



Yale SCHOOL OF MANAGEMENT
Program on Financial Stability

EliScholar – A Digital Platform for Scholarly Publishing at Yale

YPFS Resource Library

1-26-2010

Signed Confidentiality of Non-Public Info Dan Berkovitz - Commodity Futures Trading Commission

Thomas Greene

Dan M. Berkovitz

<https://elischolar.library.yale.edu/ypfs-documents/6696>

This resource is brought to you for free and open access by the Yale Program on Financial Stability and [EliScholar](#), a digital platform for scholarly publishing provided by Yale University Library. For more information, please contact ypfs@yale.edu.



January 26, 2010

Via Email and First Class Mail

Dan M. Berkovitz
General Counsel
Commodity Futures Trading Commission
III Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Phil Angelides
Chairman

Hon. Bill Thomas
Vice Chairman

Re: Confidentiality of Non-Public Information

Dear Mr. Berkovitz:

In connection with the Commission's request for certain materials from the Commodity Futures Trading Commission (the "Information Provider") 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. Our confidentiality commitment to you is outlined below. You may rely upon the terms of this commitment when submitting confidential information to the FCIC.

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:
Subpart (d) of Section 5 of FERA provides:

(A) 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)

Brooksley Born
Commissioner

Byron S. Georgiou
Commissioner

Senator Bob Graham
Commissioner

Keith Hennessey
Commissioner

Douglas Holtz-Eakin
Commissioner

Heather H. Murren, CFA
Commissioner

John W. Thompson
Commissioner

Peter J. Wallison
Commissioner

Thomas Greene
Executive Director

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

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, 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.

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.

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.

Therefore, we propose the following:

Non-Disclosure Commitment

This letter (the "Commitment") to the Information Provider from the FCIC (and with the Information Provider, the "Parties") sets forth the commitment of the FCIC with respect to its treatment of non-public information obtained from the Information Provider. For purposes of this Commitment "non-public information" means information that the Information Provider has not made, and is not required by law to make, public and which the Information Provider 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 Information Provider provides information to the FCIC the FCIC will treat information as non-public if it is informed by the Information Provider that the information is non-public. The Information Provider 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 Information Provider to the FCIC remains the property of the Information Provider.**
- 2. Unless otherwise authorized in writing by the Information Provider, 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. All employees and agents of the FCIC with whom non-public information is shared must be advised of and, as condition of receiving non-public information, be bound by the terms of this Commitment and instructed to comply with all of its terms.**
- 3. Except as contemplated in this letter, non-public information may not be shared by the FCIC with any third party without the prior written permission of the Information Provider.**
- 4. 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 Information Provider provides to that information.**
- 5. If the FCIC receives a request from a third party for non-public information of the Information Provider, such as a Freedom of Information Act request or a subpoena, the FCIC will:**
 - a. unless prohibited by law, immediately notify the Information Provider of such request, subpoena, order, or other process and furnish to the Information Provider copies of any such request or order as well as any documents related thereto;**
 - b. afford the Information Provider 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 Information Provider to preserve, protect, and maintain the confidentiality of the non-public information and any privileges associated therewith;**

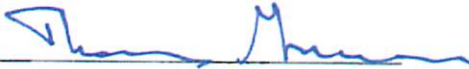
- d. notify the requestor seeking the non-public information that the information was obtained from the Information Provider and, where applicable, notify the requester that requests for such information must be made directly to the Information Provider in accordance with applicable federal or state law;
 - e. resist and agree to not initiate production of the non-public information, and testimony related thereto, pending written consent of the Information Provider, except as provided in paragraph 6, and:
 - f. consent to application by the Information Provider to intervene in any action in order to preserve, protect, or maintain the confidentiality of the non-public information or any privileges associated therewith.
6. 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;
 - c) immediately notifies the Information Provider of its intent to comply with the order and of any actions taken in compliance with the order; and
 - d) if the request or demand is from any duly authorized Committee of the United States Congress, to advise such committee of the confidential nature of the non-public information and request that the non-public information be treated as provided by the terms of this agreement.
7. 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 Information Provider 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 (with either the Chairman or the Vice Chairman acting alone on behalf of the FCIC in the context of public hearings), *provided that* nothing in this paragraph shall apply to any information covered by Section 8 of the Commodity Exchange Act, 7 U.S.C. 12, including without limitation information named in section 4f(c)(10) of such Act, 7 U.S.C. 6f(c)(10), with respect to any data or information that would separately disclose the market positions, business transactions, trade secrets, or names of customers of any person. 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 Information Provider, and allow a reasonable period of time for the Information Provider to consult with the FCIC before the FCIC uses any of the Information Provider's non-public information in any interim or final report to the President and Congress, or in any public hearings (with a target of up to 14 days prior notice whenever feasible, but with the reasonableness of the consultation period being determined based upon the amount and sensitivity of the non-public information under consideration).

8. Should a question arise as to whether information is public or non-public, the FCIC will immediately contact the Information Provider and seek a determination as to the status of the information. If the Information Provider determines that the information is non-public information, the FCIC will treat it in accordance with this Commitment.
9. 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.
10. 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.

We trust that this Commitment will enable you immediately to comply with the information requests staff members from the FCIC have and will submit to your staff and we look forward to your prompt cooperation. We thank you in advance for your assistance.

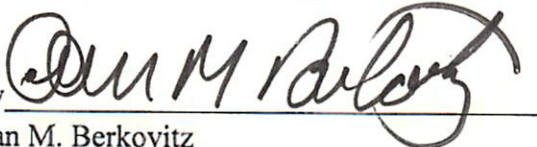
Very truly yours,

By 
Thomas Greene, Executive Director
Financial Crisis Inquiry Commission

cc: Bart Dzivi
Gary Cohen

Accepted:

Commodity Futures Trading Commission

By 
Dan M. Berkovitz
General Counsel