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February 6, 2007

VIA HAND DELIVERY

Chief Docket Clerk
Attn: Honorable William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court Building
1099 14th Street, N.W., Suite 350 West
Washington, D.C. 20005

Re: In the Matter of Franklin D. Raines, et al., Notice Number 2006-1

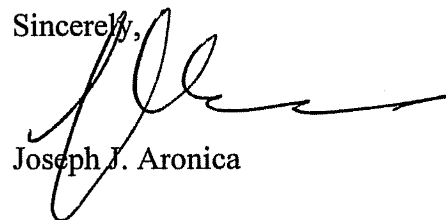
Dear Judge Moran:

Enclosed for filing in the above-referenced matter is an original and one copy of the Office of Federal Housing Enterprise Oversight's Memorandum Regarding 12 U.S.C. § 4633(a)(2).

Please date stamp the copy and return it with our messenger.

Thank you.

Sincerely,



Joseph J. Aronica

JJA/jkr

Enclosures

UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

Notice Number 2006-1

In The Matter Of:	)
FRANKLIN D. RAINES	)
J. TIMOTHY HOWARD	)
LEANNE G. SPENCER	)

RECEIVED BY OALJ
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OFHEO'S MEMORANDUM REGARDING 12 U.S.C. § 4633(a)(2)

The Office of Federal Housing Enterprise Oversight ("OFHEO") respectfully submits this memorandum to set forth reasons why the hearing in this matter will begin on February 7, 2007, with the hearing before the court and why the evidentiary phase of the hearing is not required to commence within 60 days of the filing of the Notice of Charges.

Respondents have argued that 12 U.S.C. § 4633(a)(2) entitles them to the commencement of the evidentiary phase of the hearing by February 16, 2007. However, the definition of "hearing" as used in 12 U.S.C. § 4633(a)(2) is not limited to meaning the end-stage evidentiary phase of the hearing before this Court, but encompasses all of the procedural steps leading to the issuance of an order.[1] This interpretation of "hearing" is consistent with OFHEO's implementing regulations at 12 C.F.R. 1780 as well as with practical considerations concerning

[1] In his memorandum, Respondent Raines mischaracterizes OFHEO's position regarding section 4633(a)(2). *See, e.g.,* Respondent Raines' Memorandum Concerning the Requirements of 12 U.S.C. § 4633(a)(2) at 2 and 6. OFHEO has done nothing more than quote the language of the statute. It is in this Memorandum that OFHEO lays out its interpretation of the provision in question.

discovery issues, various motions filed by Respondents, and the complexity of these kinds of cases.

However, even assuming, *arguendo*, that the definition of "hearing" were limited to the evidentiary phase of the hearing before this Court, nothing prevents the Director or this Court from timing the start of the evidentiary phase of the hearing for a reasonable date so that both sides can complete discovery, file dispositive motions and finalize their evidentiary hearing preparations in hopes of narrowing the issues and streamlining the presentation of evidence.

BACKGROUND

OFHEO filed a Notice of Charges against Respondents Raines, Howard and Spencer on December 18, 2006.[2] On the very same day, Respondent Raines filed an *ex parte* letter with the Director seeking the Director's recusal from this matter. On January 8, 2007, each Respondent filed his/her Answer, along with individual First Sets of Document Requests to OFHEO. On January 12, 2007, Respondent Spencer filed a letter with the Director also seeking his recusal from this matter. On January 31, 2007, Respondent Raines petitioned this Court for subpoenas to seek third-party discovery.

On January 17, 2007, Respondent Raines filed a Petition for a Writ of Mandamus from the United States Court of Appeals for the District of Columbia Circuit seeking to have the Director of OFHEO disqualified from adjudicating this matter, and for removal of the proceeding into federal court. Respondent Spencer filed a similar Petition on January 31, 2007. OFHEO's

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[2] Respondent Raines seems to suggest that because OFHEO had an opportunity to conduct its Special Examination of Fannie Mae, it is not now entitled to reasonable discovery or time to prepare its case. *See, e.g.*, Raines' Memorandum Concerning the Requirements of 12 U.S.C. § 4633(a)(2) at 2; *see also* Declaration of Alex G. Romain at ¶¶ 20, 21, and 22. This is clearly incorrect. The Special Examination was directed at determining the extent of problems at Fannie Mae, and was not directed at preparing a case against Respondents for trial.

response to Spencer's and Raines' Petitions are due by February 9, 2007, and Spencer's and Raines' replies are due by February 14, 2007. These matters have yet to be resolved.

On January 12, 2007, Respondent Howard filed a miscellaneous action in District Court in the form of a Motion to Require OFHEO to Pursue Notice of Charges in District Court. OFHEO filed a Motion for Extension of Time to Respond until March 12, 2007. Respondent Howard filed an Opposition and a Motion for an Expedited Hearing. That action has not yet been resolved. However, District Court Judge Richard Leon has set the miscellaneous action for a status conference on March 2, 2007.

This Court convened a telephonic conference on January 31, 2007 and discussed scheduling. A hearing has been set in this matter and will commence on February 7, 2007 at 9:30 am.

ARGUMENT

The evidentiary phase of the hearing in this matter is not required to commence within 60 days of the filing of the Notice of Charges. The main purpose for the time limitations contained in section 4633(a)(2), and cited by Respondents, is to ensure that once Notice of Charges have been filed, the agency continues to move forward with proceedings and does not unreasonably delay the momentum of the case. This purpose is fulfilled by the timely commencement of proceedings with any hearing held within 60 days of filing the Notice of Charges and the adoption of OFHEO's aggressive, proposed schedule.

I. The Definition of "Hearing" Is Not Limited to Meaning the Evidentiary Phase of the Hearing Before this Court, but Encompasses All of the Procedural Steps Leading to the Issuance of an Order.

12 U.S.C. § 4633(a)(3) provides that a hearing "shall be conducted in accordance with chapter 5 of title 5," more commonly known as the Administrative Procedure Act ("APA"). Under the APA, and OFHEO's regulations, the definition of "hearing" as used in 12 U.S.C. § 4633(a)(2) is not limited to mean merely the evidentiary phase of the hearing before this Court, but also encompasses all of the procedural steps leading to the issuance of an order, including scheduling hearings, discovery hearings, and motions/argument hearings. If Congress had intended "hearing" to be limited in the context of section 4633 to "evidentiary hearing," it could have said as much.[3]

5 U.S.C. § 556 of the APA "applies to hearings required by section 553 or 554[4] of this title to be conducted in accordance with this section." Notably, subsection (b) of section 556 refers to who "shall preside at the taking of evidence," suggesting that the reception of evidence is merely one part of, rather than the entirety of, what constitutes a "hearing."[5] Further, subsection (c) of section 556 provides a laundry list of actions that "employees presiding at hearings may" take, including actions that are prerequisite to the commencement of the

[3] Indeed, the word "hearing" simply means "judicial session." *Black's Law Dictionary* 737 (8th ed. 2004). The breadth of the word's meaning is highlighted by the numerous descriptors necessary to differentiate between the many types of hearings, such as "evidentiary hearing," "oral argument hearing," "scheduling hearing," "pretrial hearing," "preliminary hearing," and "sentencing hearing," to name but a few.

Black's Law Dictionary defines "hearing" in administrative law settings as "[a]ny setting in which an affected person presents arguments to an agency decision-maker." *Black's Law Dictionary* 737 (8th ed. 2004). Similarly, Black's defines an "adjudication hearing" in an administrative law setting as "[a]n agency proceeding in which a person's rights and duties are decided after notice and an opportunity to be heard." *Id.* Such definitions embrace an interpretation of "hearing" that extends beyond the evidentiary phase of the hearing.

[4] The relevant section in this proceeding is section 554, which applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."

[5] See also subsection (d) of section 554 for similar language.

evidentiary phase of the hearing, such as "tak[ing] depositions or hav[ing] depositions taken," *id.* at (4); "hold[ing] conferences for the settlement or simplification of the issues," *id.* at (6); and "dispos[ing] of procedural requests or similar matters," *id.* at (9).

Moreover, and as discussed more fully below, practical considerations dictate a more expansive reading of the term "hearing," and the agency's reasonable interpretation must be afforded due deference.

A. Discovery

The Parties in this case are entitled to reasonable discovery. *See generally*, 12 C.F.R. § 1780.26. At the same time, OFHEO's regulations clearly anticipate that discovery will be completed well before the evidentiary phase of the hearing. Section 1780.26(e) provides:

> "All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exception to this time limit shall be permitted, unless the presiding officer finds on the record that good cause exists for waiving the requirements of this paragraph."

12 C.F.R. § 1780.26(e). Using the February 16, 2007 evidentiary hearing date that Respondents have requested, all discovery in this matter should have been completed as of January 29, 2007.[6]

Meanwhile, Mr. Raines, Mr. Howard and Ms. Spencer have served requests for hundreds of thousands of documents that they argue are central to their defenses; requests which are currently being addressed, and which are the subject of motions to the Court that have yet to be decided. Respondents have also petitioned this Court for discovery subpoenas to third parties,

[6] The definition of "hearing" that Mr. Howard now espouses is at odds with the position he takes in his "J. Timothy Howard's Opposition to OFHEO's Motion to Strike or Limit His Document Requests." On page two of that document, Mr. Howard asserts that OFHEO's motion should be denied in favor of having discovery disputes decided by the District Court in the Fannie Mae shareholders' action. He admits that the date for OFHEO's final production in that action is March 12, 2007. The conflict between Mr. Howard's positions may only be resolved by adopting OFHEO's definition of a hearing.

notably, after January 29, 2007. Meanwhile, OFHEO has propounded two sets of document requests to each Respondent.

The production of documents is a time and labor intensive undertaking, yet the OFHEO regulations make clear that it is an important part of a fair hearing process. As such, more time is required to complete discovery in these proceedings before the commencement of the evidentiary phase of the hearing.

B. Respondents' Procedural Motions

The motions that Mr. Raines, Mr. Howard and Ms. Spencer have filed in this matter, Mr. Howard's motions in the District Court and Mr. Raines' and Ms. Spencer's petitions in the Court of Appeals, regarding this matter, all remain unresolved. It is unreasonable and impractical to suggest that the evidentiary phase of the hearing must commence prior to the resolution of these matters, especially in light of arguments that Respondents have made challenging the Director's role in this matter, as well as seeking removal of this proceeding to federal court. Respondents have also suggested that the Court may be an improper choice to preside over these proceedings as the Court was appointed by the Director.

Resolution of the above matters could affect this proceeding in far-reaching ways that could further delay the commencement of the evidentiary phase of the hearing – for example, if a new administrative law judge had to be designated or if the proceedings were moved to federal court. It is unrealistic and impractical to expect the evidentiary phase of the hearing to commence prior to the resolution of such matters.[7] When making their respective filings in the

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[7] Indeed, it is not entirely clear what Respondents seek in this regard. At least one Respondent, Ms. Spencer, urges the Court to "refrain from adopting the schedule proposed by OFHEO" while her writ of mandamus is pending before the Court of Appeals. *See* Leanne G. Spencer's Memorandum Regarding the Proposed Scheduling Order, filed on February 2, 2007. Even while admitting that her reply to OFHEO's response to that petition is not due until (Continued...)

District Court and the Court of Appeals, Respondents were no doubt aware of the potential procedural implications, and also aware of the time it would take to resolve such matters. To now demand that the evidentiary phase of the hearing begin prior to resolution of these matters is disingenuous at best.

C. Deference Due to Agency Interpretation

Finally, OFHEO's practical and logical interpretation of "hearing" in this case is reasonable and thus would be entitled to deference. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).[8] OFHEO's regulations reflect its interpretation of "hearing" for purposes of 12 U.S.C. § 4633(a)(2) as encompassing far more than an evidentiary hearing. For example, OFHEO's regulation requiring all discovery be completed 20 days prior to the commencement of the evidentiary phase of the hearing, 12 C.F.R. § 1780.26(e), anticipates a longer passage of time than 60 days between the issuance of the notice of charges and an evidentiary hearing.[9] . Similarly, OFHEO's regulation providing for a scheduling conference to

(Continued…)

February 14, 2007, she still reserves her right "to have the [evidentiary administrative] hearing on this matter commence no later than February 16, 2007," in the very next breath. *Id.*

[8] The Court should uphold the agency's interpretation where it is a permissible or reasonable interpretation. *Sullivan v. Everhart*, 494 U.S. 83, 93-94 (1990). Agencies may interpret their statutes in a way that is reasonable in light of Congress's intent. *See Chevron, Inc.*, 467 U.S. at 844. Furthermore, courts appropriately give weight to any reasonable interpretation of a statute by the agency charged with its enforcement, particularly where, as here, the agency possesses special expertise. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). Therefore, because an agency's interpretation of its organic statute generally may be presumed valid, and OFHEO has special expertise in regulating the safety and soundness of the housing finance giants, the process set forth in its regulations that calls for orderly prehearing and hearing proceedings resulting in an end-stage, oral evidentiary hearing should be upheld as a reasonable interpretation of the Safety and Soundness Act of 1992 and its implementing regulations.

[9] The Director has the exclusive authority to issue regulations to carry out the Statutory mandates of OFHEO, including regulations as to the specific conduct of the administrative proceedings contemplated under 12 U.S.C. 4631 and 12 U.S.C. 4636. *See,* 12 U.S.C. 4513(b)(1). These regulations, as set forth at 12 C.F.R. 1780, govern the timing of this proceeding. It is only through these very precise, very detailed regulations, and in conjunction with the APA that hearings may be conducted.

occur as late as 30 days after service of the Notice of Charges[10] contemplates more than 60 days between the issuance of the Notice of Charges and the evidentiary phase of the hearing. Indeed, the purpose of such scheduling conference is to schedule the course and conduct of the proceeding, as well as to determine "[t]he identification of potential witnesses, the time for and manner of discovery and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference." 12 C.F.R. § 1780.33(a). Clearly, determining "the time for and manner of discovery," as well as the exchange of "witness lists," are actions that should take place far in advance of 30 days before the evidentiary phase of the hearing in order to allow time for the resulting discovery, interviews and depositions to take place.

Given the sheer complexity of this case, any interpretation of "hearing" that would require the evidentiary phase of the hearing to begin by February 16th, is patently *un*reasonable. On the other hand, a definition of "hearing" in the context of 12 U.S.C. § 4633(a)(2) that allows any hearing to constitute the commencement of proceedings for purposes of section 4633(a)(2) solves many logistical problems, and is manifestly reasonable. Discovery has only just begun in these proceedings, and many initial issues remain unresolved. For example, OFHEO is entitled to obtain discovery on the many affirmative defenses filed by Respondents, defenses which the Respondents never raised with OFHEO until a few weeks ago. Forcing the premature commencement of the evidentiary phase of this hearing would be contrary to the interests of

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[10] 12 C.F.R. § 1780.33(a) provides:

> "Within 30 days of service of the notice or order commencing a proceeding or such other time as the parties may agree, the presiding officer shall direct representatives for all parties to meet with him in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding."

justice. Moreover, no prejudice to Respondents would result from the schedule proposed by OFHEO.[11]

II. 12 U.S.C. § 4633(a)(2) Is Not a Jurisdictional Requirement.

However, even assuming, *arguendo*, that the definition of "hearing" were limited to an evidentiary hearing before this Court, nothing prevents the Director or the Court from timing the start of the evidentiary phase of the hearing for a reasonable date so that both sides can complete discovery, file dispositive motions and finalize their trial preparations in hopes of narrowing the issues and streamlining the presentation of evidence and thereby limiting the length of the evidentiary phase of the hearing.

The sixty day time period contained in 12 U.S.C. § 4633(a)(2) is not a jurisdictional requirement, and does not prevent this Court from commencing the evidentiary phase of the hearing after 60 days has elapsed from the date of filing of the Notice of Charges. Indeed, in *Brock v. Pierce County*, 476 U.S. 253 (1986), the Supreme Court reviewed a provision in the Comprehensive Employment Training Act ("CETA") which stated that the Secretary "shall" issue a final determination on the misuse of CETA funds by a grant recipient "not later than 120 days after receiving a complaint." 29 U.S.C. § 816(b). Pierce County, a grant recipient, contested the Secretary of Labor's determination made more than two years after the complaint was filed, arguing that the determination was untimely and void. The Court concluded that "the mere use of the word 'shall'...standing alone, is not enough to remove the Secretary's power to act after 120 days. *Brock*, 476 U.S. at 262 (footnote omitted). The Court found the deadline to

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[11] Even in the criminal context, a defendant must show prejudice if he is to prevail because of a delay in a hearing. *See Barker v. Wingo*, 407 U.S. 514 (1972). Respondents cannot and have not shown any prejudice that would result from the orderly and aggressive proposed schedule offered by OFHEO.

be a procedural requirement and concluded that the agency did not lose the power to act even when the deadline had passed.[12]

Similarly, in a more recent Supreme Court case, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003), the Court held that, although the Social Security Administration Commissioner's initial assignments of coal industry retirees to coal companies under the Coal Industry Retiree Health Benefit Act of 1992 were made after the mandatory date set forth in 26 U.S.C. § 9706(a), that the untimely action was still valid. In so ruling, the Court wrote "[w]e accordingly read the 120-day provision as meant to spur the Secretary to action, not to limit the scope of his authority." *Id.* (internal quote omitted). The Court further noted that "since *Brock* [we] have [never] construed a provision that the Government "shall" act within a specified time, without more, as a jurisdictional limit precluding action later." *Id.* (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 714 (1990) (holding that a provision that a detention hearing "shall be held immediately upon the [detainee's] first appearance before the judicial officer" did not bar detention after a tardy hearing) and *Regions Hospital v. Shalala*, 522 U.S. 448, 459, n. 3 (1998) (holding that a mandate that the Secretary of Health and Human Services "shall report" within a certain time did "not mean that [the] official lacked power to act beyond it.")). The *Barnhart* Court concluded, "[w]e have summed up this way: `if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'" *Id.* (citing *United States v. James*

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[12] In *Brock*, the Secretary of Labor based its appeal upon the precedent of circuit court decisions, which held that government agencies do not lose jurisdiction for failure to comply with a statutory time period unless the statute specifies a consequence for failure to comply with the time period. The Supreme Court stated that "our decisions supplied at least the underpinnings of those precedents." *Brock*, 476 U.S. at 259. In the present case, Section 4633(a)(2) does not attach consequences to a failure to fix a hearing date within 60 days.

Daniel Good Real Property, 510 U.S. 43, 63 (1993); *see also Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994) (collecting cases).

Under OFHEO's regulations, this Court has the authority to set the date of the hearing, as well as the authority to continue or recess the hearing at any time.[13] Indeed, 12 C.F.R. § 1780.5(b) provides in relevant part:

> "The presiding officer is authorized to –
> (1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;
> (2) Continue or recess the hearing in whole or in part for a reasonable period of time[.]"

Given the extreme factual complexity of this case, coupled with the fact that the ongoing discovery process – already proving voluminous – is still far from complete, commencing the evidentiary phase of the hearing on February 16, 2007 is neither realistic nor in the interests of justice.

CONCLUSION

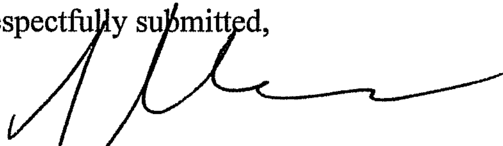
Respondents have, as noted above, filed numerous procedural and discovery motions not only in this Court but with the District Court and the Court of Appeals that have yet to be resolved. Indeed, many of the arguments Respondents have made in these subsequent filings could result in delay if, for example, a new administrative law judge had to be appointed, or if the proceeding were to be moved into a federal court. It is therefore odd that Respondents, who are the source of such motions and who will have authored numerous delays should their

[13] It is clear that this Court has the power to regulate proceedings before him or her in an orderly fashion, especially with respect to scheduling matters. *See generally*, 5 U.S.C. § 556(c). Indeed, besides the power to "[s]et and change the date, time and place of the hearing," and to "[c]ontinue or recess the hearing in whole or in part for a reasonable period of time," 12 C.F.R. § 1780.5(b), this Court also has the power to extend time limits having to do with the filing and service of papers in the proceedings. 12 C.F.R. § 1780.12. This Court's ability to schedule such matters are important in order to allow this Court to manage this case, as well as any other matters pending before him or her, and to take into account potential timing conflicts, and other unforeseeable circumstances.

motions be decided in their favor, now demand that the evidentiary phase of the hearing commence by February 16, 2007. Accordingly, Respondents have failed to articulate sufficient grounds to circumvent the scheme set forth in the Agency's regulations for the conduct of this proceeding.

For the foregoing reasons, OFHEO requests that this Court enter OFHEO's proposed scheduling order, submitted to this Court on January 31, 2007.

Respectfully submitted,



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Dated: February 6th, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2007, I caused to be served via hand delivery true and correct copies of OFHEO's Memorandum Regarding 12 U.S.C. § 4633(a)(2) on the following persons:

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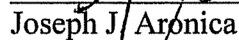

Joseph J. Aronica