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Letter from Gary J. Cohen to Doreen Johnson regarding the FCIC's request of materials from the Office of the Attorney General of Ohio, and need for confidentiality

Gary Cohen

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April 13, 2010

Via Email & Mail

Doreen Johnson
Assistant Attorney General
Office of the Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215

Phil Angelides
Chairman

Re: Confidentiality of Non-Public Information

Hon. Bill Thomas
Vice Chairman

Dear Ms. Johnson:

Brooksley Born
Commissioner

In connection with the Financial Crisis Inquiry Commission's ("FCIC") request for certain materials from the Office of the Attorney General of Ohio (the "AG's Office") and the need to maintain the confidentiality thereof, we have crafted a process to enable us to obtain information necessary for the FCIC to complete its statutorily mandated task in a timely manner, while ensuring the continued confidentiality of that information, as it may be appropriate.

Byron S. Georgiou
Commissioner

Our confidentiality commitment as to the information the AG's Office produces is outlined below. You may rely upon the terms of this commitment when submitting confidential information to the FCIC.

Senator Bob Graham
Commissioner

Section 5 of the Fraud Enforcement and Recovery Act of 2009 ("FERA") created the Financial Crisis Inquiry Commission to examine the causes, domestic and global, of the current financial and economic crisis in the United States. It expressly contemplates information sharing:

Keith Hennessey
Commissioner

Subpart (d) of Section 5 of FERA provides:

Douglas Holtz-Eakin
Commissioner

In General- The Commission may secure directly from any department, agency, bureau, board, commission, office, independent establishment, or instrumentality of the United States any information related to any inquiry of the Commission conducted under this section, **including information of a confidential nature** (which the Commission shall maintain in a secure manner). Each such department, agency, bureau, board, commission, office, independent establishment, or instrumentality shall furnish such information directly to the Commission upon request. (emphasis added)

Heather H. Murren, CFA
Commissioner

John W. Thompson
Commissioner

Peter J. Wallison
Commissioner

And Subpart (c)(5) requires the FCIC:

to build upon the work of other entities, and avoid unnecessary duplication, by reviewing the record of the Committee on Banking, Housing, and Urban Affairs of the Senate, the Committee on Financial Services of the House of Representatives, other congressional committees,

Thomas Greene
Executive Director

1717 Pennsylvania Avenue, NW, Suite 800 • Washington, DC 20006-4614
202.292.2799 • 202.632.1604 Fax

the Government Accountability Office, other legislative panels, and any other department, agency, bureau, board, commission, office, independent establishment, or instrumentality of the United States (to the fullest extent permitted by law) with respect to the current financial and economic crisis.

It is the policy of the FCIC to respect the confidentiality of information submitted to it in confidence by any other department, agency, bureau, board, commission, office, independent establishment, or instrumentality of the United States to the extent consistent with its statutory mandate and its duty to the American public, and each such entity which provides information to the FCIC can be assured that the FCIC intends to abide by its policy.

The FCIC has adopted a strict Confidentiality and Nondisclosure Policy which includes the agreement by its staff not to disclose confidential information (which includes information submitted to the FCIC in confidence by other persons) outside of the FCIC except as may be reasonably required in connection with the work of the FCIC, and then only to persons who are informed of, and agree to respect, the confidential nature of the material provided. In implementing this Commitment the staff will adhere to this Policy.

Therefore, we propose the following:

Non-Disclosure Commitment

This letter (the "Commitment") to the AG's Office from the FCIC (and with the AG's Office, the "Parties") sets forth the commitment of the FCIC with respect to its treatment of non-public information obtained from the AG's Office. For purposes of this Commitment "non-public information" means information that the AG's Office has not made, and is not required by law to make, public and which the AG's Office treats as non-public. Non-public information includes both the information itself, in any form (including oral), and any document, written transcript, audiotape, videotape, or other type of transcription, replication, reproduction, or recreation which contains or is derived from such information. It is the intent of the Parties that when the AG's Office provides information to the FCIC the FCIC will treat information as non-public if it is informed by the AG's Office that the information is non-public. The AG's Office may cure an inadvertent failure to designate information as non-public information by informing the FCIC of the error within a reasonable time after the error is confirmed.

This Commitment does not apply to non-public information which becomes publicly available in a manner other than by a breach of this Commitment by the FCIC.

Accordingly, the Parties hereby mutually agree to the following:

1. All non-public information transferred from the AG's Office to the FCIC remains the property of the AG's Office.
2. Unless otherwise authorized in writing by the AG's Office, or as contemplated in this letter, non-public information may be shared only with employees and agents of the FCIC who

have a need to know the information in the performance of their official work duties consistent with applicable law. As condition of receiving non-public information, all employees and agents of the FCIC shall be bound by the terms of this Commitment and instructed to comply with all of its terms. All other persons to whom non-public information is disclosed will be advised of and, as condition of receiving non-public information, will agree to comply with the understanding in this letter.

3. The FCIC will take all steps reasonably necessary to preserve, protect and maintain all privileges and claims of confidentiality related to the non-public information and will accord at least as much protection to the non-public information as the AG's Office provides to that information.
4. If the FCIC receives a request from a third party for non-public information of the AG's Office, such as a Freedom of Information Act request or a subpoena, the FCIC will:
 - a. unless prohibited by law, immediately notify the AG's Office of such request, subpoena, order, or other process and furnish to the AG's Office copies of any such request or order as well as any documents related thereto;
 - b. afford the AG's Office the opportunity to take whatever action it deems appropriate to preserve, protect, or maintain the confidentiality of the non-public information or any privileges associated therewith;
 - c. cooperate fully with the AG's Office to preserve, protect, and maintain the confidentiality of the non-public information and any privileges associated therewith;
 - d. notify the requestor seeking the non-public information that the information was obtained from the AG's Office and, where applicable, notify the requester that requests for such information must be made directly to the AG's Office in accordance with applicable federal or state law;
 - e. resist and agree to not initiate production of the non-public information, and testimony related thereto, pending written consent of the AG's Office, except as provided in paragraph 6, and:
 - f. consent to application by the AG's Office to intervene in any action in order to preserve, protect, or maintain the confidentiality of the non-public information or any privileges associated therewith.
5. Nothing in this Commitment will prevent the FCIC from complying with a request or demand from a duly authorized Committee of the United States Congress with authority to require and receive the non-public information, or a legally valid and enforceable subpoena or order by a court of competent jurisdiction for the non-public information or testimony related thereto if, in the case of a subpoena or court order, the FCIC:
 - a. reasonably determines that efforts to quash, appeal, or resist compliance with the order would be unsuccessful or against its interest;
 - b. attempts, to the extent practicable, to secure a protective order to preserve, protect, and maintain the confidentiality of the non-public information and any privileges associate therewith; and

- c. immediately notifies the AG's Office of its intent to comply with the order and of any actions taken in compliance with the order.
6. In accordance with its statutory mandate and its duty to the American public, notwithstanding any other provision of this Commitment, the FCIC, if it determines it is in the public interest, may release to the public non-public information obtained from the AG's Office in any interim or final report to the President and Congress, or in any public hearings, if the FCIC determines to do so by a majority vote, or by the decision of the Chairman and Vice Chairman acting together on behalf of the FCIC. Prior to any release of non-public information under this paragraph, the FCIC, or the Chairman and/or Vice Chairman, as applicable, will give prior written notice to the AG's Office, and allow a reasonable period of time for the AG's Office to consult with the FCIC before the FCIC uses any of the AG's Office's non-public information in any interim or final report to the President and Congress, or in any public hearings.
7. Should a question arise as to whether information is public or non-public, the FCIC will immediately contact the AG's Office and seek a determination as to the status of the information. If the AG's Office determines that the information is non-public information, the FCIC will treat it in accordance with this Commitment.
8. The Parties intend that sharing of non-public information with each other pursuant to the terms of this Commitment will not constitute public disclosure, nor will it constitute a waiver of confidentiality or any privilege applicable to such information. The Parties expressly reserve all evidentiary privileges and immunities applicable to the information shared under this Commitment.
9. This Commitment and all of its terms and conditions is continuing and applies to the FCIC until terminated by the Party that provided the non-public information. In the event of termination of this Commitment, the FCIC agrees that non-public information will remain confidential and continue to be protected by the terms of this Commitment.

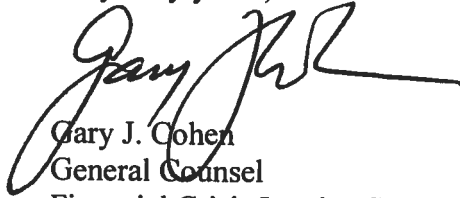
Finally, all information obtained from the AG's Office will be transmitted to the National Archives and Records Administration (NARA) following the completion of the Commission's work. To the extent permitted by law, the Commission will request that NARA not release to the public the AG's Office's non-public information for an appropriate length of time, likely five years or more. If you have a legal basis to believe that the Commission is not required by law to provide certain AG Office information to NARA, please let us know.

We trust that this Commitment will enable you to comply with the information requests staff members from the FCIC have already submitted to your staff, and look forward to your continued prompt cooperation.

If you have any questions or concerns, please do not hesitate to contact me at 202-292-1339 or GCohen@fcic.gov.

We thank you in advance for your cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gary J. Cohen", with a long horizontal stroke extending to the right.

Gary J. Cohen
General Counsel
Financial Crisis Inquiry Commission

cc: Thomas Greene
Brad Bondi