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### **Agenda for Financial Crisis Inquiry Commission Report Meeting Monday, January 24, 2011**

Phillip Angelides

Bill Thomas

Wendy Edelberg

Gary Cohen

Cassidy Waskowicz

*See next page for additional authors*

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**Author/Creator**

Phillip Angelides, Bill Thomas, Wendy Edelberg, Gary Cohen, Cassidy Waskowicz, Brooksley Born, Byron Stephen Georgiou, Bob Graham, Keith Hennessey, Douglas Holtz-Eakin, Heather Murren, John W. Thompson, and Peter J. Wallison



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**Agenda for Financial Crisis Inquiry Commission Report Meeting**

**Monday, January 24, 2011**

**4:00pm -5:30pm ET**

**Location: FCIC Office, Large Conference Room**

**1717 Pennsylvania Avenue, Suite 800**

**Washington DC 20006**

**or**

**For Those Participating Telephonically:**

**Conference Dial-In Number: 866-692-3582**

**Participant Access Code: 3387529**

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<b><u>Agenda Item</u></b>	<b><u>Presentation</u></b>
1) Call to Order	Chairman Angelides
2) Roll Call	Chairman Angelides
3) Approval of Minutes of Meeting of January 6, 2011 ( <i>Attached</i> )	Chairman Angelides
4) Chairman's and Vice Chairman's Report	Chairman Angelides and Vice-Chairman Thomas
5) Executive Director's Report	Executive Director Wendy Edelberg
6) Vote to Approve the Clearance of Documents ( <i>Attached</i> )	General Counsel Gary Cohen and Deputy General Counsel Cassidy Waskowicz
7) Vote to Approve New FCIC Website ( <i>Attached –2 separate PDF files</i> )	Gary Cohen, Cassidy Waskowicz and Communications Director Tucker Warren
8) Discussion and Possible Action on Archive Protocol ( <i>Attached</i> )	Gary Cohen and Cassidy Waskowicz
9) Additional voting procedures for remaining	Gary Cohen and Cassidy Waskowicz

**Commission actions (Attached)**

**10) Comments and Questions  
from Commissioners**

**All Commissioners**

**11) Other Items of Business**

**All Commissioners**

**12) Adjournment**

**Chairman Angelides**



**Financial Crisis Inquiry Commission  
Agenda Item 3 for FCIC Meeting of January 6, 2011  
Minutes of FCIC Meeting of  
January 6, 2011**

**Agenda Item 1: Call to Order**

Chairman Angelides called the meeting to order at 10:05am ET.

**Agenda Item 2: Roll Call**

Chairman Angelides asked Gretchen Newsom to call the roll of the Commissioners. Present were Phil Angelides, Bill Thomas, Brooksley Born, Byron Georgiou, Keith Hennessey, Doug Holtz-Eakin, Heather Murren, and John W. Thompson. Commissioner Bob Graham joined the meeting during Agenda Item 4. Commissioner Wallison was absent.

Also participating in the meeting were: Wendy Edelberg, Executive Director; Gary Cohen, General Counsel; Cassidy Waskowicz, Deputy General Counsel; Gretchen Newsom, assistant to Chairman Angelides; Scott Ganz, assistant to Vice Chairman Thomas; Courtney Mayo, assistant to the Vice Chair; and Rob Bachmann, assistant to Chairman Angelides.

**Agenda Item 3: Approval of Minutes of Business Meeting on December 23, 2010**

Chairman Angelides introduced the minutes from the FCIC business meeting of December 23, 2010.

MOTION: Georgiou moved and Holtz-Eakin seconded a motion to adopt the meeting minutes of December 23, 2010 (See Attachment 1).

APPROVED: 8-0 (Commissioners Graham and Wallison absent)

**Agenda Item 4: Chairman and Vice Chairman's Report**

Chairman Angelides informed the Commission that the estimate for the publication and release of the report was January 26<sup>th</sup>, but a firm date would be announced shortly. Vice Chairman Thomas requested that Scott

Ganz be notified of further edits to the report post commission approval, with primary focus on the report glossary. Vice Chairman Thomas raised concerns about the length of the book with respect to the number of pages allocated to the dissents as well as the timing of the submittal of the dissents. Chairman Angelides informed the Commission that subsequent business meetings would need to occur to wrap up Commission business beyond the approval of the report.

**Agenda Item 5: Executive Director’s Report**

Executive Director Wendy Edelberg did not have a report.

**Agenda Item 6: Vote to Approve the Resolution to Reapprove the Report**

Chairman Angelides introduced the resolution Mr. Cohen drafted regarding the re-approval of the Report and welcomed discussion. Mr. Cohen reminded the Commission of the 5:00pm deadline for the submittal of dissents after the re-approval of the Report and reminded the Commission that the Report and the documents referenced in the Report remain confidential until the public release of the Report.

MOTION: Born moved and Thompson seconded a motion to adopt the revised Resolution to Re-Approve the Report (see Attachment 2):

APPROVED: 6-4

AYE: 6- *Angelides, Born; Georgiou, Graham, Murren, Thompson,*  
NAY: 4 – *Thomas, Hennessey, Holtz-Eakin, Wallison\**  
(*Commissioner Wallison voted nay on the re-approval of the report via email*)

**Agenda Item 7: Comments and Questions from Commissioners**

No comments were brought up or questions asked by the Commissioners.

**Agenda Item 8: Other Items of Business**

Chairman Angelides informed the Commission that the next business meeting would occur in approximately 10 days to finalize the website and wrap-up other business matters.

**Agenda Item 9: Adjournment of Business Meeting**

MOTION: Georgiou moved and Graham seconded a motion to adjourn the meeting at approximately 11:09am.

APPROVED: 9-0 (Commissioner Wallison absent)



**Financial Crisis Inquiry Commission  
Agenda Item 3 for FCIC Meeting of January 6, 2011  
Minutes of FCIC Meeting of  
January 6, 2011**

**ATTACHMENT 1  
APPROVED Minutes of Telephonic Business Meeting of  
December 23, 2010**

**Agenda Item 1: Call to Order**

Chairman Angelides called the meeting to order at 10:07am ET.

**Agenda Item 2: Roll Call**

Chairman Angelides asked Gretchen Newsom to call the roll of the Commissioners. Present were Phil Angelides, Bill Thomas, Brooksley Born, Byron Georgiou, Bob Graham, Keith Hennessey, Doug Holtz-Eakin, and John W. Thompson. Commissioner Murren joined the meeting during Agenda Item 3 and Commissioner Wallison joined the meeting during Agenda Item 7.

Also participating in the meeting were: Wendy Edelberg, Executive Director; Gary Cohen, General Counsel; Gretchen Newsom, assistant to Chairman Angelides; Scott Ganz, assistant to Vice Chairman Thomas; Courtney Mayo, assistant to the Vice Chair; and Rob Bachmann, assistant to Chairman Angelides. Deputy General Counsel Cassidy Waskowicz joined the meeting for Agenda Item 7.

**Agenda Item 3: Approval of Minutes of Business Meeting on December 15, 2010**

Chairman Angelides introduced the minutes from the FCIC business meeting of December 15, 2010.

MOTION: Thompson moved and Holtz-Eakin seconded a motion to adopt the meeting minutes of December 15, 2010 (See Attachment 1).

APPROVED: 9-0 (Commissioner Wallison absent)

**Agenda Item 4: Approval of Minutes of Business Meeting on December 16, 2010**

A meeting on the 16<sup>th</sup> of December did not occur and thus no minutes were introduced for approval.

**Agenda Item 5: Chairman and Vice Chairman’s Report**

Chairman Angelides and Vice Chairman Thomas both thanked the staff of the Commission for their hard work. Chairman Angelides stated that he would give the balance of his report after Agenda Item 8.

**Agenda Item 6: Executive Director’s Report**

Executive Director Wendy Edelberg noted that the staff have been working long hours.

**Agenda Item 7: Approval of Clearance of Documents and Confidential Information for use when the Report is Released**

General Counsel Gary Cohen introduced the measure for “Adoption of Recommendations by the Executive Director and General Counsel Regarding the Use of Quotations and Excerpts from Documents in the Report” and informed the Commission of the status and process of addressing objections received by the Commission pertaining to the use of confidential information.

MOTION: Wallison moved and Born seconded a motion to adopt the measure Mr. Cohen provided in regard to the clearance of documents and confidential information for use when the report is released (See Attachment 2).

APPROVED: 10-0

**Agenda Item 8: Vote to Approve the Report**

Chairman Angelides introduced the resolution Mr. Cohen emailed to the Commission regarding the approval of the Report and welcomed discussion on the Report. Vice Chairman Thomas voiced his objection to using signatures on the page of the report that lists Commissioners – there was general consensus to not include Commissioner signatures on this page. In addition, there was discussion about how to indicate how members voted on the Report. Chairman Angelides stated that an alternative layout to what was provided to the Commission would be presented for consideration at the January meeting.

MOTION: Thompson moved and Born seconded a motion to adopt the Report as follows, and wherein Vice Chairman Thomas made a friendly amendment to insert the word “last”:

Be it resolved, that the Commission hereby adopts the report last circulated among the Commissioners in clean and redline form prior to the 10:00 am on December 23, 2010 commencement of this meeting, and that the same shall be submitted for final copy-



editing, fact-checking and legal clearance (documents and quotes), and with such further adjustments, modifications and additions, including, but not limited to, title pages, chapter headings, preface, table of contents, glossary and footnotes, as the Commissioners shall approve when the report is submitted for confirmation and re-approval in the first week of January 2011, at a Commission Meeting to be noticed and scheduled in the future.

APPROVED: 6-4

AYE: 6- *Angelides, Born; Georgiou, Graham, Murren, Thompson,*  
NAY: 4 – *Thomas, Hennessey, Holtz-Eakin, Wallison*

Mr. Cohen reminded the Commission that the filing of additional views or dissents must be received by him electronically no later than 5:00pm on December 24<sup>th</sup>.

Chairman Angelides continued his Chairman's report by introducing a resolution Mr. Cohen had emailed to the Commission pertaining to the "CIRCULATION and REAPPROVAL of the REPORT". Discussion on the matter ensued.

MOTION: Wallison moved and Born seconded a motion to adopt the measure Mr. Cohen provided in regard to the circulation and reapproval of the (See Attachment 3).

APPROVED: 10-0

AMENDMENT: Chairman Angelides called for minor edits to the resolution for clarification purposes. Born moved and Graham seconded a motion to amend the resolution by clarifying "on the earlier of the close of business (5:00 PM EST) on the day the report is reapproved, and 5:00 PM EST January 6, 2011(See Attachment 3).

APPROVED: 10-0

### **Agenda Item 9: Comments and Questions from Commissioners**

No comments were brought up or questions asked by the Commissioners.

### **Agenda Item 10: Other Items of Business**

Chairman Angelides and Vice Chairman Thomas again thanked the staff and Commissioners for their hard work. Chairman Angelides informed the Commission that the vote to reapprove the Report would likely be scheduled and noticed for both January 5<sup>th</sup> and 6<sup>th</sup> between 10:00am-2:00pm ET and requested

Commissioners to reserve this time on their calendars. No other items of business were raised by the Commissioners.

**Agenda Item 11: Adjournment of Business Meeting**

MOTION: Graham moved and Wallison seconded a motion to adjourn the meeting at approximately 11:09am.

APPROVED: 10-0



**Financial Crisis Inquiry Commission  
Agenda Item 3 for FCIC Meeting of January 6, 2011  
Minutes of FCIC Meeting of  
January 6, 2011**

**ATTACHMENT 2  
APPROVED Resolution to Reapprove Report (Revised)**

Resolved, that the Commission hereby adopts and reapproves the report (the "Report") the net documents link to which was last circulated among the Commissioners in redline form (reflecting changes when compared against the report approved and adopted on December 23, 2010) prior to the 10:00 am EST commencement of this meeting, and

Resolved further, that the Commission hereby approves the use in the Report at the time of the authorized public release of the Report of each quotation, document, interview, staff report, or other materials cited, quoted from and/or referred to in the Report, and

Resolved further, that the Commission hereby approves the use in the dissents at the time of the authorized public release of the dissents of each quotation, document, interview, staff report, or other materials cited, quoted from and/or referred to in the dissents as filed with Gary Cohen on December 24, 2010, and

Resolved further, that the Commission reaffirms the continued confidentiality of the Report and the dissents until the time of the authorized public release of the same, and

Resolved further, that the Commission hereby authorizes Wendy Edelberg and Maryann Haggerty, or either of them, to send the Report as adopted and approved to the Government Printing Office and PublicAffairs for typesetting and eventual publishing, and

Resolved further, that the Commission hereby authorizes Wendy Edelberg to make such technical and conforming changes on the Report as are necessary and appropriate to reflect the different publishers including changing "authorized version" for the PublicAffairs publication to "official government edition" for the Government Printing Office publication, and

Resolved further, that the Commission hereby authorizes Wendy Edelberg after the adoption of this resolution to make corrections, and grammatical or technical or non-substantive changes, to the Report, and to finalize footnotes and the glossary in the Report, and

Resolved further, that the Commission hereby authorizes Wendy Edelberg and Maryann Haggerty, or either of them, to approve “blue lines” of the Report as the same are prepared and circulated for approval by the publishers, and

Resolved further, that the Commission hereby authorizes the Chairman to determine a date for the authorized public release, first by the Government Printing Office and then immediately by PublicAffairs, of the Report and the dissents (which Report and dissents shall and must be released together).



**Financial Crisis Inquiry Commission  
Agenda Item 6 for Business Meeting of January 24, 2011  
Vote to Approve the Clearance of Documents/Document and Interview Review/Clearance Process**

**Memo To:** Commissioners of the FCIC

**From:** Gary J. Cohen  
Cassidy Waskowicz

**cc:** Wendy Edelberg  
Maryann Haggerty

**Date:** January 21, 2011

**Re:** Further Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website.

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On November 16, 2010, we prepared a memorandum for the Commissioners' consideration entitled Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website. A copy of that memorandum is attached. This memorandum is further to, and consistent with, that document, and provides the current status of the staff's document clearing process.

On December 23, 2010, at a Commission business meeting, the Commission approved a delegation of authority to the Executive Director and General Counsel to approve and clear documents used in the Commission's Report. With that authority, all documents<sup>1</sup> referred to in the Report and the dissents have been cleared for use therein (clearance was confirmed by the Commissioners at their meeting of January 6, 2011), and on the date the Report is released the Commission's website will be populated by substantially all of the written documents referred to in the Report.

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<sup>1</sup> As used in this memorandum documents are broadly construed to include paper documents, electronic documents, audio files, video files, compilations of data and the like, unless the context clearly indicates otherwise.

This Memorandum considers and recommends for approval a process for the clearance of documents which are associated with the Report or dissents for posting on the web and potential use in the Commission's e-book or enhanced e-pub.

It is the intention of the staff to post on the Commission's website after the Report is released as many of the more significant documents reviewed by the Commission during its more than year-long investigation as are appropriate for release and can be processed prior to the termination of the Commission on February 13, 2011.

To this end, the staff proposes the following procedures for clearing and posting the following categories of documents on the website and for possible use in an e-book or enhanced e-pub. (This list overlaps with some of the categories approved at the January 6<sup>th</sup> meeting. This Memorandum is only intended to cover documents that have not been previously approved for release and posting):

- a) all documents, both physical and electronic, e-mails, video files, audio files, transcripts, and materials prepared or compiled by the FCIC staff, that have already been made public but not approved for posting,
- b) documents that previously have been cleared in connection with prior hearings (whether or not used at the hearings),
- c) all preliminary staff reports and similar reports,
- d) the timeline and documents referenced in the timeline (Commissioners will be provided with a copy of the timeline and will be given an opportunity to convey comments to the Executive Director),
- e) all video and testimony from the Commission hearings,
- f) the roundtable panel discussions hosted by the Commission on November 16, 2009 and October 20, 2009, so long as no objection is raised by roundtable participants,
- g) all MFRs (note that we will not post MFRs where a transcript or audio tape exists), audio tapes and transcripts of interviews for which confidentiality was not requested or to which no objection has been raised,
- h) all of the documents referenced in PIRs and similar staff documents,
- i) all of the documents and follow-up answers to questions asked at public hearings,
- j) all MFRs, audio tapes and transcripts of interviews to which objections have been raised after the objections are resolved or overruled,
- k) all survey presentations and underlying survey data upon which conclusions referenced in the Report were based (Commissioners will be provided with a copy of the survey presentations including the Hedge Fund Survey, Market Risk Survey, CMLTI 2006-NC2 analysis, and the CDO Library and Chartbooks, and will be given an opportunity to convey comments to the Executive Director) , and
- l) other materials relevant to our inquiry and the Report which were requested, received and reviewed or prepared by the staff during the course of our investigation and which are not otherwise included in any of the above categories.

However, it is our recommendation that no confidential documents be released to the website unless:

- a) they are or have been reviewed by appropriate Commission staff and approved by the Executive Director, General Counsel or Deputy General Counsel as appropriate to release
- b) when dealing with documents covered by confidentiality agreements or understandings, after consultation with (and if required, occasional approval by) the document providers, and

- c) they are approved or deemed approved by the Commission in accordance with the procedures adopted and to be adopted at the Commission meetings of January 6 and 24, 2011.

Any documents constituting federal records not posted on the web on or before February 13, 2011, will be delivered to the national archives for processing in accordance with a separate memorandum and the decision of the Commission.

Following the above process will likely result in posting a substantial number of documents (including audio files, MFR's, answers to requests for information and data submissions) to which objections have been raised by the document providers. The general categories of objections to posting MFRs, transcripts and audio files, and documents include the following:

- i) General nonspecific allegations that the material includes business confidential information, the release of which would prove harmful.
- ii) General statements that the interviewees were promised that the interviews would be maintained as confidential, or were for background purposes only.
- iii) Requests that the interviews not be released because they were of lower level staff employees.
- iv) Requests by various bank regulatory agencies such as the Fed, the OTS or OCC, the FDIC or the SEC that bank examination material not be released due to the chilling effect that such release would have on banks' willingness to be candid in future examinations.
- v) Requests for redactions of specific items in certain documents, such as personal information.
- vi) Requests that MFRs not be released due to possible material inaccuracies alluded to by counsel to the interviewees.
- vii) Requests that an MFR not be released due to the lack of understanding by the interviewee and counsel that the interviews would be publically released other than through the archive process (generally contemplated to be at least five years in the future).

The staff was and will be responsive to specific redaction requests for personal information and trade secret information the disclosure of which could be materially harmful to the provider, and to well-founded objections based on inaccuracies in MFRs (for which no transcript or audio file exists). In addition, where it appears that the interviewee was specifically told that the interview was for background purposes only, or would be maintained as confidential for a given period of time, or was given specific assurances of confidentiality (as opposed to merely having the interview covered by a standard confidentiality agreement), the interviews, whether MFR or tape or transcript, will generally not be released.

Bank regulatory agencies have generally requested that bank examination reports not be released. But what these examinations revealed comprises a significant portion of the Commission's Report, and staff believes that disclosing these materials is merited. In addition, the bank examinations occurred generally more than three years ago and so agency claims of possible damage to a bank in 2011, caused by release of examination material from 2008 or earlier, are not credible.

In the earliest stages of the Commission's operations staff was not aware of the Commission's intention to release interview notes and audio files other than through the archives process. This lack of awareness may well have led to a lack of clarity by some parties that the interviews might become public at the conclusion of the Commission's operations. In addition, many early interviews, despite an interview procedure memorandum which expressly provided for recording absent extraordinary circumstances, were not recorded and MFRs were created after the fact through the notes of the staff members present. MFRs created through this process have faced claims of inaccuracy. (Quotes taken from MFRs and used in the Report have been verified independently.)

For these reasons, the staff is paying particular attention to objections to the release of MFRs and other documents not used in the Report. As part of the release decision the staff is and will weigh the benefit of public access to the MFR (or audio files and documents, for that matter) and the nature and quality of the materials against objections to release raising one or more of the issues outlined above.

To formalize this process, we recommend that the Commission adopt the resolution below.



**Adoption of Recommendations by the Executive Director, General Counsel and Deputy General Counsel Regarding the Use of Interviews and Documents in the Commission’s Website, E-Book and E-Pub Enhanced E-Book**

WHEREAS, in connection with the Commission’s report to the President and to the Congress of a report on the causes of the current financial and economic crisis in the United States the Commission intends to create a publicly available website and may cause to be published an e-book and e-pub enhanced e-book (collectively electronic presentations), and

WHEREAS, the electronic presentations may include confidential interviews, documents and other materials requiring approval of the Commission prior to public release, and

WHEREAS, to assure that such material is expeditiously cleared and available for inclusion in the electronic presentations, the General Counsel suggests that the Commission adopt the following resolutions:

RESOLVED, that the Commission delegates to the Executive Director, the General Counsel and Deputy General Counsel the power to review, resolve or override, on behalf of the Commission, objections made to the public release of confidential documents or interviews, on a case-by-case basis, after weighing the nature of the objections against the benefit to the report and the American public of such public release, and to approve the posting of such documents in the electronic presentations;

RESOLVED FURTHER, that the Commission adopts as the action of the Commission the recommendations of the Executive Director, General Counsel and Deputy General Counsel regarding the release and posting of such confidential documents, interviews or other materials, as well as public documents, for inclusion in the Commission’s electronic presentations, and

RESOLVED FURTHER, that the Deputy General Counsel shall inform the Commissioners from time to time upon their request as confidential documents, interviews or other materials to which objections have been made are confirmed for public release in the Commission’s electronic presentations.



**Financial Crisis Inquiry Commission  
Agenda Item 6 for Business Meeting of November 17, 2010  
Document and Interview Review/Clearance Process**

**Memo To:** Commissioners of the FCIC

**From:** Gary J. Cohen  
General Counsel, FCIC

**cc:** Wendy Edelberg  
Maryann Haggerty  
Cassidy Waskowicz

**Date:** November 16, 2010

**Re:** Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website.

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The FCIC was created by the Fraud Enforcement and Recovery Act of 2009, which was signed into law on May 20, 2009. The FCIC's mission is "to examine the causes, domestic and global, of the current financial and economic crisis in the United States." Congress empowered the Commission to "hold hearings,... take testimony, receive evidence,... and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, and documents."

In connection with its mandate, the Commission has received millions of pages of documents, conducted numerous surveys, interviewed hundreds of witnesses, held 19 days of hearings, compiled video records of testimony before the Commissioners, and completed numerous reports, both confidential and public, on various aspects of the financial crisis. The Commission has received or created approximately 15 terabytes of data, some of which remains to be examined.

It is our intent to use in the Report and our e-book both public and nonpublic documents and to create on our website a resource of public and nonpublic documents relevant to the Commission's Report and inquiry, all with the purpose of meeting our statutory mandate to report to the President, Congress and the public on the causes of the financial and economic crisis.

This Memorandum proposes a process to make the Commission's work available to the public in a meaningful and useful way. To this end I consider documents (with a focus on nonpublic documents) that may be made available in the Commission's Report and e-book (Report Elements), or website (Web Elements). Release of Commission internal materials (e.g., Commissioner and staff e-mails, Preliminary Investigative Reports (PIRs) and other work product and documents), will be the subject of a separate memorandum addressing National Archives issues. You will note below that I have recommended that all nonpublic material for use in the final Report and the website be run through an approval process.

A. I recommend that Report Elements include:

all documents,<sup>2</sup> both physical and electronic, e-mails, video files, audio files, transcripts, and materials prepared or compiled by the FCIC staff, such as the timeline, surveys and staff memoranda that have been made public, that are included, referenced or footnoted in the written Report, or included in the e-book and e-book apps.

B. I recommend that Web Elements for immediate inclusion in the website on the date the Report is released (in addition to all material previously posted) include:

- i) all Report Elements,
- ii) all documents that previously have been cleared in connection with prior hearings (whether or not used at the hearings),
- iii) all preliminary staff reports,

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<sup>2</sup> As used in this memorandum documents should be broadly construed to include paper documents, electronic documents, audio files, video files, compilations of data and the like, unless the context clearly indicates otherwise.

- iv) the expanded timeline and documents referenced in the expanded timeline,
- v) all video and testimony from the Commission hearings, and
- vi) all MFRs, audio tapes and transcripts of interviews for which confidentiality was not requested (or which have already been cleared).

C. In addition, in addition to material that was previously dealt with pursuant to clause A and B above, I recommend that Web Elements also include (when and after cleared, if necessary) the following documents:

- i) all of the documents referenced in PIRs and similar staff documents,
- ii) all of the documents and follow-up answers to questions asked at public hearings ,
- iii) all MFRs, audio tapes and transcripts of interviews for which clearance is obtained,
- iv) all surveys upon which conclusions referenced in the Report were based, and
- v) materials relevant to our inquiry and the Report which were requested, received and reviewed or prepared by the staff during the course of our investigation and which are not otherwise included in any of the above categories.

D. However, it is my recommendation that no Report Elements or Web Element be released unless:

- i) they are reviewed by appropriate Commission staff and approved by the Executive Director or General Counsel as appropriate to release (documents already cleared for prior use in hearings do not have to be re-cleared or authorized),
- ii) when dealing with documents covered by confidentiality agreements or understandings, after consultation with (and if required, occasional approval by) the document providers, and
- iii) approved or deemed approved by the Commission (in accordance with the procedures below).

## **I. Process.**

### **A. Choice of Documents for the Report**

If there is an e-book with embedded material, at most 1 GB of supplemental material chosen by the FCIC can be included. The two forms of e-books that include supplemental material, an e-book application (iPad and Droid) and an enriched e-pub, are each capable of including this amount of supplemental data, although the choice of data for each platform can differ slightly because of their different capabilities. (In addition to embedded data, e-book platforms can include hotlinks pointing to external web content. This requires that, at the very least, the portion of the Commission's website to which the hotlinks point be "live" when the e-book is published.)

Thus the task ahead for the Report and e-book suggests the following steps:

1. Staff identifies and physically segregates in electronic form all Report Elements".<sup>3</sup>
2. Staff determines the source of each Report Element and, where these were produced pursuant to confidentiality or other agreement notifies and seeks (generally as per these agreements 14 days in advance) comment from the Report Element provider to the use of the Report Element. (While the FCIC does not need affirmative consent pursuant to most of our Confidentiality Letters, either receiving no response to the notice letter or an affirmative consent should eliminate any concerns regarding release of trade secret or business proprietary information.) (This process is already underway, and has resulted in a number of questions and requests for clarification, objections to disclosure, and requests for further discussion from the recipients.) As a courtesy, we are also telling providers of Report Elements that we might also use their previously cleared materials in the Report.
3. Staff determines if any Report Elements require special affirmative consent due to special terms of any confidentiality agreements or other previously agreed-upon use restrictions, and pulls the document if the same is not forthcoming.
4. Where a request for comments elicits objections to disclosure or a required consent is not forthcoming, Staff determines if release of the Report Elements raises trade secret, personal privacy, or regulatory or statutory restrictions on disclosure, collectively "special concerns." If the staff determines that the special concerns are not valid, subject to the other requirements herein, the documents will be released. If valid, the staff will consider applicable legal requirements, and will weigh the benefit of disclosure by the Commission against the potential harm to the provider caused by disclosure of the special concerns, negotiate redactions if the same will be helpful in resolving disclosure issues and if the Report Element would still be worthy of disclosure after the redactions, and raise the matter to the Commission if the special concern issues cannot be resolved by staff and the document provider. Once resolved, the staff will then adjust the composition of the Report Elements accordingly. The decision about whether to release or redact Report Elements after valid objection must be made on a case-by-case basis depending upon the nature of the material under consideration.

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<sup>3</sup> This Memorandum primarily addresses electronic release of documents, but as these items will likely constitute documents used as the basis for footnotes, the same considerations as to care in checking and clearance applies to use in the printed Report.

## **B. Choice of Documents for the Website**

Documents released via the website make up the next subset. (Choice of the location/hosting of the permanent website will be the subject of a separate memorandum.) Website decisions for material hot-linked to the web from the e-book must be made when the e-book is "printed." As a practical matter other website decisions can be delayed until the end of January 2011 (to allow time to implement the decisions by February 13, 2011), and so the Commission will have additional time to consider and clear documents not included, or referred to, in the Report.

Thus the task ahead for the Web suggests the following steps (of course in all cases modified to the extent that items have already been cleared as part of Report Elements):

1. Staff identifies and physically segregates in electronic form all Web Elements.<sup>4</sup>
2. Staff determines the source of each Web Element and, where these were produced pursuant to confidentiality or other agreement notifies and seeks (generally as per these agreements 14 days in advance) comment from the Web Element provider to the use of the Web Element. (While the FCIC does not need affirmative consent pursuant to most of our Confidentiality Letters, either receiving no response to the notice letter or an affirmative consent should eliminate any concerns regarding release of trade secret or business proprietary information.) Staff also determines after consultation with the Web Element provider if there are any needed redactions. (This process is already underway, and has resulted in a number of questions, objections to disclosure and requests for clarification and further discussion from the recipients.) As a courtesy, we are also telling providers of Web Elements that we might also place their previously cleared materials on the Web.

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<sup>4</sup> Clearing MFRs and interviews is a very labor intensive process. The highest priority will be given to MFRs and audio tapes or transcripts of individuals quoted in the Report. Next, the staff will determine which interviews should have priority for clearance, although as a practical matter we are seeking clearance for all of them at this time, and prioritization will come into play when dealing with objections. Some interviewees were assured by FCIC staff that the interviews would be private, or were for background purposes only, and that, of course, will be respected. However, even in those cases, people may change their views and we should ask about release anyway. If promised confidentiality is not waived, the interview materials should be left to the National Archives unless there is a compelling reason to disclose documents and override the promise where circumstances permit. (Virtually all interviewees were informed that the interview materials would be delivered to the National Archives.)

3. Staff determines if any Web Elements require special consent due to special terms of any confidentiality agreements or other previously agreed-upon use restrictions, and seeks consent where needed and pulls the document if the same is not obtained.

4. Where a request for comments elicits objections to disclosure or a required consent is not forthcoming, Staff determines if release of the Web Elements raises special concerns. If the staff determines that the special concerns are not valid, subject to the other requirements herein, the documents will be released. If valid, the staff will consider applicable legal requirements, and will weigh the benefit of disclosure by the Commission against the potential harm to the provider caused by disclosure of the special concerns, negotiate redactions if the same will be helpful in resolving disclosure issues and if Web Element would still be worthy of disclosure after the redactions, and raise the matter to the Commission if the special concern issues cannot be resolved by staff and the document provider. Once resolved, the staff will then adjust the composition of the Web Elements accordingly. The decision about whether to release or redact Web Elements after valid objection must be made on a case-by-case basis depending upon the nature of the material under consideration.

## C. Commission Approval Process

The decision to release publicly confidential documents is one which should be made by the full Commission, either directly or through a process of delegation. It is unwieldy and impractical to expect that the full Commission will review all of the Web Elements and Report Elements, so a procedure for approval should be considered. Currently, the Commissioners are governed by the following:

The Ethics Guidelines for Commissioners provide that the Chairman or the Commission may release confidential information.

Many of the Commission's Confidentiality Agreements provide that documents may be released upon the agreement of the Chairman and the Vice Chairman, or upon a majority vote of the Commission.

In addition, the Commission must approve the Report, which includes the Report Elements and, for our purposes, Web Elements as well.

As noted above, in those few cases where there is staff discretion (such as under clause C(v) above), I recommend that the Executive Director or General Counsel determine which documents should be recommended to the Commission for a determination in accordance with its processes for inclusion in Report Elements or Web Elements. This will primarily occur in situations where the staff has received objections to disclosure and the determination to override the objections must be made.

## II. Legal Considerations for the Release of Documents Received by the Commission

**There Are Statutory and Regulatory Prohibitions on the Release of Confidential Information, but Congress has investigative powers which have been held to override these provisions, and the Commission has the benefit of those powers as a creation of Congress.**

18 USC §1905. Disclosure of confidential information generally --



Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311–1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

In addition, 12 CFR part 261 creates similar limitations on the disclosure of "confidential supervisory information" of the Federal Reserve Board, 12 CFR part 4 protects "non-public OCC information," 12 CFR part 309 protects "non-public information" of the FDIC and so forth.

The Commission is formed under Congress, and is entitled to the benefit of Congress's authority and power to obtain information, including but not limited to proprietary information, is extremely broad. The Commission's inextricably related ability to release this information arises out of the objectives of the Commission, to issue a report. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional investigations, the Supreme Court has firmly established that such power is so essential to the legislative function as to be implied from the general vesting of legislative powers in Congress. *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977). Even the pendency of civil or criminal litigation cannot delay a committee inquiry. *Sinclair v. United States*, 279 U.S. 263 (1929).

The federal courts, when applying Congress's broad investigatory power to obtain access to documents containing confidential or proprietary information, have expressly held that executive agencies and private parties may not deny Congress access to such documents, even if they may contain trade secrets or other sensitive information whose disclosure to the public is otherwise statutorily barred. See, e.g., *FTC v. Owens-Corning Fiberglass Corp.*, 626 F. 2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F. 2d 582, 585-86 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. FTC*, 548 F. 2d 977, 979 (D.C. Cir. 1976). Specifically, courts have held that

release of information to a congressional committee is not considered to be disclosure to the general public, see Owens-Corning Fiberglass Corp., 626 F. 2d at 970; Exxon Corp., 589 F. 2d at 589; Ashland Oil, 548 F. 2d at 979; Moon v. CIA, 514 F. Supp. 836, 840-41 (D.D.C. SDNY 1981), and once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties. See, Owens-corning Fiberglass, 626 F.2d at 974; Exxon Corp., 589 F. 2d at 589; Ashland Oil, 548 F. 2d at 979; Moon v. CIA, 514 F. Supp. at 849-51.

In addition, our statute expressly requires the Commission to 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. As the Commission's enabling legislation manifests the clear congressional intent to establish an independent legislative branch entity with investigative powers, authorities and prerogatives equivalent to those of past and present standing and special investigatory committees, the decision to release confidential documents or materials as part of its statutory duty to report on the causes of the crisis rests in the Commission's discretionary determination that such public release will further fulfillment of its mandated statutory mission, a decision that cannot be limited by any court ruling or regulatory or statutory standard. Such decisions must be made responsibly and with proper regard to the rights of the parties involved. As such,, the disclosure of relevant information by the Commission as part of its Report should be protected as outlined above.

This broad power to receive and disclose confidential and proprietary information is limited by the purpose for which the information is obtained, however, and while the use of that information in the report to be delivered to Congress and the President, and therefore to the American public would be within the powers described above, there is a question as to whether the same standard would be applied should that information be disclosed in a commercially released book without express or implied consent of the information provider. While this is an issue for the publisher and not the Commission, I nonetheless recommend that the FCIC take special care to insure compliance with the appropriate clearance procedures for all documents referenced or quoted in the Report or included in the enhanced e-books.

Finally, it appears, based on a 5th Circuit Court of Appeals case, United States v. Wallington, 889 F.2d 573 (5th Cir. 1989) that violations of 18 USC §1905 require *mens rea*, a guilty mind or conscious intent, and inadvertent violations are not actionable. (There are very few reported cases referencing §1905.)

## **The FCIC Has Entered into Confidentiality Letters Pursuant to Which It Has Received Confidential Information**

The FCIC has entered into at least 69 confidentiality agreements of various forms pursuant to which it has committed to a process concerning the Commission's use of documents and other information submitted to it by document providers, including federal agencies and departments, state and local government entities, and business organizations and individuals. (A list of the parties to those agreements is attached as Appendix A.)

While the confidentiality agreements vary, virtually all of them contain provisions that require the FCIC to maintain in confidence the documents designated as confidential and to consult with the document provider prior to disclosing the information (and often specify a 14 day consultation period). The agreements all allow the FCIC to disclose the confidential information it determines appropriate in any interim or final report or in connection with public hearings upon the agreement of the Chairman and the Vice Chairman or upon a majority vote of the FCIC. Many of the agreements specifically reference, for example, certain bank regulatory reports confidentiality provisions, trade secrets and similar items protected from disclosure by statute or regulation as examples of the types of the documents entitled to confidential treatment in accordance with the letters. But that does not override the Commission's ability to release the documents if it so determines. In many of the earlier Confidentiality Letters, the FCIC has stated that it will ask the National Archives not to release confidential documents submitted to the Commission for at least five years after the conclusion of the Commission's work (in keeping with a pattern set by the 9/11 Commission).

A typical corporate Confidentiality Letter provides:

In accordance with its statutory mandate and its duty to the American public, the Commission, if it determines it is in the public interest, may release to the public non-public information obtained from XXX as part of any interim or final report to the President and Congress, or in any public hearings, if the Commission determines to do so by a majority vote, or by the decision of the Chairman and Vice Chairman acting together on behalf of the Commission.

Prior to any release of non-public information under the above paragraph, the Commission will give written notice to XXX, and allow XXX to consult with the Commission before the Commission uses any of the XXX's non-public information in any interim or final report to the President and Congress, or in any public.

With respect to interviews and related MFRs, it has generally been the practice of counsel to financial institutions and departments and agencies to note either by e-mail as part of the process by which the interviews were arranged, or during the interview, that the interviews would also be covered by the confidentiality agreements between the FCIC and the respective financial institution or agency or department. Interviews conducted with industry observers who are not affiliated with organizations subject to confidentiality agreements have usually not contained those types of restrictions, but even in these situations an FCIC staffer should review the tapes to be certain. Some interviews were conducted with assurances of a confidential treatment or under the explanation that they were "for background purposes." For these interviews, I would notify the interviewee (and we are trying to notify all interviewees) and see if he or she objects to disclosure before making a final release decision. And if there is no objection then disclosure should be appropriate.

Not all entities and agencies have entered into Confidentiality Letters with the FCIC. Some have instead submitted documents or consented to interviews pursuant to individual requests, letters or e-mails requesting confidentiality of the applicable material.

Internally, the FCIC recognizes the sensitive nature of its work and has taken precautions to ensure the confidentiality of nonpublic information that it receives. These steps include requiring all FCIC personnel to sign a confidentiality and non-disclosure agreement, which protects all nonpublic information and specifically restricts the dissemination of any trade secrets or other proprietary information.

Given the nature of the Confidentiality Letters into which the FCIC has entered, I believe there may be a distinction between public release via the Commission's Report or website (which the FCIC will treat as ancillary to the Report) and public release through the National Archives. As to the former, compliance with the consultation or consent process described above should eliminate most concerns regarding the disclosure of trade secrets and other confidential information. As to the latter, delivery to the National Archives with a Commission suggested release schedule is only the beginning of the analysis to be addressed at a later date.

**Appendix A**

**Confidentiality Letters [to be updated]**

<b>TAB</b>	<b>NAME</b>
1	SEC- Mark Cahn
2	Board of Governors of the Federal Reserve System- Ben Bernanke
3	OCC- Julie Williams
4	FDIC- Michael Bradfiel
5	FHFA- Alfred Pollard
6	DOL- Deborah Greenfield
7	CFTC- Dan Berkovitz
8	OTS- Deborah Dakin
9	DOJ- Ronald Weich
10	Treasury- George Madison
11	Citi- Brad Karp
12	LexisNexis- Kara Hinrichs
13	HUD- Heather Kanovsky
14	FINRA- James Shorris
15	State Street- David Phelan

16	NY State Banking- Marjorie Gross
17	Goldman Sachs- Richard Klapper
18	Morgan Stanley- Raul Yanes
19	PIMCO- John Sopko
20	Vanguard- Nathan Will
21	Fannie Mae- Jeff Kilduff
22	UBS- John Moon
23	Barclays- Caroline de Onis
24	S&P- Brian Markley
25	CT AG- George O'Connell
26	OH AG- Doreen Johnson
27	omitted
28	AIG- Mitchell Berger
29	Cornwall Capital- William Gussman
30	Magnetar- Steven Ross
31	Moody's- Steven Ross
32	MKP- Patricia Alcamo
33	GSC Group- Daniel Ross
34	NIBC- Albert Lambert
35	Laura Schwartz- Robin Alperstein
36	Scion- Michael Burry
37	ACA- Nathan Erickson
38	UBS- Maite Quino

39	Alan Roseman- Robert Bennett
40	Charles Gates- Daniel Zinman
41	Markit- Mark Davidson
42	Eric Dinallo- John Kenny
43	TCW - Michael Cahill
44	Andrew Forster- David Brodsky
45	Joe Cassano- Jim Walden
46	Credit Suisse- Daniel Zinman
47	Wachovia- Robert Kelner
48	NCRC- Josh Silver
49	Ally Financial- John Hromy
50	S&P (Special)- Brian Markley
51	PIMCO –
52	Moody's (Special)- Sharon Nelles
53	Wendy Ruberti
54	Fremont General- Jim Caroll
55	NCUA- Robert Fenner
56	Maryland Insurance Administration- Neil Miller
57	David Sambol- Walt Brown
58	ICAP North America Inc.
59	RMIC- John Heitkamp
60	Greg Levine
61	Aladdin Capital- Sharad Samy

62	Stone Tower- Robert Carangelo
63	Vanderbilt Capital- Peter Simmons
64	PMI- Andrew Cameron
65	Alliance Berstein- Mark Manley
66	Tim Harkness- BlackRock
67	ING- Gerald Lins
68	Deerfield Capital- Jonathan Polkes
69	MGIC- Jeffrey Lane





**Financial Crisis Inquiry Commission  
Agenda Item 7 for Business Meeting of January 24, 2011  
Vote to Approve New FCIC Website**

*Materials Forthcoming*



**Financial Crisis Inquiry Commission  
Agenda Item 8 for Business Meeting of January 24, 2011  
Discussion and Possible Action on Archive Protocol**

**Memo To:** The Commissioners of the Financial Crisis Inquiry Commission

**From:** Gary J. Cohen  
General Counsel  
Cassidy Waskowicz  
Deputy General Counsel

**cc:** Wendy Edelberg, Executive Director  
Maryann Haggerty

**Date:** January 21, 2011

**Re:** Archived Documents

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In connection with its mandate “to examine the causes, domestic and global, of the current financial and economic crisis in the United States,” Congress empowered the Commission to “hold hearings,... take testimony, receive evidence, ... and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, and documents.” The Commission has received millions of pages of documents, conducted numerous surveys, interviewed hundreds of witnesses, held hearings, compiled hours of video of testimony before the Commissioners, and completed confidential and public reports on various aspects of the financial crisis. The Commission has received or created approximately 15 terabytes of data.

The subject of this Memorandum is to provide background to the Commissioners when they consider how to release Commission material submitted to the National Archives and Records Administration (the "National Archives" or "NARA"). This is not intended to be an action Memorandum at this time.

We have previously prepared a Memorandum to the Commissioners dated November 16, 2010 "Considerations with Respect to the Public Release of Confidential Documents and Materials in the Report, the E-Book and Website" which discusses the public release of documents in the Commission's Report and a follow-up Memorandum dated January 21, 2011 concerning the public release of documents on the Commission's website. Terms defined in those Memoranda are similarly defined herein. This Memorandum addresses the release through NARA of documents which were not released as part of the Report or on the Website.

### **Precedents for the Release of Sensitive Business Records through NARA**

Rather than propose a specific release schedule, we think it better to provide some examples adopted by other commissions and let the Commissioners make the determination themselves. We have asked the National Archives for information concerning the release of information by other commissions. They have advised us of the following:

Other than those Commissions which released everything on termination, the 9/11 Commission adopted the quickest release policy and chose to make everything (including deliberative materials) available after five years from termination of the Commission (subject to national security concerns).

The Commission on Proliferation of Weapons of Mass Destruction and Prevention of Terrorism opened all records after 10 years except Commissioner and staff email which is to be opened only after 25 years.

The Judicial Review Commission on Foreign Asset Control established three categories for its records: open immediately, closed for 15 years, and closed for 75 years (all the records require screening before release). Broadly, the Press Releases, Reports to Congress, Legal Files, and Hearings were opened immediately; Travel Files, General Office Program Files, Correspondence, OFAC Briefing Materials and Document Production are to be opened in 15 years; Administrative Files, OFAC Case Files, Commissioner and Staff Files, and Documents Provided by the Senate Intelligence Committee are to be opened in 75 years.

The Commission to Assess US National Security Space Management and Organization closed its records for between four and 12 years. But all of its records will be screened for classified information. Most records are to be opened after 4 years, but the following are to be opened after 12 years: those "specially-designated as sensitive to policy deliberations; containing policy deliberations themselves; marked as not being releasable outside the Commission; and properly marked as containing proprietary information."

The other commission records maintained by the Center for Legislative Archives (the NARA group responsible for the FCIC) were opened immediately upon transfer to NARA. These include the Commission on Military Training and Gender Issues, Commission on Electronic Commerce, the Commission on the Advancement of Federal Law Enforcement, the Millennial Housing Commission and the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century. Even in those cases NARA always screens everything, but, barring anything personal such as SS#s or medical records, anything closed by statute (ex. tax returns or grand jury info), everything was opened immediately.

As noted in prior a Memorandum, when deciding on a release schedule, Commissioners should weigh the public's interest in access to the documents not released by the Commission on its website and documents pertaining to the internal operations of the Commission as soon as possible against the fact that many of the records submitted to the FCIC contain proprietary business and financial information, bank examination information and other confidential material, and that too soon a release of internal deliberative material may focus attention away from the Report.

Congress has recognized the need to keep confidential information nonpublic. Below is a brief summary of how records are handled by Congress and the executive branch.

### **Congressional Records**

Records of the U.S. House of Representatives--including investigative records of House committees--remain closed, by default, for 30 years.<sup>[1]</sup> Investigative records containing private personal information may remain closed for 50 years.<sup>[2]</sup> If the Clerk of the House determines that the availability of any records “would be detrimental to the public interest,” the records may remain closed even longer.<sup>[3]</sup>

Senate records remain closed, by default, for 20 years.<sup>[4]</sup> As in the House, investigative records containing personal information are closed for 50 years,<sup>[5]</sup> and the Secretary of the Senate may close records for longer “in the public interest.”<sup>[6]</sup>

### **Executive Records**

Presidential and Vice-Presidential records in various categories may be sealed for a period of up to 12 years.<sup>[7]</sup> Among these categories is one for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>[8]</sup>

### **Other Relevant Considerations**

More generally, the National Archives maintains legal restrictions on the use of government records, by default, for a period of 30 years.<sup>[9]</sup> The Archivist (consulting with the relevant agency head) may choose to maintain restrictions for a longer period of time.<sup>[10]</sup> For example, we understand that bank examination records are maintained as confidential by the National Archives for 50 years. In addition, as to FCIC records received from federal agencies and departments, NARA has developed working relationships with many of the providers and may have independent release arrangements with them. To the extent that the FCIC has not received prior clearance, such arrangements will trump the FCIC's desires regarding release. <sup>[11]</sup>

The Freedom of Information Act, which promotes government transparency, contains exemptions to protect certain types of information: properly classified material; limited kinds of purely internal matters; matters exempt from disclosure by other statutes; trade secrets or commercial or financial information obtained from a person and privileged or confidential; internal agency communications that represent the deliberative, pre-decisional process, attorney work product, or attorney-client records; information that would be a clearly unwarranted invasion of personal privacy; law enforcement records to the extent that one of six specific harms could result from disclosure; bank examination records; and oil well and similar information.<sup>[12]</sup> The FCIC is not subject to FOIA but the exemptions provided in the act are instructive as to the type of material we may wish not to immediately disclose.

The SEC regularly withholds disclosures pursuant to its FOIA compliance regulations,<sup>[13]</sup> including in the context of investigating the matters similar to that which are the focus of the FCIC's investigations.

## Possible Alternatives for the FCIC's Disclosure of its Archived Records

As alternatives are considered, please keep in mind that deciding to release business records under one schedule does not necessarily require that internal Commission records be released at the same time, or that material received from agencies be released at the same time as material received from private firms. Given that, here are some suggestions:

**Maintain proprietary records as confidential for 20 or 30 years** in accordance with Congressional rules of the House or Senate. Under these rules, the Commission would not release proprietary documentation for a default period of 20 or 30 years. The Commission might adopt the House approach of 30 years because its authorizing statute provides that it sits "in the legislative branch." This is the preferred approach of counsel to a number of financial institutions with which the FCIC has dealt.

**Some counsel to the banks have suggested a release schedule of 12 years** in accordance with the Presidential Records Act. If the Commission does not wish to adopt the legislative standards in full for all of its records, but does wish to preserve business confidentiality for more than five years, it could look to the Presidential Records Act as a compromise. Under that approach, the Commission could seal records, including those containing trade secrets or other commercial and proprietary financial information, for 12 years, thereby lessening the potential impact for adverse consequences when release is finally implemented.

**Seal records for at least five years.** The 9/11 commission met as a group to determine the appropriate time period before which archived records would be generally available. The 9/11 commission chose five years and the FCIC, in some confidentiality agreements, has already indicated an intention to request a five-year nondisclosure period with the National Archives. The 9/11 commission did not distinguish between material received by the commission or created by the commission, although differing schedules were discussed. Thus all 9/11 commission archived documents started becoming available in 2009, approximately five years after its report was released (subject to national security holdbacks). However, not all of the material has been processed and so the full record is not yet available. There were those on the 9/11 commission who desired immediate release while others were in favor of up to 10 years. They chose 2009 to begin releasing documents to get through two congressional cycles and to get out of "the news cycle."

Regardless of when the Commission determines that FCIC records may be released in general, NARA will attempt to review all of the Commission's documents and restrict release if the material is subject to a Confidentiality Letter and if it clearly contains confidential material or trade secrets, or if it was received from an agency that is the beneficiary of a statutory or regulatory nondisclosure protection. NARA has told us that it will make its job more manageable if a longer time period is suggested by the FCIC. (It is my view that material which was neither used in the Report, nor posted on the website, is not "part of any interim or final Report to the President and Congress, or [used] in connection with any public hearings" (language allowing immediate release in many of the FCIC's Confidentiality Letters). This is also the view of the National Archives after the Commission's staff's meeting with them on September 23, 2010.)

## Conclusions

The Commissioners should decide when they want NARA to disclose archived materials after a full discussion at the final Commission meeting.

It is possible for the Commissioners to adopt different time periods for release for different categories of documents, so that third party documents could be released after X years, internal staff memoranda (for example PIRs) after Y years, and all other materials (including e-mails and notes) after Z years.

So one option would be for the Commission to choose one disclosure period for everything, in which case I would recommend no sooner than five years (to push the release out past the statute of limitations for lawsuits involving the financial crisis). Alternatively, the Commission can create categories for release such as a five or ten year release schedule for submitted documents, and a longer release period for internal Commission workings such as staff notes, all e-mails and staff memorandum (including PIRs). For simplicity it would be best to choose one period for everything, but the Commission may wish at least to carve out Commission e-mails for a longer retention period, since such communications are internal deliberative matters.

As it makes its determination, the Commission should be mindful of its stated views in favor of transparency in deciding what it posted on the website as too big a contrast with a longer nondisclosure period for the Commission's own internal documents.

Finally, it is not unusual to provide for immediate access to archive materials for certain individuals. In this regard I recommend that all of the Commissioners, Peter Kadzik ( outside counsel recently retained by the Commission ), Gretchen Newson, Scott Ganz, Wendy Edelberg, Gary Cohen, Greg Feldberg, Chris Seefer, Maryann Haggerty and Cassidy Waskowicz, be granted access to the Commission documents at the National Archives.

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[1] House Rule VII(3)(b)(4).

[2] House Rule VII(3)(b)(2).

[3] House Rule VII(4)(a).

[4] S. Res. 474 § 2(a)(2), 96th Congo (1980).

[5] *Id.* § 2(a)(1).

[6] *Id.* § 3(b).

[7] 44 U.S.C. §§ 2204, 2207 (2006).

[8] *Id.* § 2204(a)(4).

[9] *Id.* § 2108.

[10] *Id.*

[11] As an example, assume that the FCIC has deposited with NARA a bank examination report as to which no consent to disclose has been sought or received. In that case NARA may schedule release in 50 years, even if the FCIC chose a 5 year release schedule for its documents in general.

[12] 5 U.S.C. §§ 552(b)(4)-(7), 552(b)(4)(2006).

[13] 17 C.F.R. § 200.80(b)(4) (2010).

## Appendix A

### FINANCIAL CRISIS INQUIRY COMMISSION

#### Records Management Policy.

1. **Purpose.** This guidance contains mandatory Financial Crisis Inquiry Commission ("FCIC" or the "Commission") procedures for managing records effectively and efficiently throughout their life cycle. These procedures will help FCIC successfully accomplish its mission, preserve official records in accordance with applicable statutory and regulatory requirements, and promote access to information by FCIC staff and the public, as appropriate.
2. **Authority.** The FCIC will comply with 44 U.S.C. Chapters 21, 29, 31, and 33 and 18 U.S.C. Chapter 101, and regulations established by the National Archives and Records Administration (NARA) for managing Federal records as stated in 36 C.F.R. parts 1220, 1222, 1228, 1234, and 1236.
3. **FCIC Responsibilities under the Document Retention Policy.** The Executive Director and General Counsel shall establish and maintain an active, continuing program for the economical and management of the records of the FCIC (44 U.S.C. § 3101).
4. **Policy.**
  - A. FCIC will establish effective management controls over the creation, maintenance, and use of records in any medium, including electronic and microform media, throughout their life cycle.
  - B. The provisions of this directive are mandatory and are applicable to all Commissioners and staff of the FCIC.
  - C. All Government employees and contractors are required by law to create and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency. In addition, Federal regulations govern the life cycle of these records: they must be properly stored, preserved, and available for retrieval, and may be disposed of only in accordance with NARA-approved records control schedules.

**D.** FCIC will cooperate with NARA and other agencies in applying standards, procedures, and techniques to improve the management of records; promote the maintenance of those records of continuing value (permanent); and facilitate the segregation and disposal of temporary records.

**E.** All records, including electronic and other forms of information will be systematically identified and appraised.

**F.** Records are broadly defined by statute and regulation to include all recorded information, regardless of medium or format, made or received by the FCIC under Federal law or in connection with the transaction of public business, either preserved or appropriate for preservation because of their administrative, legal, fiscal or informational value. Records serve as FCIC's memory; they are of critical importance in ensuring that FCIC continues to function effectively and efficiently.

**G.** FCIC officials are responsible for incorporating into the records of the Commission all essential information on their major actions. Significant decisions and commitments reached orally or by informal electronic mail will be documented and included in the record.

**H.** Minutes will be taken at all Commission meetings, and these, together with a copy of the agenda and all documents considered at or resulting from such meetings, shall be incorporated into the FCIC's record and made available for public inspection.

**I.** All Commission meetings shall be transcribed or recorded and the recording or transcript shall be incorporated into the FCIC's records and made available for public inspection.

**J.** The FCIC will take appropriate action to ensure that all staff and Commissioners are capable of identifying Federal records. For electronic mail systems, the FCIC will ensure that all staff and Commissioners are informed of the potential record status of messages, transmittal and receipt data, directories, and distribution lists.

## **5. Materials to be managed under this Policy.**

A. Determining if Documents are Federal Records, Nonrecords or Personal Papers.

1. Identifying Federal records.

a. Documentary materials are records when they meet both of the following conditions:

i. They are made or received by an agency of the United States Government under Federal law or in connection with the transaction of agency business; and

ii. They are preserved or are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain.

b. *Record status.* In addition to the two conditions stated above, use the following criteria as a guide for determining whether or not a document, such as an email message, meets the statutory definition of



a Federal record. If the material (whether a document, email, or other recorded information) meets any of the following criteria, it is considered a Federal record and should be preserved in accordance with procedures set forth below:

- i. It contains unique, valuable information developed in preparing position papers, reports, studies, etc.
- ii. It reflects significant actions taken in the course of conducting FCIC business.
- iii. It conveys unique, valuable information about FCIC programs, policies, decisions, or essential actions.
- iv. It conveys statements of policy or the rationale for decisions or actions.
- v. It documents oral exchanges (in person or by telephone), during which policy is formulated.
- vi. It adds to the proper understanding of the formulation or execution of FCIC actions or of FCIC operations and responsibilities.
- vii. It documents important meetings.
- viii. It makes possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
- ix. It protects the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
- x. It documents the persons, places, things, or matters dealt with by the Commission.
- xi. It documents the administration of the Commission, such as personnel, procurement, payroll, budget, and other "housekeeping" operations (*See* General Records Schedules for many types of administrative records created by the Commission).

c. *Electronic mail messages.* Messages created or received on electronic mail systems may meet the definition of record in 44 U.S.C. § 3301.

d. *Working files and similar materials.* Working files, such as preliminary drafts and rough notes, emails and other similar materials shall be considered Federal records if:

- i. They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with FCIC staff about FCIC business; and

ii. They contain unique information, such as substantive annotations or comments, that add to a proper understanding of the FCIC's formulation and execution of basic policies, decisions, actions, or responsibilities.

e. *Documents circulated to one or more Commissioners, or from a Commissioner to staff.* Drafts, rough notes, emails, or other documents that are circulated to one or more Commissioners, or from a Commissioner to staff, are presumed to be Federal records, because such documents may contain unique information that adds to a proper understanding of the Commission's formulation and execution of basic policies, decisions, actions, or responsibilities. The presumption that such documents are Federal records shall be rebutted (and the document shall be considered a nonrecord) if the document does not contain any information that adds to a proper understanding of the Commission's formulation and execution of basic policies, decisions, actions, or responsibilities. See infra 5.A.2.b. For example, a draft version of the final report circulated to Commission members, and the Commissioners' e-mails of substantive changes back to the staff, would be a Federal record.

f. *Documents received from Federal agencies and private and public companies.* Records reviewed by Commissioners and/or staff which are relevant to the mission of the Commission are Federal records. The records may be referred to in emails, memoranda, white papers, briefings, or reports. Documents received which are irrelevant or not used by the Commission or staff are nonrecords. The FCIC must record all Federal records it receives.

2. Identifying nonrecord materials.

a. *General guidance.* Nonrecord materials are Government-owned informational documents excluded from the definition of "records" or not meeting the requirements of that definition. (*see* 36 C.F.R. §1222.34(b)). Nonrecord material may be disposed of at any time after its purpose has been served. Nonrecord material shall not be interfiled with temporary or permanent record material. The following are specifically excluded from status as records by statute (*see* 44 U.S.C. § 3301):

- i. Library and museum material (but only if such material is made or acquired and preserved solely for reference or exhibition purposes);
- ii. Extra copies of documents (but only if the sole reason such copies are preserved is for convenience of reference).

b. *FCIC policy on identifying nonrecords.* Documents will generally be considered federal records, except when, as set forth above at 5.A.1.e., documents that do not contain unique information that adds to a proper understanding of the FCIC's formulation and execution of basic policies, decisions, actions, or responsibilities. Nonrecord material may be disposed of at any time after its purpose has been served.

i. *Documents circulated among staff.* Drafts, rough notes, emails and other documents circulated internally (among staff only, as contrasted to such items circulated to the Commissioners) may be nonrecords if they do not contain unique information that adds to a

proper understanding of the FCIC's formulation and execution of basic policies, decisions, actions, or responsibilities. (It is assumed that substantive actions of the FCIC will have to be approved by the Commission, so the internal staff commentary on memoranda that do not go to the Commissioners or are not released to the public will be considered nonrecords.)

Example: If a staff member circulates a memorandum among staff, and another staff member makes substantive changes which are incorporated into the final memo, then the original document is nonrecord because the unique information that adds to a proper understanding of the FCIC's actions is incorporated into the new document (also see iii below).

ii. *Documents circulated to one or more Commissioners, or from a Commissioner to staff.* As provided above in 5.A.1.e., such documents are generally federal records. However, if the document does not contain unique information that adds to a proper understanding of the FCIC's formulation and execution of basic policies, decisions, actions, or responsibilities, it is a nonrecord. Example: An email from a Commissioner to staff notifying them that she cannot attend a meeting is a nonrecord.

iii. *Commissioner and staff notes to self.* Personal notes taken during the course of FCIC activities and not circulated to other Commissioners or staff members are generally considered nonrecords. Examples: A Commissioner's notes to self during a team meeting is a nonrecord, but staff notes on a team meeting where official minutes are not kept would be a Federal record as they represent the only source of information regarding the meeting. Similarly, staff notes on a witness interview where an official transcript is not created would be a Federal record.

3. Identifying personal papers.

a. Personal papers are documentary materials of a private or nonpublic character that do not relate to, or have an effect upon, the conduct of FCIC business. Personal papers are excluded from the definition of Federal records and are not owned by the Government. Examples of personal papers include:

i. Materials accumulated by an official before joining Government service that are not used subsequently in the transaction of Government business;

ii. Materials relating solely to an individual's private affairs, such as outside business pursuits, professional affiliations, or private political associations that do not relate to FCIC business; and

iii. Diaries, journals, personal correspondence, or other personal notes that are not prepared or used for, or circulated or communicated in the course of, transacting Government business.

b. If information about private matters and FCIC business appears in the same document, the document shall be copied at the time of receipt, with the personal information deleted, and treated as a Federal record.

c. Materials labeled "personal," "confidential," or "private," or similarly designated, and used in the transaction of public business, are Federal records subject to the provisions of pertinent laws and regulations. The use of a label such as "personal" is not sufficient to determine the status of documentary materials in a Federal office.

d. If personal papers are maintained at the FCIC office, they shall be clearly designated as such and filed or otherwise maintained separately from the official records of the office.

e. FCIC officials may not remove any Federal records from FCIC custody while removing their personal papers and designated nonrecord materials. Before anyone departs from FCIC, they shall consult with the Executive Director or General Counsel to ensure that official records that may be included in personal papers are returned to FCIC files. The Executive Director or General Counsel may approve a request from the departing official to take extra copies of work-related files if the records do not contain national security-classified information or are otherwise restricted (e.g., Privacy Act, etc.).

B. The FCIC has been specifically excluded from the operation of the Federal Advisory Committee Act, thereby eliminating any document management obligations under FACA.

C. Categories of Documents Deemed to be Federal Records

1. *Permanent records.* Permanent records are those records that NARA appraises as having sufficient value to warrant continued preservation by the Federal Government as part of the National Archives of the United States because the records have continuing value as documentation of the organization and functions of the FCIC or because the records document the nation's history by containing significant information on persons, things, problems and conditions. FCIC records determined by the FCIC and approved by NARA to be permanent must be available in a medium and format that conforms to the standards for permanent records. FCIC permanent records shall be transferred to the National Archives of the United States at the time designated on a NARA-approved Request for Records Disposition (SF 115). When permanent records are transferred to National Archives, legal custody of the records is transferred to NARA at this time. NARA takes measures needed to preserve the records and also provides reference service, including service to FCIC.

2. *Temporary records.* Temporary records are records that are designated for either immediate disposal or for disposal after a specified period of time or an event in accordance with a NARA-approved Request for Records Disposition (form SF 115) or the General Records Schedule. Temporary Records may document FCIC business processes or document legal rights of the government or the public, document government accountability, or contain information of administrative or fiscal value. Records classified as temporary should not be retained beyond their authorized retention period; nor shall they be destroyed or otherwise disposed of prior to the end of their authorized retention period. Temporary records shall be maintained and disposed of only in accordance with the following records control schedule:

a. *Transitory records.* Records of short-term interest (180 days or less), including in electronic form (e.g., e-mail messages), which have minimal or no documentary or evidential value. Included are such records as:

- i. Routine requests for information or publications and copies of replies which require no administrative action, no policy decision, and no special compilation or research for reply;
- ii. Quasi-official notices including memoranda and other records that do not serve as the basis of official actions, such as notices of holidays or charity and welfare fund appeals, bond campaigns, and similar records;
- iii. Records documenting routine activities containing no substantive information, such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling related activities;
- iv. Suspense and tickler files or 'to-do' and task lists that serve as a reminder that an action is required on a given date or that a reply to action is expected, and if not received, should be traced on a given date shall be destroyed immediately, or when no longer needed for reference, or under a predetermined schedule or business rule (e.g., implementing the auto-delete feature of "live" electronic mail systems).

b. *Non-transitory records.* All temporary records that are not transitory records shall be retained until the Commission ceases to exist. Non-transitory records shall be destroyed or transferred to GSA (as may be required by GSA regulations) upon termination of the Commission, as appropriate, unless those records otherwise should be retained with NARA as permanent Federal records pursuant to Paragraph 5.A.1.

3. *Unscheduled records.* Records whose final disposition has not been approved by NARA. Unscheduled records are potentially permanent and must be treated as if they are permanent.

## 6. **Records Disposition Program**

A. *Goals of the Program.* An effective records disposition program is essential to successful records management and is an integral part of the FCIC's information resources management program. The goals of the records disposition program are to:

1. Maintain adequate and proper documentation and evidence of the FCIC activities for the time required to meet programmatic needs.
2. Retire records requiring longer retention to economical storage facilities, providing savings in space and equipment.
3. Preserve records of continuing or enduring value through transfer to the National Archives.

B. *Records Disposition Authority.* The following are the two basic types of records disposition authorities for FCIC records:

1. *NARA General Records Schedule (GRS).* Disposition requirements for administrative or housekeeping records that are common to most Federal agencies are listed in the GRS published by NARA. The disposition requirements of the GRS, including records retention periods are mandatory FCIC-wide unless an exception is obtained from NARA. The GRS does not cover all FCIC records.

2. *FCIC Records Control Schedules.* The GRS may be supplemented by FCIC-specific schedules covering records that are unique to program administrations and staff offices. The records series or systems contained in these records schedules are unique to their organization. Disposition instructions and retention periods cited in these schedules are mandatory.

C. Records Management

1. All records maintained by the FCIC shall be reviewed prior to the termination of the Commission. Records that require review by NARA shall be collected at that point, or earlier. Permanent records shall be designated as such and transferred to NARA.

2. Any unlawful or accidental destruction, defacing, alteration or removal of FCIC records must be reported promptly to the Executive Director or General Counsel. The penalty for the willful and unlawful destruction, damage, or alienation of Federal records is a fine under the provisions of Title 18, U.S.C., or 3 years in prison, or both (18 U.S.C. § 2071).

**Appendix B**  
**Confidentiality Letters**

<b>TAB</b>	<b>NAME</b>
1	Board of Governors of the Federal Reserve System- Ben Bernanke
2	OCC- Julie Williams
3	FDIC- Michael Bradfiel
4	FHF A- Alfred Pollard
5	DOL- Deborah Greenfield
6	CFTC- Dan Berkovitz
7	OTS- Deborah Dakin
8	DOJ- Ronald Weich
9	Treasury- George Madison
10	LexisNexis- Kara Hinrichs
11	HUD- Heather Kanovsky
12	FINRA- James Shorris
13	State Street- David Phelan
14	NY State Banking- Marjorie Gross
15	Goldman Sachs- Richard Klapper
16	Morgan Stanley- Raul Yanes
17	PIMCO- John Sopko
18	Vanguard- Nathan Will
19	Fannie Mae- Jeff Kilduff

20	UBS- John Moon
21	Barclays- Caroline de Onis
22	S&P- Brian Markley
23	CT AG- George O'Connell
24	OH AG- Doreen Johnson
25	Joe Cassano- Jim Walden
26	AIG- Mitchell Berger
27	Cornwall Capital- William Gussman
28	Magnetar- Steven Ross
29	Moody's- Steven Ross
30	MKP- Patricia Alcamo
31	GSC Group- Daniel Ross
32	NIBC- Albert Lambert
33	Laura Schwartz- Robin Alperstein
34	Scion- Michael Burry
35	ACA- Nathan Erickson
36	UBS- Maite Quino
37	Alan Roseman- Robert Bennett
38	Charles Gates- Daniel Zinman
39	Markit- Mark Davidson
40	Eric Dinallo- John Kenny
41	TCW - Michael Cahill
42	Andrew Forster- David Brodsky
43	Joe Cassano- Jim Walden



44	Credit Suisse- Daniel Zinman
45	Wachovia- Robert Kelner
46	NCRC- Josh Silver
47	Ally Financial- John Hromy
48	S&P (Special)- Brian Markley
49	PIMCO
50	Moody's (Special)- Sharon Nelles
51	Wendy Ruberti
52	Fremont General- Jim Carroll
53	NCUA- Robert Fenner
54	Maryland Insurance Administration- Neil Miller
55	David Sambo l- Walt Brown
56	ICAP North America Inc.



**Financial Crisis Inquiry Commission**  
**Agenda Item 9 for Business Meeting of January 24, 2011**  
**Additional voting procedures for remaining Commission actions**

Note to Commissioners from Gary Cohen --The Chairman asked me to prepare two additional voting and quorum procedures for consideration by the Commissioners to insure that matters in the next three weeks as the Commission winds down can be handled expeditiously. I therefore changed the unanimous written consent to a majority, and added to the existing 48 hour notice provision for a meeting (which could be exercised by either the Chairman or Vice Chairman) to include e-mail voting in a manner similar to applied for the Report.

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The Commission's Rules, Part III, Meetings, is hereby amended as follows:

F. Action Without Meeting (replaces existing F.).

Any action required or permitted to be taken by the Commission at a duly called meeting may be taken without a meeting if a majority of the Commissioners shall consent in writing to such action. Such written consent or consents shall be filed with the minutes of the proceedings of the Commission. Such action by written consent shall have the same force and effect as a majority vote of such Commissioners at a duly called meeting.

G. Voting and Quorum By E-Mail (new provision)

1. For the one or more meetings of the Commission called for the purpose of concluding the business of the Commission after the date of adoption of this Amendment, either the Chairman or the Vice Chairman may call a meeting and set the agenda, a date and schedule the beginning and end time for the meeting (which can either be in person and/or by telephone) on no less than 48 hours notice (a "Concluding Meeting").
2. The notice of a Concluding Meeting shall include a statement to the effect that email voting shall be available and shall designate the Deputy General Counsel ([cwaskowicz@fcic.gov](mailto:cwaskowicz@fcic.gov)) to be the recipient of the email votes accepting or rejecting matters to be presented therein.
3. Email votes for or against the matters noticed for the Concluding Meeting may be cast at any time during and after the Concluding Meeting until the earlier of the time (i) all 10 Commissioners have either voted in person, by telephone or by email, and (ii) 24 hours after the date and time the Concluding Meeting was scheduled to end.
4. The email address from which the vote is cast by Commissioners shall be the either the one regularly used by the Commission to send out "All Commissioners" email notifications, or the Commissioner's fcic.gov address. The Deputy General Counsel shall confirm to all Commissioners the receipt of email votes.
5. If there are fewer than 6 Commissioners present at the beginning of a Concluding Meeting, provisional votes for or against matters under consideration may be called for and cast and the determination of whether a quorum existed for the Concluding Meeting shall be deferred until the earlier of the time (i) 6 Commissioners shall be present

or deemed present and (ii) time for email voting has passed. A Commissioner timely casting his or her vote by email shall be deemed to have been present at all times during the Concluding Meeting in determining the existence of a quorum.