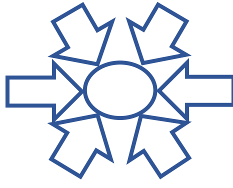

GSE Activity Report

Friday, June 02, 2023

Watch Out

Summary

As we detailed earlier this week, the OCC's new enforcement policy is a paradigm shift in terms of the legal and reputational risk run by national banks and federal thrifts – that is, by the depository institutions that matter the most to mortgage finance. The most important strategic driver of what these companies do in this sector are the forthcoming end-game capital rules and subsequent changes to stress testing and the broader regulatory-capital regime. However, these new enforcement standards matter, as this report makes clear.

Impact

Acting Comptroller Hsu has been none too subtle in his campaign to differentiate his agency from the Fed and FDIC, noting emphatically that none of the recently failed banks had a national charter. He also remains not only unconfirmed in his long-lasting "acting" role, but also not even nominated by a White House fearful of opposition whipped up by Elizabeth Warren and other progressives still smarting from the 2021 decision to withdraw a very progressive Comptroller-nominee and angered by what they believe to be the OCC's unduly lenient attitude to bank mergers.

This new, super-tough supervisory policy will make progressives happy. Whether it's enough to mollify to a confirmation is yet to be known.

But, whatever its context, the new OCC policy's construct is massive and major. Although the agency tried to blunt industry opposition by saying it applies only to larger banks, most of it applies expressly and all of it applies indirectly to federally-chartered entities of all shapes and sizes. From a mortgage perspective, its most important aspect is a novel provision linking OCC formal enforcement actions up to and including forced divestiture to enforcement actions from the CFPB, FTC, or even state authorities. Any OCC-regulated entity that fails quickly to remediate a CFPB action could come under enforcement action, but any entity deemed a repeat offender of CFPB or other sanctions above and apart from those from the banking agencies could have its charter clock cleaned.

These risks cut across the range of consumer-finance activities, but perhaps nowhere as important as in mortgages because of the tendency for things to go wrong when borrowers come under stress. The Bureau's new approach to servicing and loss-mitigation also creates risks to banks, as do the policy's new provision stating that the agency could drop the hammer on a national bank even if the misdeeds are those only of a third-party service provider – i.e., a nonbank servicer.

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Outlook

This policy was effective when the agency issued it on May 25. Importantly, neither the Fed nor FDIC has followed suit with anything like it. As a result, only federal charters are in a vise, at least for now. Still most banks active in mortgage finance are federally chartered and the policy's impact is thus substantial even if unmatched by the other banking agencies.

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