RSC Republican Study Committee
Financial Services Working Group
Congressman Scott Garrett (R-NJ), Chairman
Congressman Tom Price (R-GA), RSC Chairman
September 15, 2010

The Secrets of Frank-Dodd
"FRODD"

When the Democrats rushed the Financial Services bill to meet an artificial deadline, they left a Freedom of Information Act (FOIA) loophole for the SEC.

Section 929I authorizes the SEC to withhold records under FOIA provided to the commission pursuant to Section 17(b) of the Securities Exchange Act of 1934, Section 204 of the Investment Advisers Act of 1940, or Section 31 of the Investment Company Act of 1940 "if such records or information have been obtained by the Commission for use in furtherance of the purposes of [these titles], including surveillance, risk assessment, or other regulatory or oversight activities." Section 929I addresses the concern of regulated entities that confidential and highly sensitive business information collected during the SEC's examination process ultimately could be disclosed to the public.

Ironically, one of the goals of this legislation, supposedly, was greater transparency. These should be greater transparency in the markets, and greater transparency about what the regulators are doing. Despite these intended goals, the SEC was granted wide ranging exemption for Freedom of Information Act inquiries. This is an example of problems that can occur when Congress rushes a 2,300 page bill through the legislative process, much of it is decided in a hurried manner without proper analysis and, at the end, nobody has the opportunity to read the bill in its entirety until it is already established in law.

The Legislative Response

In response to this loophole Rep. Darrell Issa and Rep. Spencer Bachus have introduced H.R. 5924, the SEC Freedom of Information Restoration Act. This legislation would strike the FOIA exemptions included in section 929I and insert language that would instead provide the SEC with the ability to protect sensitive records obtained in its examination of financial institutions by using a pre-existing FOIA exemption covering records of financial institutions (5 U.S.C. § 552(b)(8)). The bill provides that any entity that the SEC is responsible for regulating, supervising, or examining is deemed a "financial institution" for purposes of applying the FOIA institutional exemption.

Chairman Frank has scheduled a hearing, "Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision" for September 16, 2010.

Question to consider…

1. Is section 929I consistent with the Obama administration's policy of government transparency?
2. What should the Commission include in guidance to its staff to ensure that section 929I is used only as it was intended and not to impede public scrutiny of the SEC's performance?
3. How would the repeal of section 929I affect the SEC's new powers under Dodd-Frank to supervise a wide range of financial institutions?
4. What percentage of FOIA requests does the SEC currently deny?

In other news
Elizabeth Warren may become Bureau of Consumer Financial Protection Czar

There's been some buzz recently that President Obama will bypass Congress and unilaterally install Elizabeth Warren atop a new federal bureaucracy with substantial authority over everything from credit cards to mortgages to pay-by-installment plans.

"It's unclear whether she would have the votes to win Senate confirmation, and Senate Banking Committee Chairman Christopher Dodd (D., Conn.) has warned that nominating her could lead to a long, drawn-out fight over the new agency and its powers. Putting her in an interim role, even if she's not technically an 'interim director,' would allow her to bypass Senate confirmation, while still playing a role." (WSJ, 9/13/10)

Is there something wrong with wanting a public debate about this brand new federal bureaucracy and its broad powers to affect every corner of families' financial decisions? And shouldn't it be a major red flag that the President's rumored choice for financial czar is too liberal to be confirmed by the same Senators that passed ObamaCare and Dodd-Frank?

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*Legislative Response and Questions to consider provided by Financial Services Committee, Minority Staff

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THE WALL STREET JOURNAL

'Systemic Risk' Stonewall

Some bailout questions the Fed still hasn't answered.

On the key facts behind the bailouts of 2008, regulators have stonewalled the public, the press and even the inspector general of the Troubled Asset Relief Program. On Wednesday, we'll find out if they can also stonewall the Financial Crisis Inquiry Commission.

Chairman Phil Angelides and his panel will begin two days of hearings on the subject of "Too Big to Fail," featuring testimony from Federal Reserve Chairman Ben Bernanke and Federal Deposit Insurance Corporation Chairman Sheila Bair. Across bailouts from Bear Stearns to AIG, the government has refused to release its analysis of the "systemic risks" that compelled it to mount unprecedented interventions into the financial system with taxpayer money. Two years after the crisis, Mr. Angelides and his colleagues should finally let the sun shine on this critical period of our economic history.

A year ago we told you about former FDIC official Vern McKinley, who has made a series of Freedom of Information Act requests. He wanted to know what Fed governors meant when they said a Bear Stearns failure would cause a "contagion." This term was used in the minutes of the Fed meeting at which the central bank discussed plans by the Federal Reserve Bank of New York to finance Bear's sale to J.P. Morgan Chase. The minutes contained no detail on how exactly the fall of Bear would destroy America.

He also requested minutes of the FDIC board meeting at which regulators approved financing for a Citigroup takeover of Wachovia. To provide this assistance, the board had to invoke the "systemic risk" exception in the Federal Deposit Insurance Act, and it therefore had to assert that such assistance was necessary for the health of the financial system. Yet days later, Wachovia cut a better deal to sell itself to Wells Fargo, instead of Citi. So how necessary was the assistance?

The regulators have been giving Mr. McKinley the Heisman, but two weeks ago federal Judge Ellen Segal Huvelle made the FDIC show her the Wachovia documents. She is still considering the McKinley suit, but the crisis commission doesn't need to wait for her decision. It should let all Americans read them now.

Then there's AIG. Who decided that firm was too big to fail, and on what basis? Last winter, Senator Jim Bunning went on CNBC and said that Mr. Bernanke's staff did not think AIG was too big to fail. "His staff didn't agree with him. . . . I'm talking about an email that he sent his staff after his staff recommended that the Federal Reserve not touch AIG," said Mr. Bunning.

In February, we sent a FOIA request to the Fed for an internal memo entitled "Issues Related to Possible IPC Lending to American International Group" and an email from Chairman Bernanke that included a draft of the proposal that he would soon present to the Fed Board of Governors to approve lending to AIG. Yesterday a Fed spokeswoman told us it is still reviewing the request.

You could argue that the Fed has been a model of good government in handling our request compared to the way it has responded to TARP inspector general Neil Barofsky. Documents he's asked for were not produced and in some cases the New York Fed has told Mr. Barofsky that documents did not exist when in fact they did. Along with investigating the management of the crisis, the former prosecutor is also now investigating the withholding of information about the crisis.

What could the New York Fed be hiding? For one thing, a clear explanation of why it felt it had to bail out AIG. The story from regulators during the crisis was that credit-default swap counterparties had to be paid lest the financial system collapse. The public became incensed about 100-cents on the dollar pay-outs to big banks. Then last winter, Treasury Secretary Timothy Geithner, who ran the New York Fed in 2008, said the real problem had been AIG's insurance business, threatening average consumers.

Writing in our pages in February, former New York Insurance Superintendent Eric Dinallo said that "policyholders would have been protected" in the event of an AIG bankruptcy. That seemed clear enough, but then Mr. Dinallo immediately added that an AIG bankruptcy "would have been bad for those same policyholders." So which was it? State insurance regulators and industry analysts have since told us that Mr. Dinallo was wrong when he suggested that policyholders would have suffered.

Two years after the bailouts and more than a month after President Obama signed into law new authority for the government to prevent "systemic risk," Washington still won't tell us what this term means. Releasing the history of 2008 would at least allow us to know what regulators thought it meant at the time, with lessons for the future. Is there any other reason for this inquiry commission to exist?

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