

## Washington Spotlight on the Financial Services Industry

August 13, 2009

Members of the bipartisan Financial Crisis Inquiry Commission (FCIC) will soon meet for the first time to consider how best to accomplish the sweeping directives mandated by the Fraud Enforcement and Recovery Act of 2009 (FERA), which require an examination of *all* factors that led to the failures of the credit, capital and housing markets and several large Wall Street firms, and that resulted in the \$700 billion financial bailout package. The Commission, made up of six Democrats and four Republicans, has broad-based powers, including the ability to hold hearings, take testimony, receive evidence, administer oaths, subpoena witnesses and documents, and obtain information directly from any relevant government department or instrumentality. Importantly, the Commission also will have the power to seek contempt charges against those who fail to comply with its demands and to make *criminal referrals* to federal and state authorities if evidence of illegal activity is uncovered.

Although there have been some informal discussions, it is anticipated that the Commission's initial formal meeting will be shortly before Labor Day. In the interim, as with any commission, the first order of business will be to hire and organize a staff, including an executive director and general counsel, and to develop a budget, guidelines and procedures for the Commission's business. Unlike other commissions or congressional committees, FERA specifically exempted the FCIC from existing statutory rules and procedures, leaving the Commission members to develop and adopt their own set of formal and informal procedures. Creating rules and procedures likely will be crucial to the Commission's agenda, and will be informative as to how the Commission will conduct its business. To meet its hefty goal of producing a final report by the end of 2010, the Commission will need to begin its substantive work in earnest soon. The FCIC's Chairman has already promised to start public hearings shortly after the Commission has its first meeting. Thus, Wall Street and affected industries should anticipate hearing from the Commission beginning in September, including the possibility of document, interview and testimony requests.

The FCIC, however, is not the only governmental entity searching for evidence of wrongdoing in connection with the 2008 financial crisis. The United States Senate Permanent Subcommittee on Investigations, the House Committee on Oversight and Government Reform, the Department of Justice, the Securities and Exchange Commission and other agencies are also reviewing matters related to the crisis. In fact, last week, several large Wall Street financial institutions received subpoenas from the Senate Permanent Subcommittee on Investigations, led by Senator Carl Levin, which is reportedly initially looking for evidence of fraud in connection with the housing market meltdown.

*These investigations, inquiries and efforts to overhaul the financial regulatory framework are unlikely to be coordinated.* Firms caught in the cross-hairs of investigations aimed at determining the causes and exacerbating factors of the 2008 financial markets crisis should anticipate a series of broad inquiries and requests for interviews and testimony, a degree of Washington partisanship, and possible referrals for enforcement action. Since there will be several organizations seeking to capture the public’s attention, the net will probably be cast wider than is otherwise logical. If missteps are made, wrongdoing uncovered, or suspicions raised as to an entity’s conduct or involvement by one investigating body, other investigative requests and testimony are likely to follow. The media can also play a role in expanding the scope of targets, as these competing outlets vie with each other for attention.

To avoid missteps, it will be important for potential “target” companies to consider and implement coordinated global legal, legislative and public relations strategies to guide their executives and Boards of Directors through the expected broad and complex maze of inquiries. Firms will need to strike delicate balances in being completely responsive, while avoiding the pitfalls inherent in being under the glare of the Washington spotlight and the possible threat of further investigations or follow-on litigation. Considerations regarding the protection of privileged, confidential or proprietary information, as well as exposure to witnesses of potential collateral consequences of their testimony, will need to be carefully weighed. For example, Congress and some commissions have not felt bound by the attorney-client privilege and work product protection. Firms will also need to be vigilant to inevitable “whistleblower” issues that can arise in these environments.

Much has been made of the comparison between the FCIC and the “commission” led by Ferdinand Pecora in the wake of the Great Depression, which turned public sentiment against Wall Street and resulted in tough financial markets reforms. Unsurprisingly, the FCIC Chairman stated that the Commission will “leave no stone unturned” in ascertaining “facts as to what brought down the nation’s financial system.” Senator Levin and others are expected to be equally aggressive. Thus, the risk of being caught in an investigative vortex is enhanced, as is the need for a careful, seasoned strategy.

Morgan Lewis is well-poised to assist your firm to assemble your assets and prepare to meet the challenges outlined above. We have seasoned professionals with the experience to deal with each facet of these potential investigations and complex financial issues, and 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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