

Congress to Establish Financial Crisis Inquiry Commission

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Yesterday, the House of Representatives passed S. 386, the [Fraud Enforcement and Recovery Act of 2009](#), by a 367-59 vote. Among other things, S. 386 establishes a Financial Crisis Inquiry Commission (the "Commission"), with broad authority to examine the domestic and global causes of the current U.S. financial and economic crisis. The Senate passed a [similar bill](#) in late April and final passage, most likely of the House version, is expected soon.

Under both versions of the bill, the Commission will have roughly 18 months to investigate the circumstances that led to the financial crisis and issue a report to Congress with its findings and recommendations. The Commission will have broad investigative authority, including subpoena power, and the ability to refer any evidence of criminal activity to the U.S. Attorney General and state attorneys general. Other key provisions, as described in the House bill, include the following:

Membership:

The Commission will have ten members, who must be private citizens and may not be employed by any government entity. [§ 5(b)(2)(B)] Commission members will be appointed as follows: Three each appointed by the Speaker and Senate Majority Leader; two each appointed by the minority leaders in the House and Senate. [§ 5(b)(1)(A-D)] The Chair and Vice Chair must be from different parties and will be selected jointly by the respective leaders. [§ 5(b)(3)] Members are expected to be prominent U.S. citizens with national recognition and depth of experience in fields such as banking, regulation of markets, taxation, finance, economics, consumer protection and housing. [§ 5(b)(2)(A)]

Quorum, Subpoena Procedures, Confidentiality and Conflicts of Interest:

Six members of the Commission will constitute a quorum [§ 5(b)(4)(B)], with subpoenas issued only with the joint concurrence of the Chair and Vice Chair or with an affirmative vote by a majority of the members. [§ 5(d)(2)(B)(iii)] Effectively, this vests subpoena power in the hands of the Democrats in the event that a matter of partisan division emerges. In our view, if there is any pushback to the House bill from Senate Republicans, it will be due to their concerns regarding subpoena power. The House bill does not squarely address the issue of confidentiality of financial information provided to the Commission, except that the bill requires that information of a "confidential nature" provided to the Commission from a government entity must be maintained in a "secure manner." [§

5(d)(4)(A)] The House bill is also silent on the issue of conflicts of interest for members, staff, consultants and contractors, but because the Commission will be located in the legislative branch it is possible that congressional ethics rules will be used as a benchmark.

Focus:

The Commission will have two primary areas of focus: (1) an examination of the role that a list of 22 distinct topics played in the current crisis; and (2) an examination of the specific causes of the collapse of each major financial institution that failed (including institutions that were acquired to prevent their failure) or was likely to have failed if not for the receipt of exceptional Government assistance from the Secretary of the Treasury during the period from August 2007 through April 2009. [§ 5(c)(1-2)] Assistance from the Federal Reserve does not appear to trigger the provision.

With respect to the Commission's first area of focus, major topics among the 22 listed include accounting practices, fraud and abuse in the financial sector, tax treatment of financial products, credit ratings agencies, lending practices and securitization, corporate governance, compensation structures, credit default swaps and other derivatives, short-selling, and the quality of due diligence undertaken by financial institutions. [§ 5(c)(1)(A-V)] The House bill adds a specific focus on consumer protection and abuse of consumers in the mortgage sector to the list of topics to be considered. [See, e.g. § 5(c)(1)(A)] It remains unclear whether the Commission will assess the 22 listed topics purely at the policy level, or if it will determine that the topic-specific mandate also authorizes company specific inquiries. Notably, the Commission's institution specific reporting authority—as outlined in section 5(h) of the House bill—appears to extend *only* to "specific findings on any financial institution examined by the Commission under subsection (c)(2)," which applies only to "failed," "acquired" or "likely to have failed" major financial institutions.

With respect to the second area of focus, the Commission is specifically tasked with conducting an examination of "major financial institutions" that failed or were acquired to prevent their failure, or that were "likely to have failed" but for the receipt of "exceptional Government assistance." [§ 5(c)(2)] The latter category of "likely to have failed" institutions is not defined in either the House or Senate bills, however, and may be a subject of considerable discussion once the Commission is established. The term "major financial institution" is also undefined. The scope of subsection 5(c)(2) does not appear to authorize separate or collateral investigations of healthy financial institutions that acquired entities to prevent their failure.

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