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### Agenda Item 3. Commission Rules and Procedures 8-12-2009

Irv Nathan

Katherine E. McCarron

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**Financial Crisis Inquiry Commission**  
**Agenda Item 3 for Telephonic Meeting of August 19, 2009**

*Privileged and Confidential*

**MEMORANDUM**

To: Phil Angelides, Chairman  
Financial Crisis Inquiry Commission  
William Thomas, Vice Chairman  
Financial Crisis Inquiry Commission

From: Irvin B. Nathan, General Counsel  
Katherine E. McCarron, Assistant Counsel  
Ariel B. Waldman, Assistant Counsel  
Office of General Counsel,  
U.S. House of Representatives

CC: Timothy Blodgett, Administrative Counsel, CAO

Date: August 12, 2009

Re: FCIC Rules of Procedure

**Overview**

As requested, below is a proposed initial set of rules to govern the Financial Crisis Inquiry Commission (“FCIC” or “Commission”).

**I. Authority Governing the Commission’s Operations**

The FCIC was established by the Fraud Enforcement and Recovery Act of 2009 (“FERA”), P.L. 111-21, 123 Stat. 1617. The FCIC’s operations shall comply with the FERA, as amended, and with these FCIC Rules of Procedure (FCIC Rules), as adopted and amended. To the extent the FCIC Rules conflict with the FERA or any provision of federal law, federal law controls. When the FCIC encounters in an official meeting or hearing a situation for which specific rules are not provided for in the FERA or in these FCIC Rules, the FCIC shall adhere to the provisions of Robert’s Rules of Order, as applicable.

**II. Conducting Commission Business**

At meetings or hearings of the Commission, there shall be a presiding Commissioner. The Chairman shall be the presiding Commissioner when he is present. In the Chairman’s absence, the Vice-Chairman shall be the presiding Commissioner. If neither

is present, then a member of the Commission designated by the Chair will serve as the presiding Commissioner.

The presiding Commissioner has the authority to ensure the orderly conduct of the Commission's business. This power includes, without limitation, recognizing members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold the floor, determining the order in which members of the Commission may speak or question witnesses, conducting votes of members of the Commission, and designating Commissioners to conduct specified functions in connection with meetings or hearings.

### **III. Meetings**

#### **A. Generally**

The Commission may conduct either open or closed meetings, as the Chairman and Vice Chairman, acting jointly, may determine at their discretion. For meetings designated as open, the Commission may, in its discretion, elect to have all or a portion of the meeting be closed.

Under the FERA, the Commission is not subject to the Federal Advisory Committee Act. The Commission is also not subject to the Freedom of Information Act or the Government in Sunshine Act.

#### **B. Notice to Commissioners**

All meetings shall be noticed by email and fax to each Commissioner by the Chairman or his designee. Meetings held in the regular course must be noticed at least seven (7) days in advance. Meetings held pursuant to exigent circumstances must be noticed at least forty-eight (48) hours in advance. Whether exigent circumstances exist will be determined jointly by the Chairman and Vice Chairman. Meeting notices shall provide the time and place of the meeting and an agenda. Meetings may include sessions with selected individuals or groups, in addition to Commissioners.

#### **C. Revised Agenda**

Commissioners wishing to add or delete items from a meeting agenda shall notify the Chairman and Vice Chairman of the proposed change or changes to the agenda not less than forty-eight (48) hours before the scheduled meeting (or for a meeting held pursuant to exigent circumstances not less than twenty-four (24) hours before the scheduled meeting), and in any event should take good-faith steps to provide such notice as soon as possible. The Chairman and Vice Chairman, acting jointly, shall make an agreed-upon determination as to any additions or deletions to the agenda.

#### **D. Public Notice**

If all or part of a regularly-scheduled meeting is to be open to the public, notice will be provided at least seven (7) days in advance by publication in the Congressional Record and any other publications selected by the Commission, and shall include notice of agenda items open to the public. Meetings held pursuant to exigent circumstances must be noticed at least forty-eight (48) hours in advance.

#### **E. Minutes**

Minutes of each meeting shall be prepared by the FCIC Director or the Director's designee, distributed to each Commissioner, and maintained with official records of the Commission. The minutes will include a record of the persons present (including the names of Commission members, staff and witnesses), and a description of the matters discussed and conclusions reached, and all copies of reports received, issued or approved by the FCIC.

### **IV. Hearings**

#### **A. Generally**

Hearings shall be open to the public except such portions as the Commission or the Chairman and the Vice Chairman acting jointly determine to be closed.

#### **B. Notice of Hearing**

If all or part of a regularly-scheduled hearing is to be open to the public, notice shall be provided at least seven (7) days in advance in the Congressional Record and other publications selected by the Commission, and shall include a listing of the agenda items open to the public. Hearings held pursuant to exigent circumstances must be noticed at least forty-eight (48) hours in advance.

#### **C. Witness Statements**

Witnesses who are to appear before the FCIC who wish to provide an opening statement shall file with the Commission, at least three business days in advance of their appearance, twenty copies of a written statement of their testimony and proposed exhibits for the benefit of the members of the Commission and staff. Witnesses' oral testimony may be limited to a brief summary of their submission. Testimony at hearings before the FCIC may be conducted under oath, at the direction of the Presiding Commissioner. The FCIC may question witnesses, who may be represented by counsel at FCIC hearings.

#### **D. Public Participation**

Members of the public may attend any portion of a hearing that is not closed to the public. The Chairman may decide to exclude oral comment periods during a hearing. Members of the public may, at the discretion and direction of the Chairman or presiding

Commissioner, offer oral comment. Members of the public may submit written statements to the FCIC at any time.

#### **E. Transcripts**

A transcript of each FCIC hearing shall be made and retained by the FCIC in the official Commission records. The Director shall review and correct the transcript before distribution. Copies of transcripts of open and closed meetings shall be provided to each Commissioner upon request. Copies of transcripts of all open hearings or open portions of hearings shall be made available to the public upon request.

#### **V. Commissioner Voting at Meetings and Hearings**

To transact business at a meeting or hearing, as required by the FERA, § 5(b)(4)(B), a quorum of the FCIC shall consist of six (6) Commissioners. Once a quorum is present, any motion at a meeting shall require a majority of those present and voting, so long as the quorum remains; at a hearing, procedural motions shall not require a quorum and may be carried by a majority of the Commissioners present.

There shall be no proxy voting.

#### **VI. Eligibility to Vote**

At a meeting or hearing of the Commission, when a decision or recommendation of the Commission is required, the presiding Commissioner will request a motion for a vote. Any member, including the presiding Commissioner, may make a motion for a vote. So long as a quorum is present, Commission business shall be transacted by a majority vote of the members present, except for the issuance of subpoenas under Section 5(d)(2)(B)(iii). Each Commissioner shall have a single vote and, for votes requiring a majority vote as referenced above, his or her vote shall be entered by roll call during meetings or by written document outside of ongoing meetings.

#### **VII. Staff**

All staff shall be appointed and terminated by the Chairman and Vice Chairman, acting jointly.

#### **VIII. Subcommittees and Agents of the Commission**

The FERA requires the Commission to address twenty-two (22) specific causes of the current financial and economic crisis, § 5(c)(1)(A)-(V), and to address the causes of the collapse of each major financial institution that failed or was likely to have failed if not for the receipt of government assistance, *id.* § 5(c)(2). The statute further provides that any subcommittee, member, or agent of the Commission may, if authorized by the Commission, take any action which the Commission is authorized to take under § 5(d)(8) of the FERA. To address this complex set of assignments, at the direction of the

Chairman, any subcommittee on any topic may be formed by the FCIC.

The subcommittee chairs and members of the subcommittees shall be appointed by the Chairman of the Commission in consultation with the Vice Chairman. Each subcommittee must have two or more Commissioners, with staff as may be appropriate. At meetings or hearings of a subcommittee, the Chair of the given subcommittee shall preside. In the absence of the Chair of the subcommittee, a designee of the subcommittee Chair shall preside.

FCIC subcommittees shall be subject to the FCIC Rules to the same extent as the full Commission, except that subcommittees may pass any motion by a majority of the Commissioners present regardless of whether a quorum of the Commission is present.

A subcommittee may not issue a subpoena. If a subcommittee wishes to have a subpoena issued, the subcommittee shall request that the full Commission issue the subpoena and the Commission may in its discretion issue the requested subpoena pursuant to Section 5(d)(2)(B)(iii) of the FERA.

## **IX. Reporting to Congress**

### **A. Submission of Report and Testimony to Congress**

The report of the Commission and appearance before and consultations with Congress are governed by FERA § 5(h), which provides that the FCIC's report is due to the President and Congress on December 15, 2010, and that the Chairperson shall, within 120 days after the date of the report's submission, appear before the Senate Banking, Housing and Urban Affairs Committee and the House Financial Services Committee.

### **B. Vote on Report**

The full Commission shall vote on approval and submission to Congress of the report. The Chairman shall set the time and date for a meeting of the Commission for the purpose of voting on approval and submission of the report, which date shall be no later than 30 days before its due date. Notice of this meeting must be provided to all Commissioners no less than one week prior to the date of the meeting. Commissioners who are unable to attend the meeting at which the vote on approval and submission is scheduled may vote telephonically or by email by transmitting their vote in either manner to a staff member designated by the Chairman. Approval and submission requires a majority of the votes of those Commissioners physically present and voting and those who vote telephonically or by email.

### **C. Additional or Dissenting Views**

Commissioners may submit additional or dissenting views for publication in the report submitted to Congress. They may be submitted by one or more Commissioners. They are to be provided to the staff member designated by the Chairman by a time designated

by the Chairman (that shall be prior to the final deadline for completion of all report material), and the staff member shall promptly circulate to all Commissioners all additional and dissenting views that are received. Additional or dissenting views not provided by the time specified by the Chairman will not be included in the report submitted to Congress.

## **X. Budget**

Under the FERA, § 5(j): “There is authorized to be appropriated to the Secretary of the Treasury such sums as are necessary to cover the costs of the Commission.” The Commission’s fiscal year spending plan approved by the Commission shall govern the Commission’s activities and expenditures. Spending deviations exceeding \$50,000, or reprogramming of more than \$50,000 from one of the plan's spending categories to another, shall be approved by the Chairman and Vice Chairman and noticed to all Commissioners.

## **XI. Non-staff Expenditures and Contracting**

No consultants or other outside personnel, whether their services are obtained by contract, detail, volunteering, or a remunerative agreement, may be hired without the approval of the Commission or approval of a person delegated by the Commission to exercise such authority, and all such proposed arrangements shall be noticed to all Commissioners.

## **XII. Record Keeping**

### **A. Governing Law**

The FCIC is a “federal agency” for purposes of the federal records management provisions at 44 U.S.C. § 2901, *et seq.*, and therefore is subject to certain record-keeping requirements. *See* 44 U.S.C. § 2901(14) (defining federal agency to include, among other things, “any establishment in the legislative . . . branch” except the Senate or House of Representatives); FERA, § 5(a) (providing that the FCIC is “established in the legislative branch”).

### **B. Scope of Record-Keeping Obligations**

The FCIC does not need to preserve every document; rather, the FCIC “shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and [its] essential transactions.” 44 U.S.C. § 3101.

### **C. Record-Keeping Program Requirements**

The FCIC will “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.” *Id.* § 3102. The program must

provide for “effective controls over the creation and over the maintenance and use of records in the conduct of current business,” *id.* at § 3102(1); must establish safeguards against the removal or loss of records, including making it known to FCIC officials and employees “that records in the custody of the agency are not to be” destroyed except in accordance with 44 U.S.C. §§ 3301-3314 (and therefore should only be destroyed after consultation with counsel), *see id.* § 3105(1); and must inform employees of penalties provided by law for the unlawful removal or destruction of records, *see id.* § 3105(2).

#### **D. Cooperation with National Archivist**

The National Archivist has certain oversight authority over the FCIC’s record-keeping, including but not limited to, that the FCIC is required to notify the Archivist of “any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in [the FCIC’s] custody,” *id.* § 3106, and the Archivist may inspect the FCIC’s “records management programs and practices,” *id.* §§ 2904(c)(7) & 2906, and may report to congressional committees and OMB on its evaluations of the FCIC’s compliance in this regard, *id.* § 2904(c)(8). The FCIC will comply with federal law in its record-keeping practices and interactions with the Archivist.

### **XIII. Modification of Existing Rules**

These FCIC Rules may be amended by a majority vote of the Commissioners serving at the time. Any changes proposed to these FCIC Rules shall be reviewed by counsel and staff as directed by the Commission, for their legality, soundness, sufficiency, and appropriateness prior to their adoption or approval unless a majority of Commissioners determines that such a review is not necessary.