IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA and OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, Petitioners, v. VAUGHN CLARKE, Respondent.	)	No. 03-3440 (DKC)

REPLY IN SUPPORT OF PETITION FOR SUMMARY ENFORCEMENT OF ADMINISTRATIVE SUBPOENA DUCES TECUM

INTRODUCTION

Petitioners explained in the opening memorandum that the administrative subpoena to Respondent Vaughn Clarke should be enforced by this Court because: 1) the subpoena was issued for a lawful purpose within the statutory authority of the agency that issued it; (2) the agency has satisfied statutory requirements of due process; (3) the documents and testimony requested are relevant to that purpose; and (4) the subpoena demand is reasonable and not unduly burdensome. Respondent offers three arguments in response: the special examination is completed; the examination in question is not a safety and soundness examination; and the Office of Federal Housing Enterprise Oversight (OFHEO) has issued a Notice of Charges against Respondent. Respondent also seeks attorney's fees. Each of these arguments is unavailing.

Respondent contends that the special examination is over because the special examiners issued a report (known as the Report of the Special Examination of Freddie Mac ("Report")), but he is incorrect in that assessment. The issuance of the Report does not end the examination. The Report provides information about the conclusions and recommendations to date, but the special examiners are continuing to move forward by interviewing individuals and reviewing documents pertinent to the delay and restatement of earnings by the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "the enterprise").

Respondent also claims that the special examination is not a safety and soundness examination, but that argument relies on a tortured definition of "safety and soundness." The special examination is an inquiry into policies and practices that may seriously harm the long-term viability of Freddie Mac and damage investor confidence in the enterprise. As such, it is a safety and soundness examination.

Respondent argues that the filing of a Notice of Charges against him precludes the enforcement of the subpoena. In that, he is mistaken. There is no legal authority that precludes OFHEO from continuing the safety and soundness examination at the same time that it files charges against specific individuals.

Finally, citing absolutely no authority for a waiver of sovereign immunity, an essential pre-requisite for the assertion of any monetary claim against the United States, Respondent claims he is entitled to attorney's fees. However, even if there were a waiver of sovereign immunity, which there is not, Petitioner's position is well-supported in law, and the subpoena enforcement was brought in good faith. Even if this Court should somehow decide not to enforce the subpoena, there is no basis for awarding attorney's fees.

ARGUMENT

I. THE SPECIAL EXAMINATION IS NOT CONCLUDED.

As discussed in the opening memorandum, the subpoena was issued pursuant to OFHEO's special examination of Freddie Mac, a safety and soundness examination which came on the heels of the announcement that Freddie Mac's financial statements would need to be delayed and/or restated for fiscal years 2000, 2001, and 2002. Memorandum of Points and Authorities in Support of Petition for Summary Enforcement of Administrative Subpoena Duces Tecum at 5-7 (hereinafter "Pet.'s Memo"); Declaration of David W. Roderer ¶¶ 2-5 (hereinafter Roderer Decl.).[1] Respondent does not deny, nor can he, that OFHEO has the authority to issue administrative subpoenas pursuant to safety and soundness examinations. See 12 U.S.C. §§ 4517(f) and 4641(a).

Respondent contends that the subpoena should nonetheless not be enforced because the special examination ended with the issuance of the Report.[2] Respondent Vaughn Clarke's

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[1] This citation refers to the first declaration of David W. Roderer, attached to the opening memorandum. There is also a declaration by Mr. Roderer attached to this reply brief, which will be referred to as the Second Roderer Declaration (2d Roderer Decl.).

[2] The case that Respondent relies on to make this point, EEOC v. Federal Home Loan Mortgage Corp., 37 F. Supp. 2d 769 (E.D. Va. 1999), is inapposite. Resp.'s Memo at 3. There are substantial differences between EEOC investigations and the special examination at issue here. In cases involving investigations of financial institutions, "the initiation of civil proceedings will not moot an administrative subpoena." RTC v. Walde, 18 F.3d 943, 950 (D.C. Cir. 1994). OFHEO has an ongoing interest in the safety and soundness of Freddie Mac and its current and recent managers. Therefore, OFHEO's examination authority does not cease when it issues a Notice of Charges. Regardless of whether OFHEO has concluded that it has sufficient evidence to take action against Respondent (or Freddie Mac, for that matter), OFHEO retains the authority to investigate matters related to the safety and soundness of Freddie Mac, because that is OFHEO's role as regulator. OFHEO has a duty as the safety and soundness regulator to bring enforcement actions once it has found sufficient cause to do so. The agency cannot be required

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Opposition to OFHEO's Petition for Summary Enforcement of Administrative Subpoena at 3-4 (hereinafter "Resp.'s Memo"). However, the special examination is not over. It is an ongoing process. 2d Roderer Decl. ¶ 5.

OFHEO continues to question current and former employees, examine documents, and otherwise investigate the policies and practices that led to the restatement and delay of the 2000, 2001, and 2002 financial statements. Id. at ¶¶ 4-5. While the special examiners have issued a report with their conclusions and recommendations to date, that Report does not mark the end of the examination. Id. at ¶¶ 4-5. Rather, it reflects OFHEO's desire to keep Congress and the public informed of its progress while the examination continues. Id. at ¶ 4. Notwithstanding Respondent's characterization of this as a "final report," the Report does not purport to be final, and its issuance does not signal the end of the examination. It is not for Respondent to decide when the special examination has concluded. That is for OFHEO to decide. Subpoenas issued pursuant to the ongoing special examination remain valid and are enforceable by this Court.

II. THE SPECIAL EXAMINATION IS A SAFETY AND SOUNDNESS EXAMINATION.

Based upon an assortment of public statements in which OFHEO indicated that Freddie Mac was "safe and sound," Respondent contends that this could not be a safety and soundness examination. See Resp.'s Memo at 5-7. This argument rests on a hopelessly narrow perception

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[2](...continued)
to wait until all the facts and potential actions relating to the institution are fully investigated before bringing individual cases. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980) (en banc). Such delay would allow problems to fester and create even greater risks to the institution. An EEOC investigation, by contrast, has a clear ending; once private litigation has commenced, the EEOC's role as investigator and mediator ceases. EEOC at 773. Thus, the EEOC provides an inapt analogy.

of what constitutes a safety and soundness examination. Respondent seems to believe that as long as Freddie Mac is presently "safe and sound," OFHEO is precluded from undertaking a safety and soundness examination. Based on this reading of the phrase, OFHEO cannot conduct a safety and soundness examination unless one of the enterprises is on the brink of financial failure. Notably, Respondent cites not a single case in support of his narrow reading of the scope of a "safety and soundness" examination. As presented in the opening brief, safety and soundness examinations deal with business practices that may affect the safety and soundness of the enterprise. Pet.'s Memo at 6.

A banking practice is unsafe and unsound when it is "deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder." Greene County Bank v. FDIC, 92 F.3d 633, 636 (8th Cir. 1996); In re First Nat'l Bank of Eden, S.D. v. Dep't of Treasury, 568 F.2d 610, 611 n.2 (8th Cir. 1978); see also Landry v. FDIC, 204 F.3d 1125, 1138 (D.C. Cir. 2000) (noting that an unsafe or unsound practice is one that poses a reasonably foreseeable undue risk to the institution). Courts have found unsafe and unsound banking practices in situations where the institution in question was not itself about to be declared unsafe and unsound. See, e.g., Lindquist & Vennum v. FDIC, 103 F.3d 1409, 1417 (8th Cir. 1997) (finding certain employment agreements and bonuses to be unsafe and unsound banking practices).

It is clear, not only from the Roderer declarations, but also from the Report that the examination at issue is a safety and soundness examination. Roderer Decl. ¶¶ 3-5; 2d Roderer

Decl. ¶ 5; Report at 2, 18, 60, 122, 124, 163, 165-66 (attached as Exh. A to 2d Roderer Decl.).[3] The focus of the examination is on issues that may pose a serious threat to the future safety and soundness of Freddie Mac: the determination of weaknesses in accounting practices, controls, and corporate governance. 2d Roderer Decl. ¶ 3-5; Report at 2 ("The Director instructed the special examination to make recommendations to him as to additional steps that needed to be taken to help ensure the continuing safe and sound operations of the Enterprise."). The special examiners are looking into why earnings reports were inaccurate, an issue critical to investor confidence, which is, in turn, critical to a safe and sound enterprise. Roderer Decl. ¶ 4.

Respondent argues that if the examination at issue were truly a safety and soundness examination, his testimony would be treated confidentially. Resp.'s Memo at 7-8. The laws that Respondent relies on do not support this claim. 12 U.S.C. § 4517(d) simply applies to OFHEO's Director and examiners the same "disclosures, prohibitions, obligations, and penalties as are applicable to examiners employed by the Federal Reserve banks." Respondent does not cite to any rules governing Federal Reserve banks that are relevant to the disclosure of sworn testimony in the context of an examination. Rather, he cites to 12 C.F.R. § 1703.11(b)(8). Section 1703.11 is OFHEO's regulation regarding requests for release of information. Section 1703.11 states the general rule that information is to be released and then sets out a series of exemptions to the general rule. It is true that under (b)(8) OFHEO is permitted to withhold "[a]ny matter that is contained in or related to examination, operating, or condition reports that are prepared by, on behalf of, or for the use of OFHEO." However, OFHEO is not obligated to withhold such

[3] The entire report is available at http://www.ofheo.gov/media/pdf/specialreport122003.pdf.

information; it is merely permitted to do so. The regulation clearly permits the Director to authorize the release of information, notwithstanding the fact that there is an applicable exemption. § 1703.11(b). Thus, that Respondent's testimony may be released does not conflict with the notion that the examination at issue is a safety and soundness examination.

Respondent points to three other facts that allegedly show pretext:[4] that the examination began four months after the announcement of the need for a restatement; OFHEO's retention of a private law firm to assist with the examination; and the overlap between the areas to be covered in the testimony being subpoenaed and the Notice of Charges hearing. Resp.'s Memo at 8-9.

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[4] Respondent's notion of pretext is somewhat different than that seen in the caselaw that he is relying on. In United States v. Gertner, 65 F.3d 963 (1st Cir. 1995), the Internal Revenue Service (IRS) subpoenaed a law firm's records under the pretext that the taxpayer-law firm was under investigation when, in fact, the IRS was only seeking evidence of criminal activity on the part of the law firm's unnamed clients. Id. at 965-66. Because the court concluded that the IRS was solely interested in the anonymous clients and not interested in investigating the law firm, it concluded that the subpoena should not be enforced because the IRS had failed to comply with the "John Doe" provisions at 26 U.S.C. § 7609(f). By contrast, in Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310 (1985), the Court held that where the IRS had an interest in investigating both the taxpayer being subpoenaed and unnamed parties about whom the taxpayer would be providing evidence, the subpoena should be enforced, and the John Doe provisions did not need to be followed. Id. at 320-22. Therefore, as long as at least one purpose of OFHEO's subpoena of Respondent is the investigation of matters related to the special examination, the subpoena is not considered pretextual. Of course, the criminal nature of the issues raised in Gertner and the statutory structure governing the IRS make the case inapposite in any event. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1378-81 (D.C. Cir. 1980) (en banc); see also United States v. Frowein, 727 F.2d 227, 231-32 (2d Cir. 1984). Further, Respondent's contention that the entire special examination is a pretext for the sole purpose of obtaining his testimony to be used in his Notice of Charges hearing defies credulity. The special examination has been ongoing for months, during which time the special examiners interviewed many current and former Freddie Mac employers and sifted through many pages of documents. 2d Roderer Decl. ¶ 4. The examination has so far produced a Report of 172 pages. Respondent cannot seriously believe that the only motivation behind all of this work was to create an opportunity to subpoena his testimony. Nor can Respondent credibly deny that information that he possesses, as former Executive Vice President and Chief Financial Officer is directly relevant to the special examination being performed by OFHEO. See Roderer Decl. ¶¶ 23-25; 2d Roderer Decl. ¶¶ 4-5, 9.

None of these points supports Respondent's claim that this was not a safety and soundness examination.[5]

First, the timing of the announcement of the special examination is explained by the fact that the special examination arose out of OFHEO's ongoing safety and soundness oversight of Freddie Mac's operations, including monitoring of matters related to Freddie Mac's accounting policies and practices, engagement of a new auditor, and delay in the production of its 2002 financial statement. 2d Roderer Declaration ¶ 3. From late 2002 through mid-2003, OFHEO steadily increased the intensity of its scrutiny of Freddie Mac as additional information regarding operational and other deficiencies emerged. Id. In June 2003, facts and circumstances, including Freddie Mac's termination of its top management, led OFHEO to intensify its probe of Freddie Mac by initiating a "special examination." Id. OFHEO's Director designated the exam as "special" because of the use of additional staff from outside of OFHEO's examination unit to focus on a specific matters at Freddie Mac. Id. Thus, the timing of the special examination does not in any way prevent it from being a safety and soundness examination.

Second, OFHEO is empowered to hire a private law firm to assist with the examination.

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[5] Respondent claims that he is entitled to discovery on his pretext claim. However, in order to be entitled to such discovery, there needs to be some basis for the claim of pretext. See United States v. Am. Target Advertising Inc., 257 F.3d 348, 355 (4th Cir. 2001) ("Quite simply, there has been no showing of bad faith on the part of the Postal Service in connection with its issuance of the contested subpoenas."). Formal discovery on pretext "is prohibited in these types of summary enforcement proceedings absent 'extraordinary circumstances.'" Id. "To obtain discovery, the target of the subpoena or other process must 'distinguish himself from the class of the ordinary respondent, by citing special circumstances that raise doubts about the agency's good faith.'" Id. (quoting Dresser, 628 F.2d at 1388). In this case, it is apparent from the Report and the declarations, and the nature of Respondent's former position, that the special examination is not pretextual and is related to the safety and soundness of Freddie Mac. Thus, no discovery should be permitted.

Respondent is correct that 12 U.S.C. § 4517(c) authorizes the Director to contract with an assortment of federal agencies to conduct examinations. Resp.'s Memo at 8-9. Where Respondent's analysis goes astray is in concluding that this is meant to limit, rather than expand, the Director's ability to procure assistance with examinations. Section 4517(c) provides that the "Director shall appoint examiners to conduct examinations under this section. The Director may contract with the Comptroller of the Currency. . . ." (emphasis added). The ability to contract with federal agencies is permissive, whereas the appointment of examiners is mandatory. See S. Rep. No. 102-282 *14-15 (May 15, 1992) (noting that the Director is authorized to contract for any service but that federal banking agencies are highlighted). The Director is thus allowed to use those listed federal agencies as examiners, but it is not limited to that option. Pursuant to § 4517(e), the Director is authorized to obtain the services of any technical experts the Director deems appropriate to assist with examinations. In addition, § 4515(e) authorizes the Director to appoint and compensate such outside experts and consultants as he deems necessary. Each of these provisions provides ample support for the Director's authority to hire Crowell & Moring LLP to assist in the special examination.

Third, Respondent notes that there is an overlap between the special examination subpoena subject matter and the issues raised in the Notice of Charges. Resp.'s Memo at 9. The existence of such overlap does not change the fact that the issues raised in both the examination and the Notice of Charges pertain to the safety and soundness of the enterprise. The problems that arose from Respondent's use of CTUGs, Swaption Valuations, and Linked Swaps to "smooth" earnings are the result of accounting policies or corporate governance failures that could threaten the safety and soundness of the enterprise. See id.; 2d Roderer Decl. at ¶ 5.

The special examination is a safety and soundness examination. OFHEO is therefore empowered to issue subpoenas pursuant to that examination, and this Court should enforce the subpoena issued against Respondent.

III. THE NOTICE OF CHARGES ISSUED AGAINST RESPONDENT DOES NOT PRECLUDE ENFORCEMENT OF THE SUBPOENA.

Respondent contends that the subpoena was issued improperly because OFHEO filed a Notice of Charges against him on December 17, 2003. Resp.'s Memo at 9-10. Respondent fails to acknowledge, however, that the subpoena at issue was originally issued on October 10, 2003, well before the Notice of Charges issued. Roderer Decl. ¶ 21. Furthermore, OFHEO first indicated its intent to depose Respondent on July 18, 2003, very early on in the special examination process. Roderer Decl. ¶ 10. It is Respondent's delaying tactics and failure to appear for a properly-subpoenaed examination that have created the timing problem about which Respondent complains in his brief. 2d Roderer Decl. ¶ 8.

While it is true that oral discovery is not permitted as part of the enforcement proceeding that is now pending against Respondent, 12 C.F.R. ¶ 1780-26(c), the fact of a pending enforcement proceeding does not strip OFHEO of its ability to issue subpoenas pursuant to its separate special examination authority. See 2d Roderer Decl. ¶ 7. The information that Respondent has been withholding from OFHEO all this time remains as relevant to the special examination now as it was in July. Id. at. ¶¶ 5, 9. OFHEO is entitled to proceed simultaneously with its special examination and with enforcement actions against those people or entities that appear to have engaged in wrongdoing based upon evidence already gathered. Id. at ¶ 5. See In re Stanley Plating Co., 637 F. Supp. 71, 72-73 (D. Conn. 1986) (administrative agency allowed to

proceed with subpoena pursuant to its enforcement procedures while civil action is pending). If Respondent's contention that administrative subpoenas cannot be enforced against those who are also subject to Notices of Charges were accepted, it would lead to the absurd situation that OFHEO would be unable to engage in any further examination of Freddie Mac because it has recently issued a Notice of Charges against Freddie Mac. The only alternative would be for OFHEO to delay indefinitely the issuance of Notices of Charges against people or entities that possess information critical to safety and soundness examinations. However, those who possess the information are most likely to be the ones against whom Notices of Charges would be appropriate.

The broader role of OFHEO to ensure the safe and sound operation of the enterprises must not be constrained by the narrow prosecution of misconduct by Freddie Mac or related persons. See Sutro Bros. & Co. v. SEC, 199 F. Supp. 438, 439 (S.D.N.Y. 1961) (no limit on investigative power from institution of adjudicative hearing; such limit would frustrate purpose of investigative authority). It is untenable to contend that by filing an enforcement action against a party, OFHEO is thereby constrained from obtaining information from that party in its examination activities. See United States v. Merit Petroleum, Inc., 731 F.2d 901, 905 (Temp. Emer. Ct. App. 1984) (despite filing of Notice of Probable Violation, agency maintains interest in obtaining all records pertinent to investigation).

The D.C. Circuit has spoken to the issue of enforcing an administrative subpoena after a civil complaint has been filed.[6] See Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1518 (D.C. Cir. 1993). In Linde, the Resolution Trust

[6] The Fourth Circuit does not appear to have been squarely faced with this issue.

Corporation ("RTC") issued an administrative subpoena against law firm Linde Thomson. Id. at 1510. The district court ordered that the subpoena be enforced, and Linde Thomson appealed. Id. While the case was on appeal, RTC filed a civil suit against Linde Thomson. Id. The D.C. Circuit held that the intervening civil suit did not terminate RTC's investigation or moot the subpoena enforcement. Id. at 1517-18. The court noted that the RTC statute did not "contemplate the termination of investigative authority upon the commencement of civil proceedings." Id. at 1518. The same is true of OFHEO's statute. As in Linde, the administrative enforcement action does not derail the examination, and the subpoena should still be enforced. Other jurisdictions have taken the same approach as the D.C. Circuit to the issue of enforcing administrative subpoenas after the commencement of other proceedings. Id. (listing cases).[7]

An almost identical factual situation to Linde is seen in RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994). There, too, the D.C. Circuit held that an intervening civil suit did not prevent the enforcement of an administrative subpoena. Id. at 949-50. In Walde, the court noted that if the individual subject to the subpoena had concerns about how that testimony would subsequently be used, those issues were properly raised in the context of the proceeding in which the testimony was presented, not in the context of the subpoena enforcement. Id. at 950. See also Office of Thrift Supervision, Dep't of Treasury v. Dobbs, 931 F.2d 956, 958 (D.C. Cir. 1991). Similarly, Respondent can raise any concerns that he might have that testimony he gives pursuant to the

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[7] The cases listed in Linde are as follows:
United States v. Frowein, 727 F.2d 227, 231-32 (2d Cir. 1984);
United States v. Merit Petroleum, Inc., 731 F.2d 901, 904-05 (Temp. Emer. Ct. App. 1984);
In re Stanley Plating, 637 F. Supp. 71, 72-73 (D. Conn. 1986);
Sutro Bros. & Co., v. SEC, 199 F. Supp. 438, 439 (S.D.N.Y. 1961).

instant subpoena could be used in the hearing that results from the Notice of Charges can be raised in that hearing, if OFHEO offers any such testimony.

In sum, the subpoena was issued for a proper purpose: OFHEO's special examination of Freddie Mac. The Director has the authority to issue such a subpoena, and Respondent is obligated to obey it.

IV. RESPONDENT IS NOT ENTITLED TO ATTORNEY'S FEES.

Respondent argues that he is entitled to attorney's fees because Petitioners have acted in bad faith in seeking to enforce the subpoena. Resp.'s Memo at 11-12. As an initial matter, no party is entitled to attorney's fees against the United States unless there has been a waiver of sovereign immunity. See Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 265-68 (1975). Respondent has not cited to any source for the waiver of sovereign immunity that would be the basis of his claim for attorney's fees. The only case cited by Respondent in this section, Chambers v. Nasco, 501 U.S. 32, 50 (1991), deals with awarding attorney's fees to a private litigant based on the bad faith of the other party, and is therefore irrelevant to the waiver of sovereign immunity issue. See Resp.'s Memo at 11. Therefore the request for attorney's fees should be denied.

Had Respondent attempted to offer a legal basis for his attorney's fee's claim, it would still have failed. The Equal Access to Justice Act (EAJA) provides for a waiver of sovereign immunity so as to allow claims for attorney's fees, but only in certain statutorily-defined circumstances. See 28 U.S.C. § 2412(d)(1)(A). In order to be entitled to fees under EAJA, Respondent would first need to be a prevailing party. Petitioners anticipate that Respondent will be unable to meet this burden.

Additionally, Respondent is not entitled to attorney's fees under EAJA if the Court concludes that the position of the United States in this litigation was substantially justified. Id. The government's position is substantially justified if there is a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action. Pierce v. Underwood, 487 U.S. 552, 565 (1988). Such is the case here. Petitioners seek the enforcement of a subpoena that is within the statutory authority of OFHEO. Respondent notes that there has been an intervening administrative enforcement action filed against him, however, Respondent has cited neither statute nor relevant caselaw that prevents OFHEO from enforcing a subpoena under such circumstances. Petitioners, by contrast, have cited extremely relevant cases supporting the contention that subpoenas should be enforced under these circumstances. See supra part III. As noted above, OFHEO is not prevented from simultaneously engaging in examinations and administrative enforcement actions. At the very least, reasonable minds can differ as to whether an administrative subpoena under these circumstances enforceable.

Respondent also contends that the special examination has ended. However, notwithstanding Respondent's insistence to the contrary, the special examination is not over and is still a valid basis of the subpoena. See supra part I. OFHEO is in a better position to determine whether the examination is over than Respondent is. Certainly, the government is not unreasonable in concluding that the examination is still in progress when the special examiners continue to take testimony and examine documents. The position that the government has taken is therefore substantially justified. See Roanoke River Basin Assoc. v. Hudson, 991 F.2d 132, 140 (4th Cir. 1993) (affirming district court's decision to look at litigation as a whole in determining substantial justification issue).

One can also obtain fees from an agency if there is a determination that the United States acted in bad faith. 28 U.S.C. § 2412(c)(2). There is no basis for any such finding in this case. As noted above, the government has based its litigating position on the strength of existing caselaw and the facts as understood by the entity in charge of the special examination. Even if this Court should conclude that the subpoena should not be enforced, there would be no basis for a finding of bad faith.

Respondent argues that he raised the same arguments as seen in this brief to OFHEO in his request to revoke the subpoena prior to the filing of the enforcement action, and that OFHEO failed to follow the Administrative Procedure Act by not responding to the request. Resp.'s Memo at 12. However, OFHEO engaged in all of the adjudication of Respondent's request to revoke the subpoena that is required. The statute authorizing the Director to quash subpoenas, 12 U.S.C. § 4641(a)(4), contains no provision for individuals to request that a subpoena be revoked. It sets up no procedure for such revocation, so there is no procedure pursuant to that statute that the Director could have failed to follow.

Respondent relies on two sections of the APA for this argument: 5 U.S.C. § 555(b)[8] &

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[8] 5 U.S.C. § 555(b) provides as follows:
(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or
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(e).[9] Resp.'s Memo at 12. To the extent that § 555(b) applies it all, it requires only that a matter be concluded within a reasonable time. Section 555(e) requires that notice of the denial of an application be given. Neither section sets out a specific time frame or procedure, nor does either prevent the notice of denial from taking the form of a petition filed in federal district court. Respondent has received notice that the subpoena is not being revoked, and he has received an explanation of the grounds for denial of his request. Petitioners filed with this Court, inter alia, a petition to enforce the subpoena, a supporting memorandum, and a declaration by David W. Roderer of OFHEO. Each of these documents explains why the subpoena was not revoked–because the subpoena was validly issued. Neither 12 U.S.C. § 4641 nor 5 U.S.C. § 555 entitles Respondent to any further notice than that which has been provided in the course of this litigation. That OFHEO found Respondent's request to revoke the subpoena less than compelling is not an indicator of bad faith in filing the enforcement action.

Petitioners acted in good faith in seeking the enforcement of this subpoena, and the position taken in the litigation is substantially justified. Therefore, the request for attorney's fees should be denied.

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[8](...continued)
deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

[9] 5 U.S.C. § 555(e) provides as follows:
(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

CONCLUSION

The subpoena seeking testimony and documents from Respondent was issued for a lawful purpose within the statutory authority of OFHEO. The information sought is directly relevant to the examination of the Freddie Mac earnings restatements. Respondent's protestations to the contrary are unavailing. Petitioners respectfully request that this Court enforce the administrative subpoena and deny the request for attorney's fees.

Respectfully submitted,

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