**California Fair Political Practices Commission**
**MEMORANDUM**

**To:** Chair Ravel, Commissioners Casher, Eskovitz, Wasserman, and Wynne

**From:** Zackery Morazzini, General Counsel

**Re:** Regulation 18740 Exemption Request and Request for Opinion; *In re Reimer*

**Date:** August 22, 2013

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## Background

Mr. Davis Riemer was appointed to the Alameda-Contra Costa Transit District Retirement System ("AC Transit") and assumed office on April 15, 2013. In his private capacity, Mr. Riemer owns an investment advisory business, DHR Investment Counsel, Ltd. (DHR). DHR is a registered investment advisor with the Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940. Mr. Riemer's clients are individuals and families.[1]

On May 15, 2013, Mr. Riemer filed his Assuming Office SEI. In lieu of identifying the clients of his business who might otherwise meet the disclosure threshold in the law, he attached the following statement:

> "I am not disclosing the identities of the individual clients of my business, DHR Investment Counsel, Ltd. (DHR). DHR provides investment advisory services, and I am a registered investment advisor with the Securities and Exchange Commission (SEC). As a registered investment advisor, I am subject to the SEC privacy rules promulgated under Section 504 of the Gramm Leach-Bliley Act. Under these rules, registered investment advisors are prohibited from disclosing any non-public personal information about their individual clients without those customers' prior express permission. Since DHR is compensated for its services based upon a percentage of a client's investments under management with the firm, disclosing that an individual is a client of DHR would disclose that the client had at least a certain amount of assets under management with the firm. This is non-public personal information that DHR is prohibited from disclosing under the SEC rules.
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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 in any way attempt to use my official position

[1] He has one corporate client, but that client is located, and doing business, outside the District's jurisdiction and would not otherwise come within the disclosure requirements applicable to Mr. Riemer.

to influence any decision of the Retirement System when to do so constituted or would constitute a violation of Government Code Section 87100 and related statutes."

Under the procedure established by Regulation 18740, the matter was presented to Commission staff as an "exemption request." After review of the law and facts, staff has concluded that the exemption request had merit. However, the Commission is required to review any request for 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 Mr. Riemer'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 also provides:

> "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***

Mr. Riemer's request is almost identical to a request for exemption filed by Paul Rosenstiel and approved by the Commission in *In re Rosenstiel* (2012) 12 FPPC Ops 1 on September 13, 2012.[2] In the *Rosenstiel* Opinion we explained that the request (like this one) does not fit neatly into the exception in Regulation 18740 for two reasons.

> "First, the basis for his request is that federal securities law prohibits the disclosure of non-public information accumulated by the banking industry. [T]he Gramm-Leach-Bliley Act (GLBA) at 15 USC § 6802 states:
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> > "(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].
> >
> > "(b) Opt out.
> >
> > "(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;

[2] A copy of the *In re Rosenstiel* opinion is attached hereto.

> "(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.

The federal statute does provide specific exceptions allowing release of the information. The exception considered in connection with the *Rosenstiel* request was in 15 USC § 6802(e)(8), which states the federal law shall not prohibit the disclosure of nonpublic personal information:

> "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."

This exception has been narrowly construed by at least one state's supreme court. In *Ameriquest v. Office of the Attorney General* (2010) 241 P.3d 1245, 1254, the Washington Supreme Court stated:

> "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 "nonpublic personal information" from Ameriquest under the exception for "a properly authorized civil, criminal, or regulatory investigation." (15 U.S.C. § 6802(e)(8); 16 C.F.R. § 313.15(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 nonpublic 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."

Staff concurs with the court's interpretation and analysis of this exception. 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 in a Form 700 which is publically available and in some cases available on line.[3] 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.

***3. Federal Preemption***

As we also discussed in the *Rosenstiel* request for exemption, an alternative way to analyze this 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.)?
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> Title 15 United States Code § 6807 provides:
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> "(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.

[3] In the *Rosenstiel* Opinion, we also discussed the fact that the federal law allows the release of such information after informing clients and giving them an opportunity to opt out of the disclosure. The Commission at that time determined not to impose on Mr. Rosenstiel the burden of distributing such a notice to all his clients and reporting those sources that did not choose opt out. We would recommend the Commission remain consistent with the *Rosenstiel* Opinion in this respect.

> "(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 investor information, § 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.

**Conclusion and Recommendation**

In conclusion, if you agree that federal law prohibits Mr. Riemer from disclosing individual investors on his Form 700 pursuant to Regulation 18740, Mr. Riemer would still be prohibited by Section 87100 from making, participating in making, or influencing any decision that will materially affect a source of income, disclosed, or not disclosed. We recommend adoption of the proposed *Riemer Opinion.*