

UNITED STATES OF AMERICA  
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

Notice Number 2006-1

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In The Matter Of: )

FRANKLIN D. RAINES )

J. TIMOTHY HOWARD )

LEANNE G. SPENCER )

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**OFHEO'S MOTION TO DOCKET EX PARTE LETTER**  
**FROM RESPONDENT RAINES**

NOW comes the Office of Federal Housing Enterprise Oversight (OFHEO) and moves the Presiding Officer to docket a letter from counsel for Respondent Mr. Raines to the Director of OFHEO, which letter is dated December 18, 2006, and which letter is attached hereto as Exhibit 1 ("Letter"). This Letter appears to be a prohibited *ex parte* communication from counsel for Mr. Raines to the Director of OFHEO in violation of Title 12, Code of Federal Regulations, Section 1780.8. OFHEO requests that the Letter be docketed properly, and that Respondent Mr. Raines be directed to serve copies on all parties.

**Mr. Raines' Letter Appears to Be an Ex Parte Communication**

The Letter from Mr. Raines' counsel to the Director may be viewed as an *ex parte* communication prohibited by 12 C.F.R. § 1780.8.

(1) Ex parte communication means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between—

(i) An interested person outside OFHEO (including the person's representative; and

(ii) The presiding officer handling that proceeding, the Director, a decisional employee assigned to that proceeding, or any other person who is or may reasonably be expected to be involved in the decisional process.

(2) A communication that does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding, does not constitute an ex parte communication.

The Letter meets all of the requirements for *ex parte* communications. The Letter does not indicate that OFHEO's Office of General Counsel or counsel for other parties were copied on the Letter. The Letter was sent to the Director following the issuance of the Notice of Charges, which initiated the within adjudicatory proceeding. Clearly, Mr. Raines and his counsel compose interested parties and the Letter was intended to communicate with the Director.

In the Letter, Mr. Raines demands that the Director recuse himself from the within adjudicatory proceeding. His counsel further demands that a different procedural mechanism be employed to decide the claims in the Notice of Charges. Hence, the Letter reflects Mr. Raines' efforts to seek affirmative action from the Director regarding the adjudicatory proceeding. His demands have a potentially significant impact on the outcome of the adjudicatory proceeding. Accordingly, the Letter should be treated as a communication pertaining to the merits of the adjudicatory proceeding.

Conclusion

For the foregoing reasons, OFHEO seeks to have the Letter docketed in the within adjudicatory proceeding. OFHEO further requests that the Court set a briefing schedule so that the parties may address the proper course of action to be taken in regard to the apparent *ex parte* Letter pursuant to Title 12, Code of Federal Regulations, Section 1780.8.

Dated January 23, 2007

Respectfully submitted,

A handwritten signature in cursive script that reads "David A. Felt". The signature is written in black ink and is positioned above a horizontal line.

David A. Felt  
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**ORDER**

Now, this \_\_\_ day of January, 2007, upon receipt and consideration of a letter by Kevin M. Downey, counsel to Franklin D. Raines, which letter is dated December 18, 2006; it appearing, without deciding, that Mr. Downey's December 18, 2006, letter contains written communications relevant to the merits of the within adjudicatory proceeding; it further appearing, without deciding, that the herein referenced letter was made *ex-parte* in violation of Title 12, Code of Federal Regulations, Section 1780.8;

**IT IS ORDERED** that on or before December 26, 2006, Kevin M. Downey shall cause his December 18, 2006, letter to be placed on the record of the proceeding and served on all the parties.

**IT IS FURTHER ORDERED** that, within ten days of receipt of service of the *ex parte* communication, all parties may file responses to the December 18, 2006, letter. Such responses may include a recommendation regarding whether sanctions should be imposed.

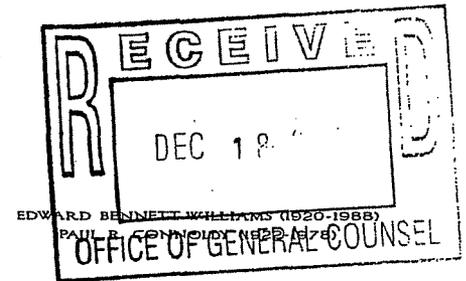
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Honorable William B. Moran  
Presiding Officer

# EXHIBIT 1

LAW OFFICES  
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December 18, 2006

**By Hand Delivery**

Honorable James Lockhart  
Office of Federal Housing  
Enterprise Oversight  
1700 G Street, NW  
Washington D.C. 20552

**Re: Notice of Charges Against Franklin D. Raines**

Dear Director Lockhart:

This law firm represents Frank Raines in connection with litigation matters arising out of Fannie Mae's accounting restatement.

I have received and reviewed the Notice of Charges that your agency filed against Mr. Raines this afternoon. The allegations leveled against Mr. Raines in that Notice are false. We look forward to refuting them in a fair and impartial forum. Two actions on your agency's part will be necessary to ensure that Mr. Raines receives due process in connection with this matter.

First, please remove yourself immediately and completely from any further regulatory action affecting Mr. Raines. The long record in this matter demonstrates that you are a fatally biased regulator and that you are determined to use the Notice of Charges and the hearing in this matter to advance your agenda of having the Congress enact legislation concerning Fannie Mae that you endorse.

Since May of this year, you have stated – publicly, repeatedly, without qualification, and without affording any due process to Mr. Raines – that Mr. Raines and others at Fannie Mae “manipulated accounting;” engaged in “mismanagement,” “fraud,” and “earnings manipulation;” and that Mr. Raines obtained compensation from Fannie Mae “fraudulently.”

Your motive for stating such conclusions is obvious: you seek to advance the argument that particular forms of legislation concerning Fannie Mae are necessary. Thus, your conclusions regarding Mr. Raines's conduct have been leveled, amongst other places, in speeches with such explicit titles as "The Current GSE Regulatory Environment and the Need for Reform" (arguing that portfolio limits are necessary because "unconstrained growth focusing on earnings per share" is harmful to Fannie Mae). Whatever your view may be as to the appropriateness of legislation, you are not entitled to advance such views by formulating legal conclusions regarding Mr. Raines's personal conduct and stating them publicly in advance of any due process afforded to Mr. Raines to dispute them.

Your conduct is especially troubling because the conclusions that you have repeatedly asserted stand in contrast to the findings of the independent review conducted by former Senator Warren Rudman, which found that Mr. Raines did not know that any of the Company's accounting practices departed from Generally Accepted Accounting Principals (GAAP). The contrast between Senator Rudman's conclusions and yours are striking both for their content and for the manner in which they were reached and presented. Senator Rudman reported his conclusions after a seventeen-month, \$65 million dollar investigation. You began stating your conclusions of fact and law within three and one-half weeks of being nominated to serve as the Director of OFHEO. The Rudman review consisted of the review of many more millions of pages of documents and the interviews of scores more witnesses than your agency's examination. On the critical substantive issue of whether Mr. Raines knew of any effort to alter earnings numbers to affect compensation at Fannie Mae, Senator Rudman's report noted actual witness recollection that "Raines insisted that the Company should book everything that needed to be booked." See Rudman Report, at 49. Your Notice of Charges ignores this and other critical facts and, without citation to any actual evidence, but with highly inflammatory rhetoric, accuses Mr. Raines of orchestrating fraud and earnings manipulation.

Equally notable is the reaction of other regulators to accounting restatements in similar circumstances. A recent count of public companies that have restated earnings because of errors in the application of the accounting standard at issue here totals 117 companies. But no company (or corporate officer) – other than those regulated by your agency – has faced the spate of public accusations of misconduct that you have relentlessly leveled. This is so even though many of the other restatements appear to have resulted from exactly the same purported misinterpretations of accounting standards. Of course, none of those

other companies is in the midst of the same political discussion as the companies that you regulate.

You have now started a proceeding which is designed to determine whether the assertions that you have made publicly are in fact true. As you know, the proceeding that you have initiated makes you, rather than an objective third party, the ultimate decision maker with regard to the very conclusions that you have stated publicly over several months. The Due Process Clause of the United States Constitution, the statute that created OFHEO, your agency's own regulations, and fundamental notions of fairness obviously preclude you from doing so. Please advise promptly whether you will agree to our request to stand down.

To cleanse the taint of prejudgments that has infected OFHEO, there is a simple step your agency can take which will permit the parties to get to the merits and resolve this matter promptly. As you well know, 12 U.S.C. § 4632 permits you to enter a temporary order effecting the remedies sought in your Notice of Charges. Mr. Raines and the other Respondents can then challenge such an order in the United States District Court for the District of Columbia, which can adjudicate the merits of the order. We will agree to an appropriate stipulation waiving any procedural impediment and permit you to proceed in this manner. We could then have this matter adjudicated promptly in federal court, a forum that does not suffer from questions of prejudice, bias, or politics.

Second, we request that you cause your agency to produce expeditiously and without any designation of confidentiality documents (i) compiled during your agency's investigation of Fannie Mae's accounting restatement and (ii) that relate to your agency's oversight of Fannie Mae during Mr. Raines's tenure as Chief Executive Officer.

The agency is already under Court order to produce such documents to us. (As you know, we caused a subpoena to issue to your agency for such documents in other litigation almost six months ago. Your agency refused to comply. The Court then compelled your agency to do so and has noted the possibility of sanctions against your agency if it engages in further shenanigans). Your agency began to produce such documents to us just last week, but it has designated every single document produced as "confidential," preventing any public discussion of such materials by anyone but you – and it is now apparent that you have distorted and obscured the content of such documents in your public statements and actions.

A review of a small number of documents produced to date reveals direct and disturbing contrasts between the underlying investigative documents

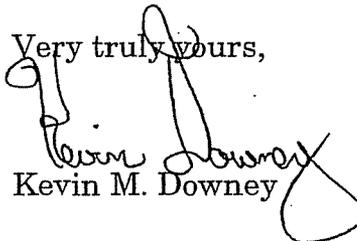
WILLIAMS & CONNOLLY LLP  
Honorable James Lockhart  
December 18, 2006  
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and the rhetorical assertions of your Special Examination Reports. If you do not consent to remove the confidentiality designations today, we will take action to compel the removal of the Confidential designations, at which time we will describe, with as much particularity as permissible, contrasts between your public assertions and the actual testimony of witnesses and content of documents known to your agency when it filed the Notice of Charges.

We are eager to disprove your allegations. If you are also interested in fairness, you will let the federal courts resolve this matter and make public documents long kept secret so that the process, which has been conducted to date under the impermissible influence of a legislative agenda, can be conducted fairly. We wish to expedite adjudication of the merits, and our suggestions will achieve that end. If you wish to continue to use Mr. Raines as a prop in the interests of your own political agenda, you will not consent and will continue to proceed as you have to date.

We await a response.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kevin M. Downey". The signature is stylized and cursive, with a large loop at the end of the last name.

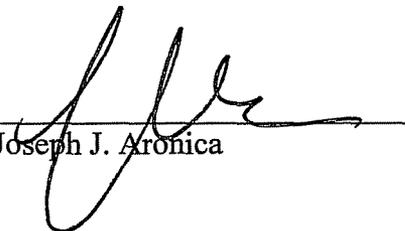
Kevin M. Downey

I hereby certify that on this 23<sup>rd</sup> day of January 2007, I caused a true copy of the foregoing Motion to Docket Ex Parte Letter From Respondent Raines to be served via U.S. Mail on the following persons:

Steven M. Salky  
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Kevin M. Downey  
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Washington, D.C. 20005  
*Counsel for Franklin D. Raines*

  
\_\_\_\_\_  
Joseph J. Aronica