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FHFA leader’s exit fuels speculation, lobbying on stock agreement

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President Biden’s replacement for Federal Housing Finance Agency Director Mark Calabria stands to significantly alter the direction of the government-sponsored enterprises and the guessing game as to who will be named has begun.

Current FHFA Deputy Director Sandra Thompson was named to the post on an acting basis Wednesday night. Possible permanent replacements for Calabria include economist Mark Zandi and Julia Gordon, president of the National Community Stabilization Trust and a former FHFA official.

The timing on formally replacing Calabria depends on the Biden administration's priorities, but if what’s happening at the Consumer Financial Protection Bureau is any indication, Thompson is likely to jump into the role quickly, noted Ryan Wood, regulatory counsel at Covius Compliance. Acting CFPB director Dave Uejio, has come out with "guns blazing," since being assigned to that post following Kathy Kraninger’s firing, he said. However, the CFPB also has a different, broader, mandate.

Among the other key housing roles yet to be filled by the Biden administration are the Federal Housing Commissioner, whose role is to oversee the Federal Housing Administration, and the president of Ginnie Mae, a job that has been vacant on a permanent basis since Ted Tozer left after President Obama left office.

Many who reacted to the U.S. Supreme Court's decision in Collins v. Yellin, which was the catalyst for Calabria’s firing, are quick to point out that a number of crucial policy issues remain unsettled.

For example, the court's decision in the case did not support a claim brought by shareholders of Fannie Mae and Freddie Mac, which argued that the Preferred Stock Purchase Agreements between the GSEs and U.S. Treasury, that put in place what is commonly referred to as the net worth sweep, was illegal. The PSPAs allowed the federal government to take Fannie Mae and Freddie Mac into government conservatorship during the Great Recession while still allowing them to remain publicly-traded corporations.

Jesse Van Tol, CEO of the National Community Reinvestment Coalition urged the next director to “act immediately to revisit a number of recent policies that undermine the role of the GSEs the market, mortgage rates and mortgage products, including the December rule around their capital requirements and the program and product restrictions included in the January amendments to the FHFA-Treasury Preferred Stock Purchase Agreements."

Immediately after Thompson’s appointment, Community Home Lenders Association’s executive director Scott Olson sent a letter to her and Treasury Secretary Janet Yellin calling for the suspension of the January amendments. The CHLA, which consists primarily of small and mid-sized nonbank mortgage lenders, previously questioned several moves the agency made, contending they were consequences of the January revisions to the PSPAs.

“The Administration has made as a centerpiece of its housing policy the pursuit of racial equity in homeownership,” Olson wrote. “The PSPA volume caps are completely contradictory to this policy.”

The aim of the caps — to push more otherwise GSE-eligible loans into the private market — is not appropriate at a time when the nation is looking to recover from the pandemic, he argued.

As part of the January PSPA revisions, a $1.5 billion-per-lender per-enterprise cap on sales through the cash window was put in place starting next year. This cap is designed to push larger lenders to the swaps market, and let the cash window focus on the smaller lenders.

But that cap amount is too low, as many smaller lenders do more than $1.5 billion in business with Fannie or Freddie. Instead the cap should be raised to $5 billion during any 52 week period, Olson’s letter said.

"The sweep is a relic of the last mortgage crisis," said David Dworkin, president and CEO of the National Housing Conference in an interview. "There's no question that

GSEs need to improve their capital position. Some of their profits should go to capital, but they also need to address real inequities in the housing markets."

A favorable decision that nullified the net worth sweep would have likely pushed up the time frame for their release from conservatorship. As it is, a recent Keefe, Bruyette & Woods report that looked at Calabria's plan estimated it would take 15 years to build up enough capital.

With this decision, the existing GSE capital rule is likely to be revisited, but not any time soon, KBW analyst Bose George said in a report. "We would expect the GSE reform template developed by Mark Calabria to be put on the back-burner. While it could be revisited in the future, we believe that GSE reform will no longer be a near-term priority," he declared.

The firing is a positive for the mortgage market, George argued. "The increased focus on supporting borrowers should help credit performance, which should help holders of mortgage credit risk including the mortgage insurers," he said. "Increasing the GSE footprint (potentially by removing the 7% cap on second homes and investor properties and/or by eliminating the 50 bp adverse market fee on refinances) would be positive for mortgage volumes, which should help mortgage originators and title insurers."

But any impact is likely to be modest and potentially not discernible in a market in which volumes are already declining sharply.

On the other hand, a potential increase in the GSE footprint if the January amendments are cancelled won't be discernible in the market because the 7% cap just went into place this year. "Finally, it could be seen as a slight negative for correspondent mortgage lenders if the $1.5 billion cash window limitation is removed. But in this case, also, the limit went into effect just this year, so it has probably not benefited correspondent lenders in any meaningful way yet," George said.

The Supreme Court's ruling was somewhat welcomed by the free market Competitive Enterprise Institute, in that it opposed the sweep, but CEI representatives indicated that they weren't completely pleased with the outcome.

"It is sad to see no remedy was given to Fannie and Freddie shareholders by the court and, instead, the case was sent back to the lower court to consider if shareholders should get something for the harm caused to them," said Devon Booker, an attorney at CEI.

CEI Senior Fellow John Berlau praised Calabria for ending the net worth sweep.

"His 'regulatory capital framework' set a course for privatization of the GSEs and reduces their competitive advantages over private housing finance entities," Berlau said. "His successor would do well to heed Calabria's excellent stewardship of the GSEs."

As for Fannie Mae and Freddie Mac, this decision should result in at least one overarching change when it comes to how they operate in the short term.

"They have been operating their business with a singular focus on recapitalization and release from conservatorship," said NHC's Dworkin. "That is not appropriate at this time."

Supreme Court's perspective on CFPB and the FHFA

The Supreme Court's ruling should not have been a surprise, given what it previously said when ruling on the CFPB's constitutionality.

"In the FHFA ruling, the court did not rescind or set aside a prior government agreement on the grounds that the structure of the agency was unconstitutionality," said Jenny Lee, a partner in the law firm of Arent Fox, in a statement.

In the CFPB's Seila Law case, the court found that "CFPB was unconstitutional and did not provide a remedy that canceled out the CFPB action that the petitioner was trying to nullify."

Similarly, the court in the FHFA decision left it to other parties, such as lower courts, other litigants, or the administration to find a remedy.

"Here, while the stage is now set for the Biden administration and the lower court on remand to act, the four corners of the SCOTUS ruling itself meant no change directly to the work of those agencies," said Lee.

However, there is one big difference between the FHFA case and Seila Law, said Wood at Covius Compliance.

In the FHFA case, the statute involved, the Housing and Economic Recovery Act, states, "that courts are not allowed to restrain or affect the exercise of the powers or functions of the FHFA as a conservator," Wood said in an interview. "So the court, looking at that, told shareholders, 'I'm sorry, the statute explicitly ties our hands in this situation.'"

The court did leave open the possibility that there are some remedies for the shareholder, he added.

So the case could end up working its way back up through the court system. "It's also possible that depending on what happens in the lower courts this comes back up to the Supreme Court again on those narrower issues," Wood noted.

But it seems unlikely the investors that sued could come away with any recovery in this go-round. “While the plaintiffs' claim was not dismissed, their position seems tenuous because it would appear to be difficult to show that the third amendment would have been different if the president had the ability to remove the director of the FHFA,” said KBW’s George.

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