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February 20, 2007

VIA HAND DELIVERY

The Honorable William B. Moran
United States Administrative Law Judge
United States Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court Building, Suite 350
1099 14th Street N.W.
Washington, D.C. 20005

Re: In the Matter of Franklin D. Raines, et al. Notice No. 2006-1

Dear Judge Moran:

During the February 7, 2007, hearing in the above-titled administrative action, Your Honor directed the parties to submit to the Court our positions concerning the issuance of document subpoenas to nonparties. On February 12, 2007, OFHEO requested an extension of time in which to advise the Court of OFHEO's position regarding the nonparty subpoenas. On February 15, 2007, OFHEO notified the Court that it had no objection to Respondent Raines' proposed nonparty subpoenas to Goldman Sachs & Co., Inc., Radian Group, Inc. and Metropolitan Life Insurance, Co. This letter is responsive to the remaining issue pertaining to Respondent Raines' proposed nonparty subpoena to Deloitte & Touche USA LLP ("Deloitte & Touche").

In the aforementioned hearing, Respondents' counsel asserted that the Court's role in issuing subpoenas was ministerial in nature and that the appropriate time for OFHEO to raise objections to Respondents' subpoenas was after the Court had issued the subpoenas. OFHEO disagrees with both contentions.

The Court's role in issuing subpoenas involves the exercise of the Court's discretion and judgment. Title 12, Code of Federal Regulations, Section 1780.28 sets forth the judgment required by the presiding officer in regard to the issuance of subpoenas:

if the presiding officer determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena or may

Judge Moran
February 20, 2007
Page 2

issue it in a modified form upon such conditions as may be determined by the presiding officer.

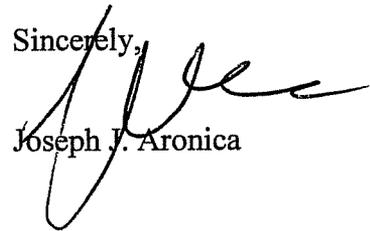
12 C.F.R. § 1780.28. Hence, the Court plays an important gatekeeper function in regard to the issuance of nonparty subpoenas and must exercise its judgment and experience in carrying out that function.

OFHEO further asserts that it is appropriate for the Court to hear objections to nonparty subpoenas prior to issuance. As noted above, the applicable regulation provides the Court with discretion regarding the issuance of non-party subpoenas. It is certainly appropriate for the parties to inform the Court of pertinent information before the Court exercises that discretion.

This case provides an excellent example as to why input by a party prior to the issuance of a nonparty subpoena is appropriate. Respondent Raines' proposed nonparty subpoena to Deloitte & Touche seeks documents that are under the control and subject to the privileges of OFHEO, a party. Specifically, requests 1-6 in the proposed nonparty subpoena seek documents produced or created by Deloitte & Touche during or in connection with Deloitte & Touche's engagement with OFHEO.¹ OFHEO and Deloitte & Touche's agency relationship render the parties identical and the documents produced by Deloitte & Touche during that period to be the property of OFHEO. Because Deloitte & Touche may not properly assert OFHEO's governmental privileges over these documents, it is essential that OFHEO raise any issue concerning any applicable privileges over the requested documents. *See First Eastern Corporation v. Mainwaring*, 21 F.3d 465 (D.C. Cir. 1994).

For the reasons stated above, OFHEO objects to the issuance of Respondent Raines' proposed nonparty subpoena to Deloitte & Touche. Furthermore, OFHEO respectfully requests the Court, in the exercise of its discretion, to modify the proposed subpoena to excise requests 2, 3 and 6.

Sincerely,


Joseph J. Aronica

cc. Kevin Downey, Esquire
Steven Salky, Esquire
David Krakoff, Esquire

¹ OFHEO has no objection to the remaining portions of the subpoena to Deloitte & Touche.

As a practical matter (prior to reviewing documents from Deloitte & Touche) OFHEO does not see a basis for asserting a privilege in regard to request numbers 1, 4 and 5. To that extent and without waiving its rights to object later, OFHEO does not object to request numbers 1, 4 and 5 prior to the issuance of the nonparty subpoena.