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FCIC Memo from Gary Cohen and Cassidy Waskowicz to Commissioners Regarding Quotation and Interview Objections

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Memo To: Commissioners of the FCIC

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

cc: Wendy Edelberg

Date: December 22, 2010

Re: Objections Regarding Release of Quotations from Interviews and Excerpts from Confidential Documents

Introduction

The Commissioners received a Memorandum dated November 11, 2010 outlining FCIC procedures for the release of confidential documents in the FCIC report. FCIC staff is in the final stages of this process, clearing certain interviews and related quotes as well as certain confidential documents for public release. This memorandum primarily summarizes the progress we have made in clearing quotes used in the report. There are a substantial number of confidential documents and interviews which must be considered by or on behalf of the Commission. Documents and Interviews for release on the Website will be the subject of a separate, but similar, memorandum in early January.

Staff has generally followed these procedures when resolving objections to the use of quotes: (i) quotes that are key to the report are included over objection (but only after resolving any errors or ambiguities), (ii) interviewees who were promised confidentiality or that their interview was for background only will not be quoted without their consent, (iii) blanket objections are generally not respected, (iv) great care is taken in using quotes from MFRs without an audio file or transcript, and (v) we are very sensitive to the disclosure of confidential information from bank supervisors related to institutions that are currently in business or have been acquired by another institution that is currently in business.

Attached as Schedule A is a proposed resolution to confirm Commission approval of confidential quotes and excerpts from documents for use in the report and

adopting recommendations by the Executive Director and General Counsel regarding the public release of the same.

Clearance of Interviews and Relevant Quotes

FCIC staff has memorialized its interviews in one of three ways: audio recording, official transcript or a Memorandum for the Record (“MFR”) which, in most cases, is a paraphrasing of the interview. Initially, FCIC staff sent out copies of its interviews that were likely to be used in the report (we erred on the side of inclusion) in audio, transcript or MFR format, depending on availability, to those interviewees who had a confidentiality understanding with the FCIC. More recently, FCIC staff only is providing interviewees with their interviews that exist solely in an MFR format. When FCIC staff sends out an interview for comment, it asks the interviewee to provide comments about specific sections of the interview which raise concerns rather than make an overall objection to use of the interview. At this point, FCIC staff is focusing on clearing quotes for use in the report and will provide further guidance on the release of interviews on its website at a later date.

The first stage of clearing actual quotes involved FCIC staff identifying those quotes from a private interview with the FCIC which the report cites. Once FCIC staff identified these quotes, it then determined which of these quotes were (i) quotes subject to a confidentiality understanding with the FCIC, (ii) quotes for which the interviewee or its counsel requested an opportunity to review or (iii) quotes for which the interviewee has raised a general objection. It was this universe of quotes that FCIC began to clear.

The chart below provides information as of December 20, 2010, related to the clearance of the 399 interviews with audio files or transcripts. Note that the number of objections includes both initial objections to the interview in general as well as objections to individual quotes in the interviews.

FCIC Interviews with Audio Files or Transcripts	399
Of those 399 interviews, interviews not requiring clearance ¹	14
Of those 399 interviews, Interviews with clearance that has been deferred ²	107
Of those 399 interviews, interviews that have been cleared (clearance number includes both no responses to letters and affirmative responses)	166
Of those 399 interviews, interviews for which we have received objections either to the interview or the specific quote ³	112

¹ Interviews not requiring clearance are those interviews for which the interviewee either had no assumption of confidentiality, such as authors, or for which the interviewee declared that he did not object to the interview being made public.

² Interviews that have been deferred are those interviews that were designated “background” interviews and are not used in the report or interviews that no longer appear in the report and do not have to be resolved at this time.

³ Interviews or quotes with objections are being resolved by staff depending on the objection, generally by fixing errors, confirming proper context, adding deleted material to clarify meaning, removing incorrect quotes, or overruling the objection.

Similarly, below is a chart providing information as of December 20, 2010, related to the clearance of the 291 interviews with only MFRs. Again, the number of objections cited below includes both initial objections to the interview as well as objections to individual quotes in such interviews.

FCIC Interviews with only MFRs	291
Of those 291 interviews, interviews not requiring clearance	3
Of those 291 interviews, interviews with clearance that has been deferred	105
Of those 291 interviews, interviews that have been cleared (clearance number includes both no responses to letters and affirmative responses)	94
Of those 291 interviews, interviews for which we have received objections either to the interview or the specific quote	89

FCIC staff has received objections to the public release of interviews and quoted material in formal letters and in email messages. Objections to the release of interviews, regardless of their format, generally fall into the following categories: (1) blanket objection to release based on confidentiality or disclosure of proprietary information, (2) blanket objection to release based on prior conversations with FCIC staff promising that the interview was for background purposes only or would not be released, and (3) objections to release of specific portions of the interview based on reasons such as confidentiality or disclosure of proprietary information. And interviewees often raise one additional objection specific to MFRs -- that MFRs are inherently unreliable since they are based on interview notes and cannot be verified by an audio recording. Again, as stated above, FCIC staff will review objections concerning the release of interviews on its website at a later date.

Objections to quoted material appearing in FCIC interviews are less easy to categorize. Generally the objections fall into the following categories: (1) objections related to the accuracy of the quote, or (2) objections requesting more context in which to understand the quote and to assure that the quote is not misleading, or (3) objections reflecting a change of heart or rethinking of the statement. FCIC staff carefully reviews each objection to a quote. Upon receiving an objection, the typical practice of FCIC staff has been to confirm the accuracy of the quote, and then resolve any inaccuracies in a matter consistent with requests, if possible.

When evaluating objections disputing the accuracy of a quote, FCIC staff carefully reviews the relevant section of the report in which the quote appears and the underlying interview. Obviously, reviewing such objections when the underlying interview is an MFR presents a greater challenge than evaluating such an objection when the underlying interview is an audio file or transcript. Some objections are easily resolved, such as objections disputing the accuracy of the words comprising the quote.

For those objections which request more context in which to evaluate the quote and argue that the quote is misleading, FCIC staff generally has not provided much additional context to the interviewee. These types of objections often require more time

and judgment to resolve. Resolution generally encompasses the following choices (i) thank the provider and correct mistakes, (ii) satisfy the provider that the quote was used in the proper context, (iii) occasionally switch out the quote or drop it from the report (rare) if the quote was from a truly confidential interview, or (iv) disagree with the provider's objections and use the quote. FCIC staff has created a separate chart that includes, to the best of the staff's knowledge, all objections to the use of quotes, received as of December 20, 2010, and summaries of how FCIC staff resolved such objections. FCIC staff is updating the chart. Upon request, FCIC staff can provide a copy of the chart, and the underlying documents referenced in the chart.

A similar process is being employed for the use of excerpts from confidential documents in the report.

Attached Schedule

Schedule A

Proposed Resolution Regarding Use of Quotations and Excerpts from Documents

RESOLUTION: Confirming Approval of Use of Quotations and Excerpts from Documents

Adoption of Recommendations by the Executive Director and General Counsel Regarding the Use of Quotations and Excerpts from Documents in the Report

WHEREAS, the Commission shall submit to the President and to the Congress a report containing the findings and conclusions of the Commission on the causes of the current financial and economic crisis in the United States, and

WHEREAS, this report and any accompanying dissents and additional views may include quotes from confidential interviews and excerpts from documents requiring approval of the Commission⁴ prior to public release, and

WHEREAS, to assure that such material is expeditiously cleared and available for inclusion in the Commission's report and any accompanying dissents or additional views, the General Counsel suggests that the Commission adopt the following resolutions:

RESOLVED, that the Commission delegates to the Executive Director and General Counsel the power to review, resolve or override, on behalf of the Commission, objections made to the public release of excerpts from confidential documents or quotations, on a case-by-case basis, after weighing the nature of the objections against the benefit to the report of such public release;

RESOLVED FURTHER, that the Commission adopts the recommendations of the Executive Director and General Counsel regarding the release of excerpts from confidential documents or quotations for inclusion in the Commission's report and any accompanying dissents or additional views, and

RESOLVED FURTHER, that the General Counsel shall inform the Commissioners from time to time as excerpts from confidential documents or quotations to which objections have been made are confirmed for public release at the time of publication of the Commission's report.

⁴ For the purpose of this resolution, approval by the Chairman acting alone, or by the Chairman and Vice Chairman, which are also methods by which release may be approved, is not being employed.

