

Charles Grassley Questions Diversion of Fannie and Freddie Earnings

By Gretchen Morgenson

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For almost two years, shareholders of Fannie Mae and Freddie Mac have been asking the United States government about its 2012 decision to divert all of the mortgage finance giants' earnings to the Treasury rather than let them repay taxpayers under the original bailout agreement.

But the government has declined to disclose documents relating to that decision, contending that some may be subject to presidential privilege.

Now, this cloak of secrecy has drawn the scrutiny of Charles E. Grassley, the Iowa Republican who is chairman of the Senate Judiciary Committee. On Tuesday, Mr. Grassley sent letters to the Justice Department and the Treasury asking for details about the decision and why the government has kept such a tight lid on documents relating to it.

"The taxpayer has a right to know what has transpired," Mr. Grassley wrote in letters to both Eric H. Holder Jr., the United States attorney general, and Jacob Lew, the Treasury secretary. "But, instead of transparency, there appears to be an invocation of executive privilege. If true, this is cause for concern."

A Justice Department spokeswoman said that its officials were reviewing the letter. A spokeswoman at the Treasury Department said its officials had not received the letter from Mr. Grassley's office.

Fannie Mae and Freddie Mac, once proud and profitable companies established by the government to provide backing for home loans, were humbled by the mortgage debacle of 2008. That September, the government placed both into conservatorship. They received \$187.5 billion from taxpayers to cover their losses.

Initially, Fannie and Freddie paid interest on the taxpayer loan. But in August 2012, the Treasury and the companies' conservator, the Federal Housing Finance Agency, amended the deal to allow the government to sweep all the companies' earnings into the Treasury.

In announcing the action, the government said it was intended to ensure that every dollar earned by the companies would benefit taxpayers.

That decision came just as the companies were returning to profitability, which has been beneficial for the Treasury. By March 31, 2015, it had received \$228.3 billion from Fannie and Freddie, \$40.8 billion more than they borrowed from taxpayers.

The government's decision to divert all of Fannie's and Freddie's earnings was unexpected when it was announced. As conservator, F.H.F.A. was supposed to oversee the companies with an eye to stabilizing them and conserving their assets. Redirecting their profits to the Treasury has prevented the companies from building up a larger capital cushion to absorb future losses, should they arise.

The shares of both companies have continued to trade publicly since they entered conservatorship. As the companies recovered and their earnings ballooned, some shareholders contended that sweeping the profits into the Treasury was an improper taking by the government of private property. Several shareholders sued the government. The Obama administration has responded by fighting document requests and demanding an unusual degree of confidentiality over material relating to the decision.

In one such case, lawyers for the Justice Department defending against a lawsuit brought by Fairholme Fund, a mutual fund company and a Fannie and Freddie shareholder, have made extensive claims of privilege on documents surrounding the profit sweep.

Logs filed in the case in mid-January listed 231 Treasury documents in which the government cited various privileges. Presidential privilege was cited in 38 of those items and in seven documents involving F.H.F.A., the conservator.

In a letter to investors last January, Bruce Berkowitz, Fairholme's managing member, criticized the government's claims to secrecy. Fairholme officials declined to comment Tuesday on Mr. Grassley's letters.

In the letter to Mr. Holder, Mr. Grassley asked for details about the executive privilege claims made by Justice Department lawyers, specifically whether President Obama personally invoked the privilege related to the documents. Mr. Grassley also asked Mr. Holder under what legal authority the sweep was authorized and whether the Justice Department spoke with Treasury or F.H.F.A. about its legality.

Mr. Lew was asked to tell Mr. Grassley why Treasury entered into an agreement with Fannie and Freddie to capture the companies' earnings and how that agreement affects F.H.F.A.'s regulatory authority over the companies and its oversight of their capital positions.

The F.H.F.A. “has regulatory authority over both Freddie and Fannie and the statutory duties include the requirement that the F.H.F.A. ensure that each regulated entity operates in a safe and sound manner, including maintenance of adequate capital and internal controls,” Mr. Grassley wrote.

Mr. Grassley asked Mr. Holder and Mr. Lew to respond to his questions by April 20.