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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Office of Federal Housing Enterprise Oversight—Disposition of Collections from Third Party Litigants

File: B-302825

Date: December 22, 2004

DIGEST

The Office of Federal Housing Enterprise Oversight (OFHEO) may not deposit into the Federal Housing Enterprises Oversight Fund amounts that it collects from third parties to its administrative proceedings in payment of document discovery costs. Under the miscellaneous receipts statute, 31 U.S.C. § 3302(b), OFHEO must deposit such collections into the general fund of the Treasury.

DECISION

The Office of Federal Housing Enterprise Oversight (OFHEO) has requested a decision on whether it may retain for deposit into the Federal Housing Enterprises Oversight Fund (Oversight Fund) moneys collected from third party litigants, or whether it must deposit them into the general fund of the Treasury as miscellaneous receipts as provided in 31 U.S.C. § 3302(b). Memorandum from Gail Palestine, Manager, Budget and Finance, OFHEO, to the Comptroller General, GAO, Mar. 2, 2004. As explained below, we conclude that OFHEO must deposit these moneys into the general fund of the Treasury.

BACKGROUND

OFHEO was established by the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act).¹ The act gives OFHEO oversight responsibilities over two government-sponsored enterprises, the Federal National

¹ Pub. L. No. 102-550, § 1311, 106 Stat. 3941, 3944 (Oct. 28, 1992) *codified at* 12 U.S.C. § 4511.

Mortgage Association and the Federal Home Loan Mortgage Corporation (hereinafter referred to as the enterprises), to ensure their capital adequacy and financial safety and soundness. 12 U.S.C. § 4513. Among OFHEO's duties are to conduct annual on-site examinations of the enterprises, to conduct enforcement proceedings and take enforcement actions. 12 U.S.C. §§ 4517, 4631, 4636.

OFHEO is funded through annual assessments collected from the two enterprises. OFHEO, "to the extent provided in appropriation Acts," may establish and collect the annual assessments in an amount not exceeding what is sufficient to provide for its reasonable costs and expenses. 12 U.S.C. § 4516(a). OFHEO must deposit collected assessments into the Oversight Fund, an account held in the Treasury. 12 U.S.C. § 4516(f). Amounts in the Fund are available for carrying out OFHEO's responsibilities and for meeting its expenses, but only to the extent provided in appropriation acts. *Id.* In fiscal year 2004, Congress appropriated \$39,915,000 from the Fund.²

OFHEO holds administrative hearings as part of its responsibilities under the act. For example, the act authorizes it to conduct cease and desist proceedings to adjudicate whether an enterprise, or one of its executive officers or directors, has engaged in conduct that (1) threatens to cause a significant depletion of the core capital of an enterprise, (2) violates the act, or (3) violates the provisions of the Federal National Mortgage Association Charter Act³ or the Federal Home Loan Mortgage Corporation Act.⁴ 12 U.S.C. § 4631(a). OFHEO is also authorized to hold hearings to adjudicate the imposition of civil monetary penalties on enterprises, executive officers, or directors. 12 U.S.C. §§ 4633, 4636(c).

OFHEO conducts its adjudicatory proceedings pursuant to its Rules of Practice and Procedure, found at 12 C.F.R. Part 1780. The rules provide for pre-hearing document discovery. 12 C.F.R. § 1780(a). Under the discovery rules, third parties⁵ may request OFHEO to produce documents for inspection, or, in lieu of inspection, parties may specify that OFHEO make copies of the responsive documents and deliver them to the requesting party. 12 C.F.R. § 1780.27(b). If a party requests more than 250 pages

²Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. G, title II, 118 Stat. 3, 390 (Jan. 23, 2004).

³ 12 U.S.C. §§ 1716

⁴ 12 U.S.C. §§ 1451

⁵ OFHEO regulations define a party as "OFHEO and any person named as a party in any notice." 12 C.F.R. § 1780.3(f). The third-party litigants that OFHEO refers to are corporate officers of the enterprises regulated by OFHEO. Facsimile note from Gail Palestine, Manager, Budget and Finance, OFHEO, to Jon Barker, Senior Attorney, GAO, Feb. 25, 2004.

of copying, OFHEO requires the requesting party to pay the copying and shipping charges. *Id.*⁶

ANALYSIS

In requesting this decision, OFHEO asks into what account—the general fund of the Treasury or the Oversight Fund—it should deposit the amounts that it receives under 12 C.F.R. § 1780.27(b).

The general rule concerning the crediting of collections to appropriations and other fund accounts is based on the requirements of the miscellaneous receipts statute, which provides that:

“ . . . an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”

31 U.S.C. § 3302(b).

The miscellaneous receipts statute is one of a number of laws that Congress has enacted over the years to effectuate the Appropriations Clause of the Constitution. B-287738, May 16, 2002. The miscellaneous receipts statute advances congressional prerogative by prohibiting an agency from augmenting its appropriations from outside sources without specific statutory authority. 69 Comp. Gen. 260, 261 (1990). Consequently, absent specific statutory authority to the contrary, agencies must deposit in the miscellaneous receipts of the Treasury any fees or other amounts paid to the government for activities relating to official duties.

For example, the Department of Agriculture could not deposit fees it collected for furnishing data from its Current Research Information System (CRIS) into an account from which it could draw funds to cover the costs of making searches and reproducing data. 49 Comp. Gen. 17 (1969). While the Department had specific statutory authority to sell copies of Department library materials and use the proceeds to cover costs, the statute did not cover CRIS data because it was not part of the Department’s library materials. Rather, “in the absence of other statutory authority,” the Department was required to deposit the collected fees into the Treasury as miscellaneous receipts. *Id.* at 18.

⁶ The regulation goes on to state that “Copying charges are at the current rate per page imposed by OFHEO . . . for requests for documents filed under the Freedom of Information Act. [Citation omitted.]” 12 C.F.R. § 1780.27(b). Other financial institution regulators have similar provisions. *See* 12 C.F.R. § 308.25(b) (Federal Deposit Insurance Corporation); 12 C.F.R. § 747.25(b) (National Credit Union Administration); 12 C.F.R. § 263.25(b) (Federal Reserve Board).

OFHEO believes that section 1313(b) of the Safety and Soundness Act⁷ provides the statutory authority for it to deposit the collections in the Oversight Fund.⁸ Memorandum from David A. Felt and Tasha L. Cooper, OFHEO Office of General Counsel, to Gail S. Palestine, Manager, OFHEO Budget and Finance, Feb. 25, 2004. Section 1313(b) states, in pertinent part, that the Director is authorized to

“take such actions . . . as the Director determines necessary regarding--

“ . . . (5) administrative and enforcement actions under subchapter II of this chapter, actions taken under subchapter III of this chapter with respect to enforcement of subchapter II of this chapter, and other matters relating to safety and soundness ”

12 U.S.C. § 4513(b)(5).

OFHEO contends that this provision authorizes it to keep reimbursements for copying and delivery costs because it is necessary in order to prosecute enforcement actions.

We disagree. Certainly, document discovery, and associated copying and delivery of materials requested in discovery, are important in the conduct of enforcement proceedings, and therefore are authorized by section 1313(b). In light of the purpose of the miscellaneous receipts statute, *i.e.*, to ensure the Congress’s constitutional power to control the level of agency activity, a generally expressed grant of authority such as section 1313(b) is insufficient to supersede the miscellaneous receipts statute. In order to deposit collections into an account other than the general fund of the Treasury, an agency must find statutory authority specifying another account other than the general fund. 69 Comp. Gen. 260, 262 (1990).

The statute establishing OFHEO’s Oversight Fund is an example. With regard to the annual assessments that OFHEO collects from the two enterprises that OFHEO oversees, it clearly provides that “[a]ny assessments collected . . . shall be deposited in the [Oversight] Fund.” 12 U.S.C. § 4516(f). Section 1313(b) does not address,

⁷ Section 1313(b) is codified at 12 U.S.C. § 4513(b).

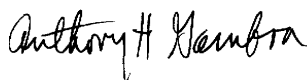
⁸ OFHEO would argue, also, that section 1313(b) permits it to charge fees for this purpose. While we agree that OFHEO may charge this fee, it is the user fee statute, 31 U.S.C. § 9701, not section 1313(b) that authorizes the charge. The user fee statute authorizes agencies to charge persons fees for services provided. 59 Comp. Gen. 389 (1980); B-219857, Dec. 1, 1986; B-209933, June 6, 1983.

either directly or indirectly, the assessment of fees for copying and delivery of materials sought through discovery or the deposit of any fees collected.⁹

The fact that OFHEO operates out of the Oversight Fund does not compel a different conclusion. While in some ways the Fund may resemble a revolving fund, amounts in the Fund are available only “to the extent provided in appropriation acts.” 12 U.S.C. § 4516(f). Thus, even though Congress created a separate fund to finance OFHEO operations, it retained control over the amount of funds available to OFHEO for its operations and, consequently, control over the level of agency activity, which the miscellaneous receipts statute was intended to preserve.¹⁰

CONCLUSION

OFHEO may not deposit into the Oversight Fund amounts it collects from third parties to its administrative proceedings conducted under the Safety and Soundness Act in payment for OFHEO’s document discovery costs. Rather, OFHEO must deposit such collected funds into the general fund of the Treasury as miscellaneous receipts in accordance with 31 U.S.C. § 3302(b).



Anthony H. Gamboa
General Counsel

⁹ Because the user fee statute, not section 1313(b), provides OFHEO the authority to charge these fees (see note 8 above), it is not surprising that section 1313(b) would not address the deposit of the amounts collected. Fees collected under authority of the user fee statute must be deposited into the general fund as miscellaneous receipts. 49 Comp. Gen. 17 (1969).

¹⁰ Even if the Oversight Fund were available to OFHEO without further appropriation, we would not reach a different conclusion. If the legislation establishing a revolving fund does not expressly authorize an agency to deposit receipts of a particular type into the revolving fund, the agency may not deposit those receipts into the revolving fund, even if the receipts are related in some way to the programs the revolving fund supports; instead, the agency must deposit such receipts into the Treasury as miscellaneous receipts. 69 Comp. Gen. at 262.