



Federal Housing Finance Agency

1700 G Street, N.W., Washington, D.C. 20552-0003

Telephone: (202) 414-3800

Facsimile: (202) 414-3823

www.fhfa.gov

November 30, 2009

Honorable Darrell Issa
House of Representatives
Washington, D.C. 20515-0549

RE: Inquiry Per Committee on Oversight and Government Reform

Dear Congressman Issa:

Thank you for your letter regarding the status of Mr. Edward Kelley, an employee of the Federal Housing Finance Agency (FHFA). I appreciate the opportunity to respond to misstatements made in the media as well as the concerns you expressed. Also, I appreciated the opportunity to meet with your staff. The information provided below addresses the issues presented and I want to note that FHFA has supported and continues to support actively the nomination, confirmation and funding for an Inspector General.

Before answering your specific questions, I want to provide the following background information that may be helpful:

Background Information

FHFA's predecessor organization—the Office of Federal Housing Enterprise Oversight-- called for and supported the creation of an Inspector General for the new agency prior to enactment of the Housing and Economic Recovery Act of 2008 (HERA). Following enactment of the new law, President Bush nominated Mr. Steve Linick to serve as the Inspector General (IG) for the new agency, as provided in the statute. The Senate did not take action on Mr. Linick's nomination.

Former FHFA Director Lockhart testified before the House Financial Services Committee on June 3, 2008, noting the absence of an Inspector General, the need for a nomination and Senate confirmation and congressional appropriation for an Office of Inspector General (OIG). Acting Director DeMarco noted this vacancy in testimony before the Senate Banking Committee on October 8, 2009, and reiterated his view on the importance of the President filling the position.

FHFA fully disclosed the resolution of the status of the IG and OIG on its website and moved to continue Mr. Kelley's service to the agency as managing an internal audit function, as closely aligned with the concept of an Inspector General as possible.

FHFA's motivation in addressing this matter centered on avoiding a situation that could compromise any action Mr. Kelley would have taken and even harmed any investigation he would conduct on his own or in conjunction with other agencies.

Finally, as an aside, the article you cite in your letter is riddled with errors, inconsistencies and provides links to documents that were made available to the media by some party without authorization— particularly egregious is a memorandum to me from lawyers in the Office of General Counsel marked as a pre-decisional attorney communication.

Status of Mr. Kelley

I want to assure you that my office did not petition the Office of Legal Counsel to remove or otherwise displace Mr. Kelley. Mr. Kelley and I were in active discussions about his status and I had reviewed a memorandum he provided on the subject. In a meeting with Mr. Kelley, detailed below, it was agreed that the OLC would be an appropriate venue for an independent review as they routinely answer questions of legislative and legal debate within and between agencies. Mr. Kelley agreed to that process, indicating that he viewed his job as “all or nothing,” that is, being the IG or not. The inquiry to OLC was whether he could occupy a position that was required to be presidentially-appointed, as provided by Congress; the answer was “no.” As such Mr. Kelley could not be removed from a position or his authorities limited as he held no such position and had no such authorities.

In reviewing congressional intent, there are no materials or statutory language indicating that Mr. Kelley serve in any capacity in the new agency other than as an employee. He was a non-presidentially appointed IG at the Federal Housing Finance Board. Congress could have provided for him to serve in a temporary capacity in the new agency, but did not. Indeed, Congress did act in the same legislation to create a transitional Director for the new agency and could have done so for the IG position.

My request for clarification of the position of IG does not represent some nefarious purpose but rather the long standing expectation that lawyers will act to protect their clients—in this case, Mr. Kelley and the agency— from taking missteps that could place them in legal jeopardy. Having Mr. Kelley operate as an IG, when he was not so entitled, in the end could have jeopardized both Mr. Kelley and the agency. As with an IG, the legal department of an agency has an obligation to uphold the law, to assure that the agency adheres to legal standards and that individuals do not take positions that run contrary to the law. Our legal department has done so in every aspect of dealing with this situation.

Mr. Kelley’s independence has never been undermined. As with any internal audit function, there must be freedom to conduct its work and Mr. Kelley has noted that he has that independence. Mr. Kelley is serving an important function and is undertaking audit activities and reporting results of those activities to the Acting Director—the same as would be the case if FHFA had an IG. In a message to all agency staff dated September 29, 2009, Acting Director DeMarco wrote that staff with concerns over internal matters could raise them to Mr. Kelley’s internal audit group, to the Office of General Counsel or to the Office of Special Counsel, an independent agency.

Responses to Questions

1. Events Leading to FHFA General Counsel's Memorandum

Mr. Kelley sought to employ new personnel for an Office of Inspector General and to pay them at a rate provided for the agency, not under the federal general schedule as most other presidentially-appointed OIG staffs are paid.

Since there is no Inspector General and no Office of Inspector General, hiring staff for such a position would put such employees at risk when a presidentially-appointed IG was confirmed. Further, without specific congressional authorization, pay rates for OIG personnel are governed by the general schedule. Mr. Kelley's proposal led to our joint discussion and resulted in the specific request to the Justice Department for assistance.

2. Mediating Dispute with Mr. Kelley

Mr. Kelley spoke with former Director Lockhart on several occasions. My office spoke with Mr. Kelley's outside counsel on several occasions. In a joint meeting with Mr. Lockhart, Mr. Kelley, Mr. DeMarco, Mr. Kelley's counsel and myself on this topic, Mr. Kelley agreed that having the Justice Department address this matter was an acceptable approach.

3. Mr. Kelley as Inspector General

Mr. Kelley's outside counsel asserted at one point that he could not serve as an Acting IG, but could serve as the IG. Later, after reading FHFA's legal memorandum, Mr. Kelley's outside counsel stated in a conversation that, while he could not serve as IG either, he should have some role of an "IG nature." Thus, after much discussion, neither Mr. Kelley's outside counsel, my office nor the Office of Legal Counsel found that Mr. Kelley could serve as Inspector General for FHFA. Further, there is no Office of Inspector General for him to head. Funds for an Inspector General and for an Office of Inspector General must come from separate congressional appropriations, a provision aimed at assuring IG independence.

4. Audit Duties of Mr. Kelley

Serving as an internal auditor, Mr. Kelley both receives requests from and provides results of internal audits to the Acting Director. As I am not involved with the activities of the internal audit function and you have asked Mr. Kelley that question, I defer to his response.

5. Mr. Kelley's Staff

There is no Office of Inspector General. Mr. Kelley's office of internal audit has three employees. In addition, he requests funding for outside audit consultants where appropriate. Mr. Kelley's hiring of staff is a function of his office needs, FHFA budget and the work load for internal audit.

6. Mr. Kelley's Position

Mr. Kelley was never an Inspector General for FHFA. Mr. Kelley was asked to perform functions similar to an Inspector General, more commonly termed an internal audit function, and he is leading those functions as head of the office of internal audit.

7. Inspector General Position

Congress required a presidentially-appointed Inspector General and actions beyond those already undertaken— having Mr. Kelley oversee an internal audit function— would place the agency and Mr. Kelley at legal risk. The nomination of Mr. Linick (for which the agency provided information), the calls by our former and current Director for an IG and our website postings all reflect the desire of the agency for a nominated, confirmed and appropriated Inspector General and Office of Inspector General.

8. FHFB OIG Employees

HERA provided that employees of the merged agencies would have a position “with the same status, tenure, grade and pay.” This does not mean that they would have the identical job or that they could fill a job that was governed by a competing legislative provision, such as where Congress provided for a presidentially-appointed IG and congressionally-appropriated Office of Inspector General.

I hope this information provides a full review of the issues you presented as well as responses to the questions posed. Again, I assure you that FHFA is working to address this situation and I will be keeping your staff informed of our progress. Should you require additional background, my direct line is 202 414 3788. With all best wishes, I am

Sincerely,



Alfred M. Pollard
General Counsel