

CLIENT ALERT

NEW LAW CREATES HISTORIC CONGRESSIONAL COMMISSION WITH BROAD POWERS TO INVESTIGATE FINANCIAL MARKET PARTICIPANTS

On May 20, 2009, President Obama signed into law S. 386, the Fraud Enforcement and Recovery Act of 2009 (FERA). In addition to expanding federal fraud laws covering funds distributed under the Troubled Asset Relief Program (TARP), FERA creates a new Financial Crisis Inquiry Commission to investigate the causes of the current global financial crisis. This law gives the panel a broad charter to investigate almost anything related to the recent financial crisis, as well as the authority to hold hearings and subpoena witnesses and documents in furtherance of its duties. It was created as the result both of a growing bipartisan consensus for a comprehensive study of recent market instability and of accusations of systemic negligence in the financial system. Clients in every facet of the financial services sector should expect heightened federal scrutiny in the coming months, with the additional prospect of demands from this new commission for interviews, records and public testimony. The commission is directed to report to Congress and refer to the federal and state attorneys general potential violations of law.

As Congress considers a likely regulatory overhaul of America's financial infrastructure amidst volatile economic conditions, lawmakers have increasingly turned to the annals of legislative history for guidance. To gain a more comprehensive understanding of the causes of the current financial crisis, their focus has fallen squarely on America's last great economic crisis and the ensuing congressional proceedings of the 1930s. In April, House Speaker Nancy Pelosi, D-Calif., first called for the formation of a "Pecora-like" commission, invoking the 1933-34 Senate Banking Committee investigation named for then-Senate counsel Ferdinand Pecora, who, for over a year, called many of the nation's most prestigious financiers before the panel. Speaker Pelosi's remarks echoed similar recommendations from House Committee on Oversight and Government Reform Ranking Member Darrell Issa, R-Calif., who has repeatedly called for the formation of a panel modeled after the 9/11 Commission.

S. 386 will create a 10-member commission that will be responsible for examining "the causes, domestic and global, of the current financial and economic crisis in the United States."¹ Six of the commissioners will be nominated by House and Senate Democratic leaders and four by their Republican counterparts. None of the commissioners can be currently serving in federal, state or local government. The chairperson will be selected by the Democratic congressional leadership and the vice chairperson will be chosen by the Republicans.

¹ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21. 20 May 2009.

The commission will have incredibly broad authority to probe virtually every aspect of the financial collapse. The following areas were specifically identified in the bill as topics for examination: fraud and abuse; the role of federal regulators; international capital markets; monetary policy and the flow of credit; accounting standards; tax issues; capital structures; credit-rating agencies; lending practices; relationships between banks, securities, insurance and other non-banking institutions; size and strength of certain companies; corporate governance; executive compensation; the housing market; unregulated financial products such as derivatives and credit default swaps; the practice of short-selling; and government-sponsored enterprises, among others.

In addition, the legislation specifically requires the commission to analyze the causes of the failure of the financial institutions that either collapsed or were acquired, as well as those that might have collapsed but for their receipt of TARP funds. The commission is required to submit a report of its findings to Congress on December 15, 2010, and later testify about those findings before both the House and the Senate.

The commission's authority to carry out this broad charter is also equally wide-ranging. The law provides that the commission will collect evidence, take testimony and hold hearings with both subpoena power and the ability to refer those who refuse to comply with a subpoena to the local U.S. District Court for enforcement. The nature of the subpoena power was the source of the one amendment to the bill. On May 14, 2009, the Senate passed the bill by unanimous consent with the caveat that Republican approval is required for the issuance of any subpoena. The House took up the bill with that amendment and passed it by a vote of 338-52 on May 18, 2009.

This contemporary reincarnation of the Pecora Commission, if conducted in the manner of its Depression-era forerunner, could generate further unwelcome public and governmental attention for the already maligned financial services industry. Chief Counsel Ferdinand Pecora so thoroughly dominated the press with "startling admissions of wrongdoing that he stole headlines from even the masterful Franklin Roosevelt", who used the publicity to push through many of his financial reforms, including the Securities Act of 1933, the Securities and Exchange Act of 1934 and the Public Utilities Holding Company Act of 1935.² As Associate Senate Historian Donald Ritchie recently described to *The New York Times*, "The Pecora commission created villains essentially. This riveted the public because it was daily headlines for months and what otherwise would be seen as fairly arcane practices, Pecora was able to dramatize it very much."³

Companies should be aware of the investigative threat of the commission's actions, as well as the potential policy ramifications of the commission's findings, intended to, in Speaker Pelosi's words, yield "transparency ... discipline and accountability to the American taxpayer."⁴

² Schlesinger, Jr., Arthur, and Roger Burns. *Congress Investigates 1792-1974*. New York: Chelsea House Publishers, 1975. 222-23.

³ Phillips, Kate, "Financial Inquiries and the Pecora Legacy," *The Caucus*, [The New York Times](http://thecaucus.blogs.nytimes.com) 6 May 2009 <<http://thecaucus.blogs.nytimes.com>>.

⁴ Marinucci, Carla. "Pelosi Calls For Panel to Probe Wall Street." [The San Francisco Chronicle](http://www.sfgate.com) 16 April 2009: A-1.

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