

**The Financial Crisis Inquiry Commission:
The FCIC's First Public Meeting and Its Path for the Future**

September 25, 2009

The first public meeting of the Financial Crisis Inquiry Commission (FCIC), held last week in Washington, D.C. on the anniversary of the collapse of the financial markets, emphasized the significant challenges and the enormous pressures the Commission must overcome to achieve the directives mandated by the Fraud Enforcement and Recovery Act of 2009 (FERA). As is customary in most inaugural meetings, each of the Commissioners gave prepared remarks discussing their individual views of the importance of the Commission's charge to uncover the causes of the financial crisis, previewing certain issues that they believed should be closely examined, and stressing the need to act quickly. The session, as well as announcements and press reports prior to and following the meeting, also provided some insights about how the Commission intends to proceed and the challenges that may lie ahead for the financial services industry, involved regulators, and firms or companies that received government assistance through the Troubled Asset Relief Program (TARP).

The FCIC's Mission and Its Members

At the outset of the meeting, Chairman Phil Angelides defined the FCIC's mission as "simple and straightforward" at its core: "We have been called upon to conduct a full and fair investigation in the best interests of the nation—pursuing the truth, uncovering the facts, and providing an unbiased, historical accounting of what brought our financial system and our economy to its knees." Although Chairman Angelides and his fellow commissioners did not outline in detail which industries or factors might be scrutinized by the FCIC, their prepared remarks predictably concentrated on mortgage lending, complex and risky credit practices, capital market failures, and the role played in the crisis by the institutions that failed—or were saved from failing—and the regulators charged with overseeing them. Thus, it is likely that the FCIC's initial focus will remain on each of the above issues, the financial services industry and other firms that accepted TARP funds, as well as their regulators and those responsible for deciding which firms survived the crisis. In fact, speaking immediately after the meeting, Chairman Angelides acknowledged that there were several obvious targets of the investigation, specifically naming several firms and alluding to others. He also stated his intention to call key government sponsors of the bailout plan, credit rating agencies, and regulating institutions in charge of market oversight.

Virtually all commissioners pledged a bipartisanship approach to the Commission's business. However, it was clear from their prepared remarks, backgrounds, and public writings that some

commission members have fundamentally different views regarding the efficacy of governmental regulation in a free capital market system. These differences will present significant challenges for the Commission both in identifying and evaluating the root causes of the financial crisis and in providing recommendations for the future.

Despite their differences, however, there is one area where all commission members will find common ground: if illegal conduct is discovered, there will most certainly be unanimity in purpose in investigating that wrongdoing and making state and/or federal criminal referrals, if appropriate. The Commission has already adopted, but not yet made public, its “Rules of Procedure” that include whistleblower protections. In addition, some commission members already have been actively encouraging whistleblowers to contact the FCIC. Therefore, as firms prepare to respond to commission requests for documents or interviews, careful attention should be paid to the handling of any practices that could be questioned or scrutinized by regulators.

The Commission’s Staff

Shortly before the hearing, Chairman Angelides and Vice Chairman Bill Thomas jointly announced the appointment of a career prosecutor, Thomas Greene, as the Commission’s Executive Director. Greene served for more than twenty years in the California Attorney General’s office, including as Chief Assistant Attorney General of the Public Rights Division. He also chaired the Multi-State Antitrust Task Force for the National Association of Attorneys General, which coordinated the investigation and prosecution of major antitrust cases across the United States.

According to the Commission’s press release, Greene “has led complex investigations and prosecuted major cases in the fields of antitrust, consumer protection, energy and corporate responsibility, among others. He coordinated the multi-state antitrust remedies against Microsoft and led the team that prosecuted multiple civil cases against Enron and negotiated a \$1.5 billion settlement with El Paso Natural Gas, concluding actions arising from California’s energy crisis.” Among other distinguished positions, Greene also previously served as the congressional representative to the Financial Accounting Standards Board and Special Counsel to the Chairman of the U.S. House of Representatives’ Subcommittee on Oversight and Investigations, a subcommittee of Rep. Henry Waxman’s (D-Calif.) Committee on Energy and Commerce.

Given Greene’s experience managing complex and wide-ranging investigations that implicate civil and criminal federal and state laws and sensitive political and public relations issues, he can be expected to effectively assist the commissioners in navigating important and complex procedural and substantive issues on matters that could be referred for or subject to further investigation by third parties, including Congress or prosecutors. Further, Greene likely will have preexisting relations with congressional staffers and members of Congress who are involved in parallel congressional investigations or drafting related reform legislation.

At its first public meeting, the Commission announced that it expects to have in place the rest of its leadership staff by the end of October.

The Commission’s Schedule

Each of the commissioners noted that the greatest challenge to meeting the FCIC’s very broad mandate is time. The final report is due fifteen months from now, on December 15, 2010. Thus,

before the conclusion of the meeting, Chairman Angelides provided some details regarding the general timeline for the Commission's investigation.

By the end of October, the Commission will:

- Fill the ranks of its investigative staff under recently appointed Executive Director Greene
- Issue document retention letters to relevant firms and government agencies
- Announce a more detailed timeline
- Establish its website and Washington, D.C. office at 1717 Pennsylvania Avenue, N.W.

By the end of November, the Commission will begin conducting interviews.

By the end of December, the Commission will hold its first substantive public hearing.

Additional Observations Based on the FCIC's First Public Meeting and Recent Reports

In addition to providing an approximate timeline of its plan of action and a glimpse into the predilections of the individual commissioners, other important takeaways from the FCIC's first public meeting and announcements last week include:

- The Commission continues to conduct nonpublic meetings to develop its path forward—which, at this point, is still a “work in progress.” The Commission has been slow to get started, but one should not assume it will not move forward with vigor and zeal.
- The Commission plans to conduct some interviews and hearings outside of Washington, D.C. to connect with those most affected by the crisis.
- Although Chairman Angelides has stated that he prefers voluntary cooperation, he indicated no reluctance to use the Commission's subpoena authority and its express power to make criminal referrals to the Department of Justice or state prosecutors.
- Most commissioners believe that the FCIC can and will provide substantive input for legislative and regulatory changes. Importantly, Chairman Angelides and others have made express comparison of the Commission's work to that of the Pecora Commission, which investigated the causes of the Great Depression and resulted in sweeping regulatory oversight, including the creation of the Securities and Exchange Commission. Although there is ongoing debate among legislators as to the FCIC's role in influencing legislative reform, it is clear nonetheless that the Commission will at least use its mandate to impact regulatory improvements.
- The commissioners acknowledged that Congress and the respective committees of jurisdiction in both chambers will continue to move independently with their own investigations and legislative calendars, thus making clear that firms from which information is sought should expect a broad and complex maze of parallel inquiries.
- Even if Congress moves forward with reform legislation without commission input or in advance of the Commission's final report, it is likely that the Commission's investigative authority can and will be used to advance legislative agendas. Other congressional committee

investigations will continue within their respective jurisdictions but, by nature, the FCIC has a transcendent subject matter mandate and should receive the most attention from the press. As such, expect the eventual commission hearing calendar to, at least, mirror the topics most relevant to the particular congressional oversight hearings and financial legislative proposals on the table at the time. However, in such a competitive environment, it can be expected that the list of targets and witnesses will be enlarged to include “new faces.”

Summary

Consistent with our prior guidance on this matter (available online at <http://www.morganlewis.com/pubs/WashingtonSpotlight-FinancialServicesIndustry.pdf>), the FCIC’s first public meeting on September 17 serves to emphasize the need for devising a global strategy as the Commission begins its work:

- **Whistleblowers:** While the Commission did not release details of its Rules of Procedures, it did indicate that they expressly include whistleblower protections. Thus, if it has not already been done, steps should be taken to ensure that management and relevant personnel are informed about the existence and scope of the Commission and other related investigations, particularly when executing employment decisions and dealing with post-employment issues. Strategies should be in place for addressing whistleblower issues if and when they arise.
- **Document Preservation and Collection:** The Commission announced that it expects to send document retention letters by the end of October. Apart from any other existing obligations, it will be prudent to preserve documents potentially relevant to the issues that may be under consideration. In addition, employees should be prepared to strictly abide by any ensuing instructions to preserve materials, as well as to identify, collect, review, and provide information in a short time period.
- **Potential Confidentiality/Privilege Assertions:** The fact that the Commission announced it had consulted with congressional lawyers when formulating its Rules of Procedures suggests that it may take the view that it should be entitled to view otherwise attorney-client privileged information, materials protected by attorney work product, and/or trade secret, proprietary, and confidential business information. In the closely watched showdown between Bank of America and the House Committee on Oversight and Government Reform, it has been made eminently clear that congressional oversight committees will not necessarily respect the attorney-client privilege, a decision that could have significant regulatory repercussions if the privilege ultimately is waived. In addition, as in any high-profile investigation, the prospect for the subsequent leaking of materials produced is significant. Therefore, to the extent sensitive materials are produced to the Commission (or a congressional committee), it will be important to take steps to contain the further release of any privileged or confidential documents so as to avoid providing material to regulators or future civil litigants. In sum, confidentiality and privilege assertions will be important to consider at the outset and during negotiations as to the scope of formal and informal requests for documents and information.
- **Discretionary Witnesses:** There will be a short time period between initial interviews conducted by commission staff and potential public testimony. Therefore, the Commission will likely focus on gaining access to certain high-level officials for potential public testimony. To

the extent that commission staff requests pre-hearing depositions or interviews, there may be some flexibility in choosing the witness and otherwise controlling the parameters of the inquiry.

- **Public Relations Strategies:** While there was relatively little coverage of the Commission in the days and weeks leading up to the September 17 hearing, its first meeting did generate significant attention from the mainstream and financial press. This suggests that once the Commission begins issuing targeted requests for documents and witnesses to established entities, those events will receive significant coverage by the major press outlets. Hence, as in any investigation, maintaining the delicate balance between demonstrating responsiveness and guarding proper firm interests is critical. Further, as with any public relations strategy, it will be important to play subtle offense as well as defense, and point out any prudential steps or effective recourse taken.

Morgan Lewis is well poised to assist your firm to assemble your assets and to prepare to meet the challenges outlined above. Our team has the experience to deal with each facet of these potential investigations and complex financial issues, as well as the skills and judgment required to formulate the strategies necessary to prepare for and respond to these inquiries.

If you have any questions regarding any of the issues discussed above, please contact any of the following Morgan Lewis attorneys:

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