sup> will require them to act in capacities “defined in Article 1

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<sup>25</sup> CA Government Code section 100507 provides that “the Exchange shall not be subject to licensure or regulation by” either of the other California state agencies that regulate health insurance – the Department of Insurance (CDI) and the Department of Managed Health Care (DMHC). This is consistent with the provision of Government Code section 100500 which provides that the Exchange is “an independent public entity not affiliated with an agency or department.” This does not mean, however, that individuals employed by the Exchange or its contractors are exempt from the licensure requirements of Insurance Code section 1631. The section 1631 requirement is imposed upon individuals. Just as individuals employed by an insurer with a certificate of authority are not exempt from licensure by virtue of the insurer’s license, so individuals employed by the Exchange in order to transact insurance are not exempt from licensure by virtue of the fact that the Exchange is not subject to regulation by CDI or DMHC. Under Insurance Code section 1631 any exemption from the licensing requirement must be specified in Article 1, the article containing section 1631. In the legislation enacting Title 22 of the Government Code the Legislature could have added an exemption from licensure to Article 1 in the Insurance Code. It did not do so, thus leaving

(commencing with Section 1621)” of the California Insurance Code. That is, by providing consumers with explanations of the benefits and premiums of insurance policies within the plan, they will be acting in the capacity of a “life licensee” pursuant to section 1622 because they will be “transacting” accident and health insurance. Such employees must therefore be licensed as accident and health licensees pursuant to section 1626 of the California Insurance Code.

#### CONCLUSION

Under relevant California Insurance Code statutes, and under the regulations adopted by the California Department of Insurance to implement those statutes, it is clear that there will be activities which the RFP will require of Call Center employees that constitute the transacting of insurance. Nothing in the federal or state laws governing the operations of the Exchange preempts or mitigates the licensing requirements of the California Insurance Code. Since the activities of the call center employees are acts which, under the Insurance Code and related regulations, constitute the transacting of insurance, employees of the portal contractor acting on behalf of and under the legal authority of the Exchange must be licensed by the Department of Insurance in order to operate lawfully in California.

An unlicensed person is prohibited by Insurance Code sections 1631 and 1626. Just as these sections would require any person who is not a Call Center employee to be licensed in order to transact insurance through the Exchange, so any Call Center employee who transacts insurance is required to be individually licensed as an accident and health agent licensee under the Insurance Code.

MICHELMAN & ROBINSON, LLP



William L. Gausewitz



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Approved for the Firm by David Hauge, Partner

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the licensing requirement applicable to the Exchange.