

**THE FINANCIAL CRISIS INQUIRY  
COMMISSION:  
WHAT TO EXPECT AND HOW TO PREPARE**

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*Webcast Briefing*

*June 19, 2009*

# Today's Panelists



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# Today's Panelists



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# How the Commission Was Created

- Legislation to create a commission first introduced in 110<sup>th</sup> Congress (Cantwell, Lieberman, and Collins)
- No legislative activity until April of this year. Then, on the unrelated Fraud Enforcement and Recovery Act (P.L. 111-21):
  - Senate voted 92-2 specifically to create a financial markets commission; and
  - House voted 367-59 to pass FERA with similar language attached.
- Supported by Chairmen of Senate Banking and House Financial Services Committees.

# Composition of Commission

- Ten members
  - Three by Senate majority leader.
  - Three by Speaker of the House.
  - Two by Senate minority leader.
  - Two by House minority leader.
- Committee Leadership
  - Chair: Senate majority leader and House Speaker jointly select.
  - Vice-Chair: Minority leaders in both houses jointly select.
- Party Affiliations
  - No restrictions, except Chair and Vice-Chair cannot be members of the same political party.
- Commissioners could be announced shortly.

# Functions

- Broad investigative mandate.
  - Examine causes of economic and financial crisis in specific areas.
  - Investigate specific institutions.
- Refer individuals for possible criminal prosecution.
- Report findings to Congress.

# Investigative Responsibilities

- Examine enumerated possible causes:
  - **Fraud and abuse in the financial sector, including fraud and abuse towards consumers in the mortgage sector.**
  - Federal and State financial regulators, including the extent to which they enforced or failed to enforce statutory, regulatory, or supervisory requirements.
  - The global imbalance of savings, international capital flows, and fiscal imbalances of various governments.
  - Monetary policy and the availability and terms of credit.
  - Accounting practices, including mark-to-market and fair value rules, and treatment of off-balance sheet vehicles.
  - Tax treatment of financial products and investments.
  - Capital requirements and regulations on leverage and liquidity, including the capital structures of regulated and non-regulated financial entities.

# Investigative Responsibilities

- Credit rating agencies in the financial system, including reliance on credit ratings by financial institutions and Federal financial regulators, the use of credit ratings in financial regulation, and the use of credit ratings in the securitization markets.
- Lending practices and securitization, including the originate-to-distribute model for extending credit and transferring risk.
- Affiliations between insured depository institution and securities, insurance, and other types of nonbanking companies.
- The concept that certain institutions are 'too-big-to-fail' and its impact on market expectations.
- **Corporate governance, including the impact of company conversions from partnerships to corporations.**
- **Compensation structures.**
- **Changes in compensation for employees of financial companies, as compared to compensation for others with similar skill sets in the labor market.**

# Investigative Responsibilities

- The legal and regulatory structure of the United States housing market.
- **Derivatives and unregulated financial products and practices, including credit default swaps.**
- Short selling.
- Financial institution reliance on numerical models, including risk models and credit ratings.
- The legal and regulatory structure governing financial institutions, including the extent to which the structure creates the opportunity for financial institutions to engage in regulatory arbitrage.
- The legal and regulatory structure governing investor and mortgagor protection.
- Financial institutions and government-sponsored enterprises.
- **The quality of due diligence undertaken by financial institutions.**

# Investigative Responsibilities

- “Examine the causes of the collapse of each **major financial institution** that failed.”
  - Includes “*institutions that were acquired to prevent their failure*” and;
  - Each institution that “*was likely to have failed if not for the receipt of exceptional Government assistance from the Secretary of the Treasury during the period beginning in August 2007 through April 2009.*”
- Inclusive, undefined language.

# Report

- Report general findings and conclusions on causes of the crisis.
  - Submit to the President and Congress.
  - Due December 15, 2010.
- Specific institutions.
  - May *produce reports* or make specific findings about any financial institution  
Commission examines.

# Information Gathering

- From other federal entities.
  - “*Any* information related to *any* inquiry of commission.”
  - Includes confidential information.
  - Federal agencies and entities “shall furnish” information directly to commission “upon request.”
- From non-governmental sources.

# “Significant Participants”

(B) OTHER ENTITIES.—It is the sense of the Congress that the Commission should 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.

# Authorities

- Hold hearings, take testimony, receive evidence, and administer oaths.
- Subpoenas, by:
  - Agreement of Chair and Vice Chair; or
  - Majority vote, including at least one Republican commissioner.
- Likely staff deposition authority.

# Enforcing Subpoenas

- General enforcement.
  - U.S. district court may issue order requiring subpoenaed person to
    - Appear at any designated place to testify and;
    - Produce documentary or other evidence.
  - Failure to obey order can lead to contempt of the district court.
  - Special enforcement procedure never used or tested before.

# Enforcing Subpoenas

- Statutory criminal contempt. 2 U.S.C. § 192-194
  - Provides for pre-judicial contempt procedure leading to judicial trial of contemnor by a U.S. Attorney.
  - Misdemeanor.
    - Fine of up to \$100,000 and up to 1 year imprisonment.
  - Punitive.
    - Contemnor cannot be purged once found in contempt.
  - Criminal statute.
    - Same defendant safeguards as any criminal proceeding.
  - Also applies if witness appears voluntarily, but refuses to testify. *United States v. Rumely*

# Defenses

- Investigation must relate to a legislative purpose.  
*Kilbourn v. Thompson*
  - But courts interpret legislative purpose broadly.  
*Shelton v. United States*
- Questions must be reasonably related to subject matter of inquiry. *Sinclair v. United States*
- Procedural irregularities. *Shelton v. United States*
- Attorney-Client Privilege.
  - Some Congressional committees have taken position that it does not apply.
  - Lack of caselaw on point.

# Defenses

- First Amendment. *Barenblatt v. United States*
  - Balance the interest in privacy against the need for disclosure.
  - Has never succeeded in court.
- Fourth Amendment. *McPhaul v. United States*
  - Overly broad demands for documents may violate protection against search and seizure. *FTC v. American Tobacco Co.*
  - Cases conflict over strength of this argument.
- Fifth Amendment. *Watkins v. United States*
  - **Individuals** can invoke right against self-incrimination. *McPhaul v. United States*
  - Generally applies only to testimony. *Fisher v. United States*
  - Can compel testimony by granting full or partial immunity.

# Other Aspects of Commission

- Staff Director and other staff to be appointed jointly by Chair and Vice Chair.
- War supplemental includes \$8 million for commission.
  - Up from \$4 million in Senate bill
  - Special Account set up for Commission
- Termination 60 days after filing final report.

# Similarities with and Differences from Other Commissions and Oversight Entities

- Other Congressional Commissions:
  - According to CRS, Congress has created at least 87 commissions over the past 20 years.
  - Of these, only 6 were investigative.
- Other Oversight Entities:
  - Senate Permanent Subcommittee on Investigations
  - House Oversight and Government Reform Committee
  - Congressional Oversight Panel
  - Special Inspector General for Troubled Asset Relief Program
  - Government Accountability Office

# 9/11 Commission Compared

- Similar structure.
  - Both independent commissions.
- Similar powers.
  - Same hearing, evidence, oath, and subpoena powers.
  - Same subpoena enforcement powers.
  - Investigative purpose.

# 9/11 Commission Compared

- Different scope.
  - 9/11 Commission focused solely on **government** accountability and not on **private** entities and individuals.
  - 9/11 Commission tasked with making recommendations, not just findings and conclusions.
- Other differences.
  - No criminal referral provision for 9/11 Commission.
  - Composition:
    - Members of Congress could serve on 9/11 Commission.
    - 9/11 Commission required equal party representation.
    - President appointed Chair of 9/11 Commission.

# Pecora Commission Compared

- Different structure.
  - Pecora Commission not an independent commission.
  - Inquiry conducted by Senate Committee on Banking and Currency.
- Similar mandate.
  - Focus on financial industry.
  - Investigate and expose private entities and individuals.
- Investigative Methods.
  - Pecora: As one historical account describes, the inquiry staff would "*descend upon a banker or broker and go through his records, file drawer after file drawer, page by page, selecting and photostating documents. Staff lawyers and accountants would assemble this material to reconstruct the motivations, discrepancies, delinquencies, and frauds involved.*"
  - FCIC: ???

# Preparing for the Worst (Do's and Don't's)

- *Don't* assume that the investigation will be like an executive branch investigation.
- *Don't* be in a hurry. Over time, investigations can shift course or lose steam.
- *Don't* treat staff with disdain or lack of respect, and don't assume that going over their heads to the staff director or commissioner is a winning strategy.
- *Don't* assume that a subpoena is without collateral consequences.
- *Don't* assume that compliance will forestall the need to testify or prevent a subpoena from being issued.
- *Don't* default to a guns-blazing, adversarial approach.
- *Do* understand the commission's rules and jurisdiction as well as the scope of the investigation and legislative undertaking on which it is based.
- *Do* give full consideration to the implications of testifying on a parallel executive branch investigation.
- *Do* negotiate the terms of a document production or a witness interview, deposition, or testimony.
- *Do* consider whether members of Congress or others could assist you in the course of the investigation.
- *Do* develop a plan, as early in the process as possible, to handle public relations aspects of the investigation.
- *Do* make sure that, if you think you are going to need assistance, you secure it early enough to be effective.

# Effects on Financial Services Regulatory Reform

- The Administration issued a detailed “white paper” on Wednesday laying out a plan for reform.
- Congressional committees say they will move:
  - Barney Frank intends to produce and mark up a bill in July for House consideration in the fall;
  - Christopher Dodd, in the fall.
- As the commission’s investigative work heats up, pressure could build to wait for its results.
- During floor debate on legislation, members appeared to anticipate that commission would set stage for reform.

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