Fair Political Practices Commission
MEMORANDUM

To: Chair Remke, Commissioners Casher, Eskovitz, Wasserman and Wynn

From: Zackery Morazzini, General Counsel

Subject: Regulation 18740 Exemption Request and Request for Opinion; *In re Hollinger*

Date: October 6, 2014

Background

Dana Hollinger was appointed to the California Public Employees' Retirement System (CalPERS) and assumed office on May 29, 2014. In her private capacity, Ms. Hollinger is the sole proprietor of Dana Hollinger Group which provides life insurance policies for estate and financial planning purposes.

On June 27, 2014, Ms. Hollinger filed an assuming office Statement of Economic Interests, Form 700, but she did not disclose the names of her clients who are individuals. Instead, consistent with Regulation 18740, she attached a brief statement as follows:

> "I am not disclosing the identities of the individual clients of my business, Dana Hollinger Group (DHG.) DHG provides life insurance policies for estate and financial planning. I am a licensed insurance agent/broker ("Licensee") with the California Department of Insurance (CDI). As a Licensee, I am subject to privacy rules promulgated by CDI under Section 504 of the Gramm-Leach-Blilley Act (GLBA). Under these rules, licensees are prohibited from disclosing any non-public personal information about consumers without the consumers' prior express permission. Disclosing that someone is a consumer of DHG who purchased an insurance product or service from a particular carrier sufficient to generate a commission of $10,000 is non-public personal information I am prohibited from disclosing under the CDI rules and the GLBA.
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> "I can also certify that, to the best of my knowledge, I have not and will not make, participate in making or attempt to use my official position to influence any decision of the California Public Employees' Retirement System when to do so constituted a violation of Government Code Section 87100 and related statutes."

Under the procedure established by Regulation 18740, the matter was presented to the Executive Director as an "exemption request." After review of the law and facts, the Executive Director concluded that the exemption request had merit. However, the Commission is required to review any exemption, and Regulation 18740(e) provides that the official's explanation for

non-disclosure, if approved, shall be treated as an opinion request. This memorandum outlines the reasoning behind the conclusion that Ms. Hollinger's exemption request should be granted.

Analysis

1. Regulation 18740

When reporting an economic interest in a source of income that is a business entity under the Act's disclosure provisions, Section 87207(b) requires the disclosure of the "name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from that person was equal to or greater than ten thousand dollars ($10,000) during the calendar year." However, Regulation 18740 provides, in relevant part:

> "An official or candidate need not disclose under Government Code section 87207(b) the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law. Such a person's name may be withheld in accordance with the following procedure:
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> "(a) An official or candidate who believes that a person's name is protected by a legally recognized privilege may decline to report the name, but shall file with his or her Statement of Economic Interests an explanation for such nondisclosure. The explanation shall separately state for each undisclosed person the legal basis for assertion of the privilege and, as specifically as possible without defeating the privilege, facts which demonstrate why the privilege is applicable.
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> "(b) With respect to each undisclosed person, the official or candidate shall state that to the best of his or her knowledge he or she has not and will not make, participate in making, or in any way attempt to use an official position to influence a governmental decision when to do so constituted or would constitute a violation of Government Code section 87100."

The comment to Regulation 18740 provides illustrations of the various California privileges.

> "A person's name is not ordinarily protected from disclosure by the law of privilege in California. Under current law, for example, a name is protected by the attorney client privilege only when facts concerning an attorney's representation of an anonymous client are publicly known and those facts, when coupled with disclosure of the client's identity, might expose the client to an official investigation or to civil or criminal liability. [Citations omitted.] A patient's name has been protected by the physician patient privilege only when

> disclosure of the patient's name would also reveal the nature of the treatment received by the patient because, for example, the physician is recognized as a specialist. [Citations omitted.] The names of business customers are not protected by the trade secret privilege unless, because of surrounding circumstances, disclosure of a particular customer's identity would also result in disclosure of special needs and requirements of the customer that are not generally known to competitors. [Citations omitted.]."

2. Federal Privacy Law

Ms. Hollinger's request for exemption does not fit neatly into the exception for a "legally recognized privilege under California law." The basis for her request is a federal law that prohibits the disclosure of non-public personal information accumulated by "financial institutions" – companies that offer financial products or services, including insurance, to individuals. (The Financial Services Modernization Act of 1999 commonly called the Gramm-Leach-Bliley Act ("GLBA") appears at 15 U.S.C. § 6802.) Under California Insurance Code Sections 2689.12 – 2689.20, certain insurance brokers and agents, including Ms. Hollinger, who are licensed by the Department of Insurance are exempt from most privacy provisions of the Insurance Code and, instead, are governed by the privacy provisions contained in the GLBA, as follows:

> "(a) Notice requirements. Except as otherwise provided in this subtitle, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 503 [15 USCS § 6803].
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> "(b) Opt out.
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> "(1) In general. A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless—
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> "(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 504 [15 USCS § 6804], that such information may be disclosed to such third party;
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> "(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and
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> "(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

There is an exception appearing at 15 U.S.C. § 6802(e)(8) that allows release of non-public information without providing the notice and "opt out" opportunity in order to comply with state laws. It states the federal law shall not prohibit the disclosure of nonpublic information:

> "(8) to comply with *Federal, State, or local laws, rules, and other applicable legal requirements*; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." (Emphasis added.)

Although it appears that no California court has interpreted this exception, it has been narrowly construed by at least one state's supreme court. In *Ameriquest v. Office of the Attorney General* 241 P.3d 1245 (2010), the Washington Supreme Court reasoned:

> "To understand the meaning of the exception in § 6802(e)(8), one has to read it together with the introduction to subsection (e) this way: 'Subsections (a) and (b) of this section shall not prohibit the disclosure of nonpublic personal information . . . to comply with Federal, State, or local laws.' 15 U.S.C. §6802(e)(8). And subsections (a) and (b), in turn, are the notice and opt-out requirements imposed on financial institutions. 15 U.S.C. § 6802(a)-(b). Therefore, the exceptions enumerated in § 6802(e) are not general exceptions available to whoever holds protected information. Rather, the exceptions describe the limited circumstances under which a financial institution may bypass the notice and opt-out provisions. Thus, the § 6802(e) exceptions do not give nonaffiliated third parties an unrestricted escape hatch from the nondisclosure rule of § 6802(c)."

In the *Ameriquest* case, the Washington Attorney General's Office (AGO) received from a mortgage company the names, addresses and phone numbers of its customers during the course of an investigation under the exception for "a properly authorized civil, criminal, or regulatory investigation." (15 U.S.C. § 6802(e)(8); 16 C.F.R. § 13.15(a)(7)(ii).) Subsequently, a private citizen submitted to the AGO a request for "[a]ll records relating to the investigation of Ameriquest" under the state's Public Records Act. The AGO's office refused to provide the non-public personal information of Ameriquest's clients. Upon reviewing the AGO's refusal, the court concluded:

> "Under the circumstances of this case, names, addresses, and phone numbers meet the definition of 'personally identifiable financial information.' Not only are these bits of information personal identifiers, but also their disclosure by the AGO would impermissibly reveal the fact that the individual is

> or has been Ameriquest's customer. Any information that meets the definition of 'nonpublic personal information' cannot be recast as publicly available information by the AGO."

As applied to the Commission, the *Ameriquest* case essentially holds that while the Commission can obtain nonpublic personal information (for example in the context of an enforcement case through subpoena), that information does not become "public," such as would be the case on a Form 700, which is publicly available without redaction upon request. Such a reading of the exception protects individuals' nonpublic personal information from public disclosure, while still allowing states access to the information for official purposes.

The Commission has granted two exemption requests having essentially the same underlying facts. (*In re Rosenstiel* (2012) 12 FPPC Ops 1 and *In re Riemer* (2013) 13 FPPC Ops 001.) Mr. Rosenstiel was a member of the California State Teachers' Retirement System who, in his private capacity, was a partner in an investment banking firm. Mr. Riemer was a member of the Alameda-Contra Costa Transit District Retirement System and was an investment advisor. In its *Riemer* Opinion, the Commission reasoned:

> "Mr. Riemer's exemption request requires us to balance the public interest in disclosure under the Act, against his fiduciary obligations with respect to his client information under federal law. After reviewing materials submitted to us, we concur in the staff recommendation finding that nondisclosure is appropriate under the peculiar circumstances of this case.
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> "While the facts do not fit squarely in the language of the regulation [18740(a)], we note that disclosure of private financial information is a particular concern of federal statutory law, and that granting this exemption, under the facts before us, creates no risk that undisclosed conflicts of interest might threaten the integrity of governmental decisionmaking."

Consistent with the Commission's analysis and conclusions in the *Riemer* Opinion and, based on the substantially similar facts here, staff recommends that Ms. Hollinger's request be granted.

3. Federal Preemption

An alternative way to analyze Ms. Hollinger's request is to treat it as a question of federal preemption.

> "The federal law establishes a class of investor information that may not be publically disclosed. In determining whether the federal law must be recognized under California law, we turn to the doctrine of preemption. Preemption is rooted in the Supremacy Clause of the U.S. Constitution, which

> provides that the 'Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.' (U.S. Const. Art. VI, Cl. 2.) Federal law preempts state law under three circumstances: '1) express preemption, which is achieved when Congress 'so stat[es] in express terms' its intention to preempt state law, 2) field preemption, which is achieved when Congress legislates in a particular area in a 'sufficiently comprehensive [way] to make reasonable the inference that Congress 'left no room' for supplementary state regulation,' and 3) conflict preemption, which is achieved when a state law actually conflicts with a federal law, even where Congress has not preempted all state law in that area." [Citations omitted.] (*Kehm Oil Company v. Texaco, Inc.* (2008) 537 F.3d 290, 298.)

The GLBA, at 15 U.S.C. § 6807, provides:

> "(a) In general. This subtitle and the amendments made by this subtitle shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.
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> "(b) Greater protection under State law. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subtitle and the amendments made by this subtitle, as determined by the Bureau of Consumer Financial Protection, after consultation with the agency or authority with jurisdiction under section 505(a) [15 USCS § 6805(a)] of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party."

By prohibiting the disclosure of specific client information, Section 6802 expressly preempts state law except in limited circumstances that do not appear applicable for purposes of disclosure under the Act. Thus, the federal law establishes a category of privileged information that, pursuant to the doctrine of preemption, must be recognized under California Law.

Recommendation

I recommend that the Commission grant Ms. Hollinger's exemption request. Should the Commission grant the request, Ms. Hollinger will still be prohibited by Section 87100 from making, participating in making, or influencing any decision that could have a material financial effect on a source of income, whether disclosed or not.

As noted above, the federal law allows the release of nonpublic personal information after informing clients and giving them an opportunity to opt out of disclosure. The Commission could instead request that Ms. Hollinger distribute such a notice to her clients and report those sources of income that did not choose to opt-out. However, in both the *Reimer* and *Rosenstiel* matters, the Commission chose not to impose on the requestors the burden of distributing such a notice to all clients and reporting those sources that did not choose to opt-out. I recommend the Commission remain consistent with those opinions in this respect.