



**CONFIDENTIAL - NOT FOR PUBLIC DISTRIBUTION**

**REVISED Agenda for Financial Crisis Inquiry Commission Meetings  
Wednesday, November 17, 2010  
12:00-2:00pm EST  
Conference Dial-In Number: 866-692-3582  
Participant Access Code: 3387529**

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<b><u>Agenda Item</u></b>	<b><u>Presentation</u></b>
<b>1) Call to Order</b>	<b>Chairman Angelides</b>
<b>2) Roll Call</b>	<b>Chairman Angelides</b>
<b>3) Approval of Minutes of Telephonic Business Meeting of November 4, 2010 (Attached)</b>	<b>Chairman Angelides</b>
<b>4) Chairman's and Vice Chairman's Report</b>	<b>Chairman Angelides and Vice-Chairman Thomas</b>
<b>5) Executive Director's Report and Progress on Report</b>	<b>Wendy Edelberg, Executive Director</b>
<b>6) Document and Interview Review/ Clearance Process (attached)</b>	<b>Gary Cohen, General Counsel</b>
<b>7) Timing of Submission and Release of Report to Congress</b>	<b>Chairman Angelides and Vice Chairman Thomas</b>
<b>8) Procedures re: Separate and Additional Views (forthcoming)</b>	<b>Chairman Angelides, Vice-Chairman Thomas, and Gary Cohen, General Counsel</b>
<b>9) Update on Archive Process</b>	<b>Gary Cohen, General Counsel</b>

<b>10) Discussion of the Report</b>	<b>All Commissioners</b>
<b>11) Comments and Questions from Commissioners</b>	<b>All Commissioners</b>
<b>12) Other Items of Business</b>	<b>All Commissioners</b>
<b>13) Adjournment</b>	<b>Chairman Angelides</b>



**Financial Crisis Inquiry Commission**  
**Agenda Item 3 for Business Meeting of November 17, 2010**  
**Minutes of Telephonic Business Meeting of**  
**November 4, 2010**

**Agenda Item 1: Call to Order**

Chairman Angelides called the telephonic business meeting to order at 10:05am ET.

**Agenda Item 2: Roll Call**

Chairman Angelides asked Gretchen Newsom to call the roll of the Commissioners. Present were Phil Angelides, Bill Thomas, Brooksley Born, Byron Georgiou, Doug Holtz-Eakin, and Heather Murren. Commissioner Wallison joined the call during Agenda Item 3 and Commissioner Graham joined the call during Agenda Item 6. Commissioners Hennessey and Thompson were absent.

Also participating in the meeting were: Wendy Edelberg, Executive Director; Gary Cohen, General Counsel; Gretchen Newsom, assistant to Chairman Angelides, Rob Bachmann, assistant to the Chair; Scott Ganz, assistant to Vice Chairman Thomas; and Courtney Mayo, assistant to the Vice Chair.

**Agenda Item 3: Approval of Minutes of Meeting, October 12, 2010**

Chairman Angelides introduced the minutes from the FCIC meeting of October 12, 2010.

MOTION: Holtz-Eakin moved and Georgiou seconded a motion to adopt the meeting minutes (attached).

APPROVED: 7-0 (Commissioners Graham, Hennessey and Thompson were absent.)

**Agenda Item 4: Amendment to Commission Rules re: Report Approval Procedures**

Chairman Angelides introduced the amendment. Discussion ensued on the topic of the amendment as well as the production status and schedule of the report, and the process and procedures of submitting differing or separate views. A process for consideration of separate or dissenting views will be sent to the Commission

for consideration at the next Commission meeting. Vice Chairman Thomas recommended a friendly amendment to the proposed amendment by inserting “grammatical” into the last sentence of the amended language.

MOTION: Georgiou moved and Wallison seconded a motion to approve the amendment with the insert of the word “grammatical” (attached).

APPROVED: 7-0 (Commissioners Graham, Hennessey and Thompson were absent.)

#### **Agenda Item 5: Comments and Questions from Commissioners**

No comments were brought up or questions asked by the Commissioners.

#### **Agenda Item 6: Other Items of Business**

Chairman Angelides informed the Commission that our publisher, Little Brown, was unable to meet a revised production schedule and would no longer serve as our publisher. Our replacement publisher will be Public Affairs and our royalty agreement will be the same as our former agreement with Little Brown except that there will not be an advance. Public Affairs guaranteed a December 15<sup>th</sup> delivery date if the report is delivered to them by December 7<sup>th</sup>, and has requested FCIC’s assistance with expedited shipping costs, estimated to be \$29,000-\$40,000 so the report can be available in bookstores when it is released. Chairman Angelides indicated that he would approve the shipping costs to ensure the book is widely and timely received by the American public. Chairman Angelides also informed the Commission that as there is not an advance with the Public Affairs agreement, our book agents have requested that the FCIC advance them a portion of their fee of approximately \$17,000 to be recouped by the Commission from royalties which would otherwise go to the agents. Chairman Angelides indicated his approval of the request given the needed services the agents are providing to assist in the publication of the report. To recoup the shipping expenses and the advance, an estimated 50,000 copies of the report would need to be sold. Discussion ensued among the Commission on these matters, and no objections were indicated. Commissioners also discussed the production and review schedule of the report.

#### **Agenda Item 7: Adjournment**

Chairman Angelides requested a motion to adjourn the meeting at 10:29am.

MOTION: Graham moved and Born seconded a motion to adjourn the meeting at 1:10pm.

APPROVED: 8-0 (Commissioners Hennessey and Thompson absent)



**Financial Crisis Inquiry Commission  
Agenda Item 3 for Business Meeting of November 17, 2010  
Minutes of Telephonic Business Meeting of November 4, 2010**

**ATTACHMENT**

**APPROVED Minutes of Telephonic Business Meeting of  
October 12, 2010**

**Agenda Item 1: Call to Order**

Chairman Angelides called the telephonic business meeting to order at 12:01pm EDT.

**Agenda Item 2: Roll Call**

Chairman Angelides asked Gretchen Newsom to call the roll of the Commissioners. Present were Phil Angelides, Bill Thomas, Brooksley Born, Byron Georgiou, Doug Holtz-Eakin, Heather Murren, John W. Thompson, and Peter Wallison. Commissioner Hennessey joined the call during Agenda Item 8. Commissioner Graham was absent.

Also participating in the meeting was: Wendy Edelberg, Executive Director; Gary Cohen, General Counsel; Gretchen Newsom, assistant to Chairman Angelides; and Scott Ganz, assistant to Vice Chairman Thomas. Chris Seefer joined the meeting during Agenda Item 8.

**Agenda Item 3: Approval of Minutes of Meeting, September 14, 2010**

Chairman Angelides introduced the minutes from the FCIC meeting of September 14, 2010.

MOTION: Born moved and Georgiou seconded a motion to adopt the meeting minutes (attached).

APPROVED: 8-0 (Commissioners Graham and Hennessey were absent.)

#### **Agenda Item 4: Approval of Minutes of Meeting, September 29, 2010**

Chairman Angelides introduced the minutes from the FCIC meeting of September 29, 2010.

MOTION: Georgiou moved and Born seconded a motion to adopt the meeting minutes (attached).

APPROVED: 8-0 (Commissioners Graham and Hennessey were absent.)

#### **Agenda Item 5: Chairman's and Vice Chairman's Report**

Chairman Angelides and Vice Chairman Thomas informed the Commission that our next meeting would take place on October 26<sup>th</sup> and 27<sup>th</sup> – an agenda will be forthcoming shortly and members should expect to have substantial amounts of draft text of the report for their review. Commissioners were asked by the Chairman to keep their schedules flexible during the week of November 15<sup>th</sup> and leading up to Thanksgiving, in case additional deliberations are needed. The Chairman also informed the Commission that at a subsequent meeting, amendments to Commission rules may be introduced to ensure a realistic timeline and production of the report.

#### **Agenda Item 6: Executive Director's Report**

Executive Director Wendy Edelberg updated the Commission on research and investigative work products that are wrapping up and that will be forthcoming for Commissioner review.

#### **Agenda Item 7: Update on the Report**

Edelberg reported to the Commission that a draft of Section 3 of the report should be anticipated in advance of the October meetings. Other sections of the report are well underway and in development and will be sent forth to the Commission on a rolling basis.

#### **Agenda Item 8: Referrals to Justice**

General Counsel Gary Cohen provided an update on the status of previous referrals to the Department of Justice (DOJ) and introduced the new referrals for consideration by the Commission (attached). Chris Seefer provided the Commission an overview of the staff memos regarding Merrill Lynch and Fannie Mae (attached), and answered Commissioner questions. The Commission discussed criteria for sending referrals to DOJ.

MOTION: Born moved that the Commission finds that the persons described in item 1 and 2 of the Merrill Lynch memo may have violated the laws of the United States and that the Commission refers these matters to the Attorney General of the United States.  
MOTION failed for lack of a second.

MOTION: Wallison moved and Thomas seconded a motion that the Commission finds that the persons described within the Fannie Mae memo may have violated the laws of the United States and that the Commission refers this matter to the Attorney General of the United States.

MOTION: Georgiou moved and Murren seconded a substitute motion wherein the Commission finds that the persons described within the Merrill Lynch memo and the Fannie Mae memo may have violated the laws of the United States and that the Commission refers these matters to the Attorney General of the United States.

The Chairman divided the motion into two motions – to make the finding and referral to Justice of the persons cited in the Merrill Lynch memo and to make the finding and referral to Justice for the persons cited in the Fannie Mae memo. The Chairman called for a roll call vote on each motion.

APPROVED: First Motion – Merrill Lynch Memo: 6-1-1-1-1 (ROLL CALL VOTE)

AYE: 6- *Angelides; Thomas; Born; Georgiou; Murren; Thompson*

NAY: 1 - *Hennessey*

PRESENT: 1- *Wallison*

NOT PRESENT: 1- *Holtz-Eakin*

ABSENT: 1- *Graham*

APPROVED: Second Motion – Fannie Mae Memo: 7-1-1-1 (ROLL CALL VOTE)

AYE: 7 - *Angelides; Thomas; Born; Georgiou; Murren; Thompson; Wallison*

NAY: 1 - *Hennessey*

NOT PRESENT: 1- *Holtz-Eakin*

ABSENT: 1- *Graham*

### **Agenda Item 9: Clayton and Moody's Letters**

Chairman Angelides introduced the Clayton and Moody's letters as well as the staff analysis of this correspondence and noted that Vice Chairman Thomas asked that these items be added to the agenda. The Chairman and the Vice

Chairman agreed to enter the Clayton letter into the public hearing record of the Sacramento field hearing. The Moody's letter will be included in the archived Commission records.

**Agenda Item 10: Comments and Questions from Commissioners**

No comments were brought up or questions asked by the Commissioners.

**Agenda Item 11: Other Items of Business**

No other items of business were brought up by the Commissioners.

**Agenda Item 12: Adjournment**

Chairman Angelides requested a motion to adjourn the meeting.

MOTION: Murren moved and Thompson seconded a motion to adjourn the meeting at 1:10pm.

APPROVED: 8-0 (Commissioners Graham and Holtz-Eakin absent)



**Financial Crisis Inquiry Commission  
Agenda Item 6 for Business Meeting of November 17, 2010  
Document and Interview Review/Clearance Process**

**Memo To:** Commissioners of the FCIC

**From:** Gary J. Cohen  
General Counsel, FCIC

**cc:** Wendy Edelberg  
Maryann Haggerty  
Cassidy Waskowicz

**Date:** November 16, 2010

**Re:** Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website.

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The FCIC was created by the Fraud Enforcement and Recovery Act of 2009, which was signed into law on May 20, 2009. The FCIC's mission is "to examine the causes, domestic and global, of the current financial and economic crisis in the United States." Congress empowered the Commission to "hold hearings,... take testimony, receive evidence,... and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, and documents."

In connection with its mandate, the Commission has received millions of pages of documents, conducted numerous surveys, interviewed hundreds of witnesses, held 19 days of hearings, compiled video records of testimony before the Commissioners, and completed numerous reports, both confidential and public, on various aspects of the financial crisis. The Commission has received or created approximately 15 terabytes of data, some of which remains to be examined.

It is our intent to use in the Report and our e-book both public and nonpublic documents and to create on our website a resource of public and nonpublic documents relevant to the Commission's Report and inquiry, all with the

purpose of meeting our statutory mandate to report to the President, Congress and the public on the causes of the financial and economic crisis.

This Memorandum proposes a process to make the Commission's work available to the public in a meaningful and useful way. To this end I consider documents (with a focus on nonpublic documents) that may be made available in the Commission's Report and e-book (Report Elements), or website (Web Elements). Release of Commission internal materials (e.g., Commissioner and staff e-mails, Preliminary Investigative Reports (PIRs) and other work product and documents), will be the subject of a separate memorandum addressing National Archives issues. You will note below that I have recommended that all nonpublic material for use in the final Report and the website be run through an approval process.

A. I recommend that Report Elements include:

all documents,<sup>1</sup> both physical and electronic, e-mails, video files, audio files, transcripts, and materials prepared or compiled by the FCIC staff, such as the timeline, surveys and staff memoranda that have been made public, that are included, referenced or footnoted in the written Report, or included in the e-book and e-book apps.

B. I recommend that Web Elements for immediate inclusion in the website on the date the Report is released (in addition to all material previously posted) include:

- i) all Report Elements,
- ii) all documents that previously have been cleared in connection with prior hearings (whether or not used at the hearings),
- iii) all preliminary staff reports,
- iv) the expanded timeline and documents referenced in the expanded timeline,
- v) all video and testimony from the Commission hearings, and
- vi) all MFRs, audio tapes and transcripts of interviews for which confidentiality was not requested (or which have already been cleared).

C. In addition, in addition to material that was previously dealt with pursuant to clause A and B above, I recommend that Web Elements also include (when and after cleared, if necessary) the following documents:

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<sup>1</sup> As used in this memorandum documents should be broadly construed to include paper documents, electronic documents, audio files, video files, compilations of data and the like, unless the context clearly indicates otherwise.

- i) all of the documents referenced in PIRs and similar staff documents,
- ii) all of the documents and follow-up answers to questions asked at public hearings ,
- iii) all MFRs, audio tapes and transcripts of interviews for which clearance is obtained,
- iv) all surveys upon which conclusions referenced in the Report were based, and
- v) materials relevant to our inquiry and the Report which were requested, received and reviewed or prepared by the staff during the course of our investigation and which are not otherwise included in any of the above categories.

D. However, it is my recommendation that no Report Elements or Web Element be released unless:

- i) they are reviewed by appropriate Commission staff and approved by the Executive Director or General Counsel as appropriate to release (documents already cleared for prior use in hearings do not have to be re-cleared or authorized),
- ii) when dealing with documents covered by confidentiality agreements or understandings, after consultation with (and if required, occasional approval by) the document providers, and
- iii) approved or deemed approved by the Commission (in accordance with the procedures below).

## **I. Process.**

### **A. Choice of Documents for the Report**

If there is an e-book with embedded material, at most 1 GB of supplemental material chosen by the FCIC can be included. The two forms of e-books that include supplemental material, an e-book application (iPad and Droid) and an enriched e-pub, are each capable of including this amount of supplemental data, although the choice of data for each platform can differ slightly because of their different capabilities. (In addition to embedded data, e-book platforms can include hotlinks pointing to external web content. This requires that, at the very least, the portion of the Commission's website to which the hotlinks point be "live" when the e-book is published.)

Thus the task ahead for the Report and e-book suggests the following steps:

1. Staff identifies and physically segregates in electronic form all Report Elements".<sup>2</sup>

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<sup>2</sup> This Memorandum primarily addresses electronic release of documents, but as these items will likely constitute documents used as the basis for footnotes, the same considerations as to care in checking and clearance applies to use in the printed Report.

2. Staff determines the source of each Report Element and, where these were produced pursuant to confidentiality or other agreement notifies and seeks (generally as per these agreements 14 days in advance) comment from the Report Element provider to the use of the Report Element. (While the FCIC does not need affirmative consent pursuant to most of our Confidentiality Letters, either receiving no response to the notice letter or an affirmative consent should eliminate any concerns regarding release of trade secret or business proprietary information.) (This process is already underway, and has resulted in a number of questions and requests for clarification, objections to disclosure, and requests for further discussion from the recipients.) As a courtesy, we are also telling providers of Report Elements that we might also use their previously cleared materials in the Report.

3. Staff determines if any Report Elements require special affirmative consent due to special terms of any confidentiality agreements or other previously agreed-upon use restrictions, and pulls the document if the same is not forthcoming.

4. Where a request for comments elicits objections to disclosure or a required consent is not forthcoming, Staff determines if release of the Report Elements raises trade secret, personal privacy, or regulatory or statutory restrictions on disclosure, collectively "special concerns." If the staff determines that the special concerns are not valid, subject to the other requirements herein, the documents will be released. If valid, the staff will consider applicable legal requirements, and will weigh the benefit of disclosure by the Commission against the potential harm to the provider caused by disclosure of the special concerns, negotiate redactions if the same will be helpful in resolving disclosure issues and if the Report Element would still be worthy of disclosure after the redactions, and raise the matter to the Commission if the special concern issues cannot be resolved by staff and the document provider. Once resolved, the staff will then adjust the composition of the Report Elements accordingly. The decision about whether to release or redact Report Elements after valid objection must be made on a case-by-case basis depending upon the nature of the material under consideration.

#### **B. Choice of Documents for the Website**

Documents released via the website make up the next subset. (Choice of the location/hosting of the permanent website will be the subject of a separate memorandum.) Website decisions for material hot-linked to the web from the e-book must be made when the e-book is "printed." As a practical matter other website decisions can be delayed until the end of January 2011 (to allow time to implement the decisions by February 13, 2011), and so the Commission will have additional time to consider and clear documents not included, or referred to, in the Report.

Thus the task ahead for the Web suggests the following steps (of course in all cases modified to the extent that items have already been cleared as part of Report Elements):

1. Staff identifies and physically segregates in electronic form all Web Elements.<sup>3</sup>
2. Staff determines the source of each Web Element and, where these were produced pursuant to confidentiality or other agreement notifies and seeks (generally as per these agreements 14 days in advance) comment from the Web Element provider to the use of the Web Element. (While the FCIC does not need affirmative consent pursuant to most of our Confidentiality Letters, either receiving no response to the notice letter or an affirmative consent should eliminate any concerns regarding release of trade secret or business proprietary information.) Staff also determines after consultation with the Web Element provider if there are any needed redactions. (This process is already underway, and has resulted in a number of questions, objections to disclosure and requests for clarification and further discussion from the recipients.) As a courtesy, we are also telling providers of Web Elements that we might also place their previously cleared materials on the Web.
3. Staff determines if any Web Elements require special consent due to special terms of any confidentiality agreements or other previously agreed-upon use restrictions, and seeks consent where needed and pulls the document if the same is not obtained.
4. Where a request for comments elicits objections to disclosure or a required consent is not forthcoming, Staff determines if release of the Web Elements raises special concerns. If the staff determines that the special concerns are not valid, subject to the other requirements herein, the documents will be released. If valid, the staff will consider applicable legal requirements, and will weigh the benefit of disclosure by the Commission against the potential harm to the provider caused by disclosure of the special concerns, negotiate

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<sup>3</sup> Clearing MFRs and interviews is a very labor intensive process. The highest priority will be given to MFRs and audio tapes or transcripts of individuals quoted in the Report. Next, the staff will determine which interviews should have priority for clearance, although as a practical matter we are seeking clearance for all of them at this time, and prioritization will come into play when dealing with objections. Some interviewees were assured by FCIC staff that the interviews would be private, or were for background purposes only, and that, of course, will be respected. However, even in those cases, people may change their views and we should ask about release anyway. If promised confidentiality is not waived, the interview materials should be left to the National Archives unless there is a compelling reason to disclose documents and override the promise where circumstances permit. (Virtually all interviewees were informed that the interview materials would be delivered to the National Archives.)

redactions if the same will be helpful in resolving disclosure issues and if Web Element would still be worthy of disclosure after the redactions, and raise the matter to the Commission if the special concern issues cannot be resolved by staff and the document provider. Once resolved, the staff will then adjust the composition of the Web Elements accordingly. The decision about whether to release or redact Web Elements after valid objection must be made on a case-by-case basis depending upon the nature of the material under consideration.

### **C. Commission Approval Process**

The decision to release publicly confidential documents is one which should be made by the full Commission, either directly or through a process of delegation. It is unwieldy and impractical to expect that the full Commission will review all of the Web Elements and Report Elements, so a procedure for approval should be considered. Currently, the Commissioners are governed by the following:

The Ethics Guidelines for Commissioners provide that the Chairman or the Commission may release confidential information.

Many of the Commission's Confidentiality Agreements provide that documents may be released upon the agreement of the Chairman and the Vice Chairman, or upon a majority vote of the Commission.

In addition, the Commission must approve the Report, which includes the Report Elements and, for our purposes, Web Elements as well.

As noted above, in those few cases where there is staff discretion (such as under clause C(v) above), I recommend that the Executive Director or General Counsel determine which documents should be recommended to the Commission for a determination in accordance with its processes for inclusion in Report Elements or Web Elements. This will primarily occur in situations where the staff has received objections to disclosure and the determination to override the objections must be made.

## **II. Legal Considerations for the Release of Documents Received by the Commission**

**There Are Statutory and Regulatory Prohibitions on the Release of Confidential Information, but Congress has investigative powers which have been held to override these provisions, and the Commission has the benefit of those powers as a creation of Congress.**

18 USC §1905. Disclosure of confidential information generally --

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311–1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the

identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

In addition, 12 CFR part 261 creates similar limitations on the disclosure of "confidential supervisory information" of the Federal Reserve Board, 12 CFR part 4 protects "non-public OCC information," 12 CFR part 309 protects "non-public information" of the FDIC and so forth.

The Commission is formed under Congress, and is entitled to the benefit of Congress's authority and power to obtain information, including but not limited to proprietary information, is extremely broad. The Commission's inextricably related ability to release this information arises out of the objectives of the Commission, to issue a report. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional investigations, the Supreme Court has firmly established that such power is so essential to the legislative function as to be implied from the general vesting of legislative powers in Congress. *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977). Even the pendency of civil or criminal litigation cannot delay a committee inquiry. *Sinclair v. United States*, 279 U.S. 263 (1929).

The federal courts, when applying Congress's broad investigatory power to obtain access to documents containing confidential or proprietary information, have expressly held that executive agencies and private parties may not deny Congress access to such documents, even if they may contain trade secrets or other sensitive information whose disclosure to the public is otherwise statutorily barred. See, e.g., *FTC v. Owens-Corning Fiberglass Corp.*, 626 F. 2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F. 2d 582, 585-86 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. FTC*, 548 F. 2d 977, 979 (D.C. Cir. 1976). Specifically, courts have held that release of information to a congressional committee is not considered to be disclosure to the general public, see *Owens-Corning Fiberglass Corp.*, 626 F. 2d at 970; *Exxon Corp.*, 589 F. 2d at 589; *Ashland Oil*, 548 F. 2d at 979; *Moon v. CIA*, 514 F. Supp. 836, 840-41 (D.D.C. SDNY 1981), and once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties. See, *Owens-corning Fiberglass*, 626 F.2d at 974; *Exxon Corp.*, 589 F. 2d at 589; *Ashland Oil*, 548 F. 2d at 979; *Moon v. CIA*, 514 F. Supp. at 849-51.

In addition, our statute expressly requires the Commission to seek testimony or information from principals and other representatives of government agencies and private entities that were significant participants in the United States and global financial and housing markets during the time period examined by the Commission. As the Commission's enabling legislation manifests the clear congressional intent to establish an independent legislative branch entity with investigative powers, authorities and prerogatives equivalent to those of past and present standing and special investigatory committees, the decision to release confidential documents or materials as part of its statutory duty to report on the causes of the crisis rests in the Commission's discretionary determination that such public release will further fulfillment of its mandated statutory mission, a decision that cannot be limited by any court ruling or

regulatory or statutory standard. Such decisions must be made responsibly and with proper regard to the rights of the parties involved. As such,, the disclosure of relevant information by the Commission as part of its Report should be protected as outlined above.

This broad power to receive and disclose confidential and proprietary information is limited by the purpose for which the information is obtained, however, and while the use of that information in the report to be delivered to Congress and the President, and therefore to the American public would be within the powers described above, there is a question as to whether the same standard would be applied should that information be disclosed in a commercially released book without express or implied consent of the information provider. While this is an issue for the publisher and not the Commission, I nonetheless recommend that the FCIC take special care to insure compliance with the appropriate clearance procedures for all documents referenced or quoted in the Report or included in the enhanced e-books.

Finally, it appears, based on a 5th Circuit Court of Appeals case, *United States v. Wallington*, 889 F.2d 573 (5th Cir. 1989) that violations of 18 USC §1905 require *mens rea*, a guilty mind or conscious intent, and inadvertent violations are not actionable. (There are very few reported cases referencing §1905.)

### **The FCIC Has Entered into Confidentiality Letters Pursuant to Which It Has Received Confidential Information**

The FCIC has entered into at least 69 confidentiality agreements of various forms pursuant to which it has committed to a process concerning the Commission's use of documents and other information submitted to it by document providers, including federal agencies and departments, state and local government entities, and business organizations and individuals. (A list of the parties to those agreements is attached as Appendix A.)

While the confidentiality agreements vary, virtually all of them contain provisions that require the FCIC to maintain in confidence the documents designated as confidential and to consult with the document provider prior to disclosing the information (and often specify a 14 day consultation period). The agreements all allow the FCIC to disclose the confidential information it determines appropriate in any interim or final report or in connection with public hearings upon the agreement of the Chairman and the Vice Chairman or upon a majority vote of the FCIC. Many of the agreements specifically reference, for example, certain bank regulatory reports confidentiality provisions, trade secrets and similar items protected from disclosure by statute or regulation as examples of the types of the documents entitled to confidential treatment in accordance with the letters. But that does not override the Commission's ability to release the documents if it so determines. In many of the earlier Confidentiality Letters, the FCIC has stated that it will ask the National Archives not to release confidential documents submitted to the Commission for at least five years after the conclusion of the Commission's work (in keeping with a pattern set by the 9/11 Commission).

A typical corporate Confidentiality Letter provides:

In accordance with its statutory mandate and its duty to the American public, the Commission, if it determines it is in the public interest, may release to the public non-public information obtained from XXX as part of any interim or final report to the President and Congress, or in any public hearings, if the Commission determines

to do so by a majority vote, or by the decision of the Chairman and Vice Chairman acting together on behalf of the Commission.

Prior to any release of non-public information under the above paragraph, the Commission will give written notice to XXX, and allow XXX to consult with the Commission before the Commission uses any of the XXX's non-public information in any interim or final report to the President and Congress, or in any public.

With respect to interviews and related MFRs, it has generally been the practice of counsel to financial institutions and departments and agencies to note either by e-mail as part of the process by which the interviews were arranged, or during the interview, that the interviews would also be covered by the confidentiality agreements between the FCIC and the respective financial institution or agency or department. Interviews conducted with industry observers who are not affiliated with organizations subject to confidentiality agreements have usually not contained those types of restrictions, but even in these situations an FCIC staffer should review the tapes to be certain. Some interviews were conducted with assurances of a confidential treatment or under the explanation that they were "for background purposes." For these interviews, I would notify the interviewee (and we are trying to notify all interviewees) and see if he or she objects to disclosure before making a final release decision. And if there is no objection then disclosure should be appropriate.

Not all entities and agencies have entered into Confidentiality Letters with the FCIC. Some have instead submitted documents or consented to interviews pursuant to individual requests, letters or e-mails requesting confidentiality of the applicable material.

Internally, the FCIC recognizes the sensitive nature of its work and has taken precautions to ensure the confidentiality of nonpublic information that it receives. These steps include requiring all FCIC personnel to sign a confidentiality and non-disclosure agreement, which protects all nonpublic information and specifically restricts the dissemination of any trade secrets or other proprietary information.

Given the nature of the Confidentiality Letters into which the FCIC has entered, I believe there may be a distinction between public release via the Commission's Report or website (which the FCIC will treat as ancillary to the Report) and public release through the National Archives. As to the former, compliance with the consultation or consent process described above should eliminate most concerns regarding the disclosure of trade secrets and other confidential information. As to the latter, delivery to the National Archives with a Commission suggested release schedule is only the beginning of the analysis to be addressed at a later date.

## Appendix A

### Confidentiality Letters [to be updated]

TAB	NAME
1	SEC- Mark Cahn
2	Board of Governors of the Federal Reserve System- Ben Bernanke
3	OCC- Julie Williams
4	FDIC- Michael Bradfiel
5	FHFA- Alfred Pollard
6	DOL- Deborah Greenfield
7	CFTC- Dan Berkovitz
8	OTS- Deborah Dakin
9	DOJ- Ronald Weich
10	Treasury- George Madison
11	Citi- Brad Karp
12	LexisNexis- Kara Hinrichs
13	HUD- Heather Kanovsky
14	FINRA- James Shorris
15	State Street- David Phelan
16	NY State Banking- Marjorie Gross
17	Goldman Sachs- Richard Klapper
18	Morgan Stanley- Raul Yanes
19	PIMCO- John Sopko

20	Vanguard- Nathan Will
21	Fannie Mae- Jeff Kilduff
22	UBS- John Moon
23	Barclays- Caroline de Onis
24	S&P- Brian Markley
25	CT AG- George O'Connell
26	OH AG- Doreen Johnson
27	omitted
28	AIG- Mitchell Berger
29	Cornwall Capital- William Gussman
30	Magnetar- Steven Ross
31	Moody's- Steven Ross
32	MKP- Patricia Alcamo
33	GSC Group- Daniel Ross
34	NIBC- Albert Lambert
35	Laura Schwartz- Robin Alperstein
36	Scion- Michael Burry
37	ACA- Nathan Erickson
38	UBS- Maite Quino
39	Alan Roseman- Robert Bennett
40	Charles Gates- Daniel Zinman
41	Markit- Mark Davidson
42	Eric Dinallo- John Kenny

43	TCW - Michael Cahill
44	Andrew Forster- David Brodsky
45	Joe Cassano- Jim Walden
46	Credit Suisse- Daniel Zinman
47	Wachovia- Robert Kelner
48	NCRC- Josh Silver
49	Ally Financial- John Hromy
50	S&P (Special)- Brian Markley
51	PIMCO –
52	Moody's (Special)- Sharon Nelles
53	Wendy Ruberti
54	Fremont General- Jim Caroll
55	NCUA- Robert Fenner
56	Maryland Insurance Administration- Neil Miller
57	David Sambol- Walt Brown
58	ICAP North America Inc.
59	RMIC- John Heitkamp
60	Greg Levine
61	Aladdin Capital- Sharad Samy
62	Stone Tower- Robert Carangelo
63	Vanderbilt Capital- Peter Simmons
64	PMI- Andrew Cameron
65	Alliance Berstein- Mark Manley

66	Tim Harkness- BlackRock
67	ING- Gerald Lins
68	Deerfield Capital- Jonathan Polkes
69	MGIC- Jeffrey Lane

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**Financial Crisis Inquiry Commission  
Agenda Item 7 for Business Meeting of November 17, 2010  
Timing of Report Submission**

IX. Reporting to the President and Congress

A. Submission of Report and Testimony

The report of the Commission and appearance before and consultations with Congress are governed by FERA § 5(h), which provides that the FCIC's report is due to the President and Congress on December 15, 2010, and that the Chairperson shall, within 120 days after the date of the report's submission, appear before the Senate Banking, Housing and Urban Affairs Committee and the House Financial Services Committee.

The Commission has resolved that the Commission shall deliver its report to the President and Congress at such time in January 2011 as determined by the Commission.

B. Vote on Report

The full Commission shall vote on approval and submission to the President and Congress of the Commission's report. The Chairman shall set the time and date for a meeting of the Commission for the purpose of voting on approval and submission of the report, which date shall be no later than ~~seven days before its due date~~ two days before the approved report is anticipated to be delivered to the Government Printing Office, as the Chairman shall determine. Notice of this meeting must be provided to all Commissioners no less than one week prior to the date of the meeting, along with a draft copy of the report

in its then current form, and any material changes to the report thereafter shall promptly be delivered to the Commissioners in redlined form from time to time prior to the meeting. Commissioners who are unable to attend the meeting at which the vote on approval and submission is scheduled may vote telephonically or by email by transmitting their vote in either manner to a staff member designated by the Chairman. Approval and submission requires a majority of the votes of those Commissioners physically present and voting and those who vote telephonically or by email. After the meeting and vote, absent another vote, (which may be called for by the Chairman on 48 hours notice), only grammatical, and technical, non-substantive changes, as determined by the Executive Director may be made to the report.

### C. Additional or Dissenting Views

Commissioners may submit additional or dissenting views for publication in the report submitted to the President and Congress. They may be submitted by one or more Commissioners. They are to be provided to the staff member designated by the Chairman by a time designated by the Chairman (that shall be prior to the final deadline for completion of all report material), and the staff member shall promptly circulate to all Commissioners all additional and dissenting views that are received. Additional or dissenting views not provided by the time specified by the Chairman will not be included in the report submitted to the President and Congress.



**Financial Crisis Inquiry Commission  
Agenda Item 8 for Business Meeting of November 17, 2010  
Procedures for Additional or Dissenting Views**

1. General. Any Commissioner may submit additional or dissenting views for publication with the report submitted to the President and Congress in accordance with the procedures set forth herein.
  
2. Timing.
  - a. All additional or dissenting views are to be provided to the General Counsel (or another staff member designated by the Chairman) no later than two days after the date the Chairman provides notice to the Commissioners of the meeting to approve the report, and the staff member shall promptly circulate to all Commissioners all such additional or dissenting views.
  - b. Commissioners submitting additional or dissenting views for publication by the Commission's commercial publisher (see section 3(c) below) must specify the maximum length thereof when making the submission per section 2(a) above.
  - c. The final versions of any additional or dissenting views must be provided to the Commission staff no later than 5:00 PM EST on the day after the day the Commission approves the report.
  
3. Format
  - a. Additional or dissenting views of any length may be submitted by one or more Commissioners for publication in the report printed by the Government Printing Office and delivered to the President and Congress.
  - b. The Commission, at the meeting called to approve the report, may either designate the additional or dissenting views destined for the document printed by the Government Printing Office to be printed:
    - i. in one volume along with the approved report and the content delivered under section 3(c); or
    - ii. in a separate volume.
  - c. Additional or dissenting views of up to approximately [2,250 words (approximately 5 typeset pages) in length, plus one page of footnotes], may be submitted by any Commissioner for publication in the Commission's commercially published report. Commissioners may choose

to aggregate and combine page allotments as they shall determine (i.e., two Commissioners may submit [4,500 words plus two pages of footnotes]).

- d. After submitting additional or dissenting views per sections 3(a) and 3(c) above, Commissioners may make further and final changes to their views (but may not increase the length of material to be published by the Commission's commercial publisher) and submit the same to the General Counsel (or another designated staff member) for circulation to the full Commission and submission for printing in the manner described herein, but not later than the date set forth in section 2(c) above.

#### 4. Miscellaneous

- a. All additional or dissenting views submitted per sections 3(a) and (c) above shall be posted on the Commission's website upon release of the Commission's report.
- b. Additional or dissenting views shall be identified by the authors thereof.
- c. Any additional or dissenting views for inclusion with the approved report materials printed by the Commission's commercial publisher, or for printing by the Government Printing Office, must be submitted in Microsoft Word, with any accompanying camera ready charts.
- d. Additional or dissenting views not provided by the time and in the manner specified above will not be included with the Approved Report submitted to the President and Congress, but shall be posted on the Commission's website if the same is submitted to the General Counsel (or another designated staff member) on or before February 4, 2011.