February 20, 2014

Erin C. Lama
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2350 Kerner Blvd., Suite 250
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Re: Your Request for Advice
**Our File No. A-14-009**

Dear Ms. Lama:

This letter responds to your request for advice on behalf of Michael Lujan regarding his duties under the "revolving door" provisions of the Political Reform Act (the "Act").[1] This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other post-governmental employment laws that may apply including, but not limited to, Public Contract Code Section 10411. Moreover, your communication of February 5, 2014 clarified that you were not seeking advice under Section 1090.

## QUESTIONS

1(a) May Mr. Lujan become personally certified through the California Health Benefit Exchange ("Covered California") as an insurance agent?

(b) May Mr. Lujan operate a company, individually or with others, which contracts with private individuals to provide guidance and oversight for certified insurance agents who are registered with Covered California, and may Mr. Lujan advise certified insurance agents on their overall business, including business with Covered California?

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2(a) May Mr. Lujan, as a consultant, advise General Agents (GAs) and/or Qualified Health Plans (QHPs) on Covered California related matters? Specifically, may Mr. Lujan assist with the implementation and strategies to satisfy their current contracts?

(b) In addition, may Mr. Lujan assist GAs and/or QHPs with the renewal of their contracts with Covered California?

## CONCLUSIONS

1(a) The Act does not prohibit Mr. Lujan from applying to Covered California to be personally certified as an insurance agent.

(b) Mr. Lujan may operate a company, individually or with others, to provide guidance and oversight for certified insurance agents who are registered with Covered California and he may advise certified insurance agents on their overall business, including business with Covered California.

2(a) Mr. Lujan may act as a consultant and advise GAs and/or QHPs on Covered California related matters and may assist with the implementation and strategies to satisfy their current contracts.

(b) Mr. Lujan may assist GAs and/or QHPs with the renewal of their contracts with Covered California, but only so long as these renewals are new proceedings with different consideration and different terms than the contract in which he participated in as a state employee.

## FACTS

Covered California (an independent public entity within California state government) is the health insurance marketplace for California pursuant to the state's implementation of the Patient Protection and Affordable Care Act. Covered California is governed by a five-member board appointed by the Governor and the Legislature.

From June 2012 through January 2013, Mr. Lujan was employed by Covered California as the Director of the Small Business Health Options Program ("SHOP"). From January 2013 through September 2013, Mr. Lujan served as the Director of Sales and Marketing for Covered California. Both positions were designated in Covered California's Conflict of Interest Code.

As a former insurance agent, general agent, and insurance carrier sales executive, Mr. Lujan was hired in great part for his contacts and relationships accumulated over his 25-year career in the private sector health insurance market in California. During his employment with Covered California Mr. Lujan was involved, in part, with the following specific projects:

- **CERTIFIED INSURANCE AGENT DISTRIBUTION CHANNEL.** Insurance agents representing Covered California must be trained and certified in order to sell Covered California health insurance plans in the individual and SHOP markets. Covered California sought to develop policies and procedures for recruiting, training and certifying licensed health insurance agents already doing business in California.

  In his role with Covered California, Mr. Lujan was responsible, in part, for the initial development of the certified insurance agent distribution channel for Covered California. Mr. Lujan prepared the initial agent policies adopted by Covered California. These policies set forth how Covered California would work with agents and the agent's compensation. Mr. Lujan met with agents and their professional associations as stakeholders to obtain input on policy, the agent's role, and the sales distribution process. The policies were codified as law.

  Further, he advised on the agent certification process, the "Agent Agreement" (the contract under which each Covered California agent operates), the shared market standards for agent agreements and the training curriculum for agents.

  You noted that the regulations, rules and policies developed, which outlined the process for the certification of approximately 15,000 agents with Covered California, were all of general applicability and had industry-wide application.

  You stated Mr. Lujan would like to seek certification as an insurance agent through the criteria he assisted in developing at Covered California, but would not be appearing on behalf of any other person nor would he be compensated.

- **GENERAL AGENTS.** Covered California has selected four insurance GAs for SHOP (Warner Pacific, LISI, Claremont Insurance Services, and Dickerson Employee Benefits). As GAs, the four companies aggregate benefit and rate information for multiple insurers and products within SHOP. Covered California sought to pursue contracts with the GAs for the support of SHOP enrollment. GAs act as an intermediary for SHOP.

  In his role with Covered California, Mr. Lujan participated in the development of the criteria for selection of GAs (e.g., who is qualified to be a GA, how many GAs would be accepted, and what general duties a GA would be expected to perform) and participated in the GA process including the drafting and approving of draft bid specifications, leading up to the granting of contracts.

  However, you stated that these specifications were applicable to all bidders on any resulting contract and there was no specific party in mind. You also stated that Mr. Lujan was not involved in any part of the contract decision-making process, including the negotiation, transaction, awarding or contracting with the GA. Mr. Lujan did participate in a conference for bidders to help clarify questions prior to the Request for Proposal (RFP) submission deadline.

After the selection process was complete, Mr. Lujan was asked to contact the bidders not selected by Covered California, but was not involved in the notification for those GAs awarded contracts.

- **QUALIFIED HEALTH PLANS.** Covered California has selected 11 health insurance companies, or QHP that were available for enrollment starting in the Fall of 2013. These QHPs meet all the state and federal requirements for plans, as well as additional standards established by Covered California. Each QHP was required to sign a QHP Model Contract outlining the terms of their agreement to provide service to Covered California.

  The 11 QHPs are Anthem Blue Cross of California, Blue Shield of California, Chinese Community Health Plan, Contra Costa Health Plan, Health Net, Kaiser Permanente, L.A. Care Health Plan, Molina Healthcare, Sharp Health Plan, Valley Health Plan and Western Health Advantage.

  California opted to conduct a competitive bid process for selection of QHPs for participation in the individual and SHOP exchanges. While the procurement process for each market segment (individual and small business) was similar, they were conducted by different evaluation and scoring teams and processes. QHPs were permitted to bid for one or both exchanges, but not all the plans opted to bid to participate in SHOP.

  In his role with Covered California, Mr. Lujan participated in the development of the criteria for selection of the QHP for both the individual and SHOP markets. These specifications were applicable to all bidders on any resulting contract and there was no identifiable specific party in mind. In addition, Mr. Lujan served as a subject matter expert in the initial phase of the SHOP QHP procurement process providing basic input and simple feedback on RFP responses from specific carriers.

  The input he provided as subject matter expert was provided with a small team of staff and consultants who also shared their impressions and thoughts about the initial RFP responses. Mr. Lujan did not provide similar subject matter expertise on the individual market RFP responses.

  Mr. Lujan was not involved in the QHP selection or award of contracts for the individual or SHOP exchange markets. Further, Mr. Lujan was not involved or included in the negotiations with the awarded QHPs. It is your understanding that performance on these contracts began at the earliest on October 1, 2013 and at the latest on January 1, 2014.

  Mr. Lujan officially left his state employment on September 24, 2013.

## ANALYSIS

### A. Governing Law

**The One-year Ban:** The one-year ban prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative action or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official *is being compensated* for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban discussed below, which only applies to "judicial or quasi-judicial" proceedings, the one-year ban applies to "any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property." (Regulation 18746.1(b)(5).) There is no prohibition on consulting with a private employer for compensation so long as you do not appear or communicate with your former employer.

An appearance or communication is for the "purpose of influencing" if it is made for the "principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (Regulation 18746.2.) An appearance or communication includes conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*) Finally, appearances and communications are prohibited if they are (1) before a state agency that the public official worked for or represented or (2) before a state agency "which budget, personnel, and other operations" are subject to the control of a state agency the public official worked for or represented. (Regulation 18746.1(b)(6).)

**Permanent Ban:** The permanent ban prohibits a former state employee from "switching sides" and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication, *or aiding, advising, counseling, consulting, or assisting in representing* any other person, other than the State of California, in an appearance or communication, made with the intent to influence any judicial, quasi-judicial, or other proceeding in which the official has participated while he or she served as a state administrative official. An official is considered to have "participated" in a proceeding if he or she took part in the proceeding *"personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information ...."* (Section 87400(d).)

**B. Conclusions and Analysis**

You stated that Mr. Lujan held two positions at Covered California, both designated in Covered California's Conflict of interest Code,[2] before his separation in September 24, 2013. You asked the following questions:

**1(a) May Mr. Lujan become personally certified through Covered California as an insurance agent?**

**One-Year Ban:** According to your facts, Mr. Lujan would be appearing before his former agency to personally (without compensation) become certified through Covered California as an insurance agent. In this process, he would be representing his personal interest, not representing another person. Regulation 18746.1(b)(4) provides:

> "The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in Regulation 18702.4, subdivision (b)(1), is not prohibited or limited by this section."

Therefore, under this regulation, the one-year ban does not prohibit Mr. Lujan from appearing before or communicating with Covered California to seek certification as an insurance agent.

**Permanent Ban:** Similarly, the permanent ban would not apply for a multitude of reasons, including the fact that it applies only to compensated conduct, the same as the one-year ban. Therefore, Mr. Lujan is not prohibited from seeking personal certification through Covered California to be an insurance agent.

**1(b) May Mr. Lujan operate a company, individually or with others, which contracts with private individuals to provide guidance and oversight for certified insurance**

[2] The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).)

**agents who are registered with Covered California and may Mr. Lujan advise certified insurance agents on their overall business, including business with Covered California?**

**One-Year Ban:** As you note in your request, the one-year ban does not limit a former official using his knowledge to consult with clients, so long as he does not communicate with or appear before his former agency.[3] Thus, the conduct in question 1(b) would not be prohibited under the one-year ban.

**Permanent Ban:** Since the advice in question is limited to *implementation*,[4] that is, the execution of an existing contract and does not involve bidding on or modifying a contract in which he was involved in as a public official, the permanent ban would not apply. For purposes of the permanent ban, working under a contract is not part of the agency's proceeding that resulted in making the contract.[5]

**2(a) May Mr. Lujan, as a consultant, advise the GAs and or QHPs on Covered California related matters? Specifically, may Mr. Lujan assist with the implementation and strategies to satisfy their current contracts?**

**One-Year Ban:** The one-year ban does not limit a former official using his knowledge to consult with clients, so long as he does not communicate with or appear before his former agency. Thus, it is not implicated in this question.

**Permanent Ban:** Advising on the implementation of an existing contract is not prohibited under the permanent ban and thus the ban would not apply.

**(b) In addition, may Mr. Lujan assist GAs and/or QHPs with the renewal of their contracts with Covered California?**

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[3] However, "appearance" is broadly defined to include "conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication." (Regulation 18746.2(a).)

[4] "Implementation" is narrowly construed and is limited to execution of the existing terms of an existing contract. "While it is permissible for him to work for the contractor on matters that involve implementation or performance of requirements in the contractor's existing contract with EDD, his permissible work under that contract is limited. He is permanently prohibited from being paid by the contractor or any other non-state entity to aid, advise, counsel, consult with or in any way assist the contractor or entity or communicate with his or her former state agency's staff or representatives for the purpose of influencing: (i) the amendment or revocation of the existing contract; (ii) the issuance or awarding of a substantially similar contract; or (iii) agency decisions that, although still within the contract's terms, are likely to result in more than a de minimis change in the level of services or goods provided by the contractor from the that originally contemplated by the agency." (*del Valle* Advice Letter, No. A-12-086.)

[5] As mentioned, however, we do not provide an analysis of the same issue under Section 1090 or Public Contract Code Section 10411.

**One-Year Ban:** The one-year ban does not limit a former official using his knowledge to consult with clients, so long as he does not communicate with or appear before his former agency.

**Permanent Ban:** In order to answer this question, we have to analyze two issues:

(1) *Did Mr. Lujan participate in the original contracts.* An official is considered to have "participated" in a proceeding if he or she took part in the proceeding "personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .." (Section 87400(d).)

*General Agents:* You stated that Mr. Lujan participated in the development of the criteria for selection of the GAs (e.g., who is qualified to be a GA, how many GAs would be accepted, and what general duties a GA would be expected to perform). Mr. Lujan's participation in the GAs process leading up to the granting of a contract consisted of drafting or approving drafts of bid specifications.

You stated that these specifications were applicable to all bidders on any resulting contract and there was no specific party in mind. You also stated that Mr. Lujan was not involved in any part of the contract decision-making process, including the negotiation, transaction, awarding or contracting with the GAs. Mr. Lujan did participate in a conference for bidders to help clarify questions prior to the RFP submission deadline. After the selection process was complete, Mr. Lujan was asked to contact the bidders not selected by Covered California, but was not involved in the awarding notification for those GAs awarded contracts.

*QHPs:* In his role with Covered California, Mr. Lujan participated in the development of the criteria for selection of the QHP for both the individual and SHOP markets. These specifications were applicable to all bidders on any resulting contract and there was no identifiable specific party in mind. In addition, Mr. Lujan served as a subject matter expert in the initial phase of the SHOP QHP (not the individual market QHPs) procurement process providing basic input and simple feedback on Request for Proposal ("RFP") responses from specific carriers. The input provided as subject matter expert was provided with a small team of staff and consultants who also shared their impressions and thoughts about the initial RFP responses.

However, Mr. Lujan was not involved in the QHP selection or award of contracts for the individual or SHOP exchange markets. Further, Mr. Lujan was not involved or included in the negotiations with the awarded QHPs. It is your understanding that performance on these contracts began at the earliest on October 1, 2013 and at the latest on January 1, 2014.

In the *Anderson* Advice Letter, No. A-98-159 we evaluated a similar situation where a former employee of the California Health and Welfare Data Center developed the technical requirements for an RFP, met with vendors to ensure that the proposals met the mandatory technical requirements of the RFP, and also assisted in writing updates to the RFP. We

concluded that his involvement in the original RFP was "participation" as defined in Section 87400(d) and was, therefore, sufficient to trigger the permanent ban. We believe that conclusion applies to your facts as well.

*(2) Is the renewal of a GA or QHP contract the same proceeding as the original contract or a new proceeding?*

We have consistently advised that the permanent ban does not apply to a new proceeding even in cases where the new proceeding is related to, or grows out of, a prior proceeding in which the official had participated. A new proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings. (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; see also *Anderson, infra*.) Ultimately, application of this exception is a factual one.

In *Anderson* we stated:

> "In the past, we have advised that the permanent ban does not prohibit a former state employee, who worked on a particular contract involving a specific party while employed with the state, from representing that same party regarding a new contract with his or her former agency. (*Glaab* Advice Letter, No. A-97-341, *Ortiz* Advice Letter, No. A-90-185.) Similarly, in the *Pratt* Advice Letter, No. A-95-386... we advised a former supervisor with the Department of Health Services that the permanent ban would not prohibit her from assisting a client in reviewing a new RFP issued by the department involving a project on which she had previously worked. While she worked with the department, the former supervisor had been responsible for the management of a contract between the department and her client for services regarding a specific project. The project was later expanded pursuant to additional funding authorized by the Legislature and a new RFP was issued. The new RFP, which was issued after the former employee left the department, involved a new contract and was, therefore, a separate proceeding for purposes of the permanent ban….
>
> "Your facts provide that before HWDC could procure services from MORPHO under the original RFP proceeding, the Governor issued an executive order pursuant to which the existing RFP was canceled and a new RFP was issued. The Governor's order had directed all state agency solicitations for contracts not yet awarded by the date of the order to exclude certain technical requirements. The new RFP is in substantially the same form as the first RFP and is for the purpose of procuring the same service. Under these facts, applying the rationale in the *Galanter* letter, we conclude that RFP 6001 and RFP 8001 constitute the same proceeding."

We do not have sufficient facts to determine whether the "renewal" qualifies as a new proceeding or is rather a continuation of the one that Mr. Lujan participated in as a state employee. Assuming, however, that the renewal is factually a new proceeding in light of the guidance above, Mr. Lujan may advise his clients regarding that new proceeding.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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