

### Flood Disaster Protection Act

The National Flood Insurance Program (NFIP) is administered primarily under the National Flood Insurance Act of 1968 (1968 Act) and the Flood Disaster Protection Act of 1973 (FDPA).<sup>1</sup> The 1968 Act made federally subsidized flood insurance available to owners of improved real estate or mobile homes located in special flood hazard areas (SFHA) if their community participates in the NFIP. The NFIP, administered by a department of the Federal Emergency Management Agency (FEMA) known as the Federal Insurance and Mitigation Administration (FIMA), makes federally backed flood insurance available to consumers through NFIP Direct Program agents who deal directly with FEMA or through the Write Your Own Program (WYO), which allows consumers to purchase federal flood insurance from private insurance carriers. The NFIP aims to reduce the impact of flooding by providing affordable insurance to property owners and by encouraging communities to adopt and enforce floodplain management regulations. The FDPA requires federal financial regulatory agencies to adopt regulations prohibiting their regulated lending institutions from making, increasing, extending or renewing a loan secured by improved real estate or a mobile home located or to be located in an SFHA in a community participating in the NFIP unless the property securing the loan is covered by flood insurance. Flood insurance may be provided through the NFIP or through a private insurance carrier.

Title V of the Riegle Community Development and Regulatory Improvement Act of 1994<sup>2</sup> which is called the National Flood Insurance Reform Act of 1994 (1994 Act), comprehensively revised the Federal flood insurance statutes. The purpose of the 1994 Act was to increase compliance with flood insurance requirements and participation in the NFIP in order to provide additional income to the National Flood Insurance Fund and to decrease the financial burden of flooding on the Federal government, taxpayers, and flood victims.<sup>3</sup> The 1994 Act required the federal financial regulatory agencies, the Board of Governors of the Federal Reserve System (FRB); the Federal Deposit Insurance Corporation (FDIC); the National Credit Union Administration (NCUA); and the Office of the Comptroller of the Currency (OCC) to revise their current flood insurance regulations and brought lenders regulated by the Farm Credit Administration (FCA) under the coverage of the Federal flood insurance statutes. The federal financial regulatory agencies and the FCA (collectively, the Agencies) jointly issued regulations on August 29, 1996 (61 FR 45684).<sup>4</sup>

The 1994 Act also made the flood insurance requirements directly applicable to the loans purchased by the Federal

National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) and to agencies that provide government insurance or guarantees such as the Small Business Administration (SBA), Federal Housing Administration (FHA), and the Department of Veterans Affairs (VA).

The mandatory flood insurance purchase requirements of the FDPA were again significantly amended with the passage of the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters Act) and the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA). These statutes made changes to the provisions pertaining to force placement of flood insurance; escrowing of flood insurance premiums and fees; exemptions to the mandatory flood insurance purchase requirement; and civil money penalties. Moreover, a new provision mandating the acceptance of a private flood insurance policy meeting certain criteria as satisfaction of the mandatory purchase requirement was added to the FDPA. The Agencies jointly issued rules addressing force placement, escrow, and the exemption to the mandatory purchase requirement for detached structures on July 21, 2015 (80 FR 43215). The Agencies jointly issued rules implementing the private flood insurance provisions of the Biggert-Waters Act on February 20, 2019 (84 FR 4953).

#### Objectives of the FDPA:

- Provide flood insurance to owners of improved real estate located in SFHAs of communities participating in the NFIP.
- Require communities to enact measures designed to reduce or avoid future flood losses as a condition for making federally subsidized flood insurance available.
- Require federal financial regulatory agencies to adopt regulations prohibiting their regulated lending institutions from making, increasing, extending, or renewing a loan secured by improved real estate or a mobile home located or to be located in an SFHA of a community participating in the NFIP, unless the property securing the loan is covered by flood insurance.
- Require federal agencies, such as the FHA, SBA and the VA not to subsidize, insure, or guarantee any loan if the property securing the loan is in an SFHA of a community not participating in the NFIP.

#### Structures Eligible for Flood Insurance Under the NFIP

The NFIP covers improved real property or mobile homes located or to be located in an area identified by FEMA as having special flood hazards. Generally, each insurable structure requires a separate insurance policy. The following

<sup>1</sup> These statutes are codified at 42 USC §4001-4129. FEMA administers the NFIP; its regulations implementing the NFIP appear at 44 CFR Parts 59-80.

<sup>2</sup> Pub. L. 103-325, Title V, 108 Stat. 2160, 2255-87 (September 23, 1994).

<sup>3</sup> H.R. Conf. Rep. No. 652, 103d Cong. 2d Sess. 195 (1994). (Conference

Report).

<sup>4</sup> Agency regulations are codified at 12 CFR 22 (OCC); 12 CFR 208 (FRB); 12 CFR 339 (FDIC); 12 CFR 614 (FCA); 12 CFR 760 (NCUA).

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types of structures are eligible for coverage:

- Residential, industrial, commercial, and agricultural buildings that are walled and roofed structures that are principally above ground.
- Buildings under construction where a development loan is made to construct insurable improvements on the land. Insurance can be purchased to keep pace with the new construction.
- Mobile homes that are affixed to a permanent site, including mobile homes that are part of a dealer's inventory and affixed to permanent foundations.
- Condominiums.
- Co-operative buildings.
- Flood insurance coverage is also available for personal property and other insurable contents contained in real property or mobile homes located in SFHAs. The property must be insured in order for the contents to be eligible.

### Structures Not Eligible for Flood Insurance Under the NFIP

- Unimproved land, bridges, dams, and roads.
- Mobile homes not affixed to a permanent site.
- Travel trailers and campers.
- Converted buses or vans.
- Buildings entirely in, on, or over water into which boats are floated.
- Buildings newly constructed or substantially improved on or after October 1, 1983, in an area designated as an undeveloped coastal barrier with the Coastal Barrier Resource System established by the Coastal Barrier Resources Act (Public Law 97-348).

### Flood Insurance Requirements for Lending Institutions

#### Basic Requirement

Flood insurance, either issued through the NFIP or from a private insurance provider, is required for the term of the loan on buildings or mobile homes when an institution makes, increases, extends or renews a designated loan, meaning all three of the following factors are present:

- The loan (commercial or consumer) is secured by improved real estate or a mobile home that is affixed to a permanent foundation (security property);
- The property securing the loan is located or will be located in an SFHA as identified by FEMA; and
- The community in which the property is located participates in the NFIP.

The FDPA provides that a regulated lending institution may not make, increase, extend, or renew any loan secured by improved real property that is located in an SFHA unless the improved real property is covered by the minimum amount of flood insurance required by statute. This includes situations where a security interest in improved real

property is taken only "out of an abundance of caution."

#### Nonparticipating Communities

Although a lender may make, increase, extend, or renew a loan in a nonparticipating community, a lender is still required to determine whether the security property is located in an SFHA and if so, to notify the borrower. The lender must also notify the borrower that flood insurance coverage under the NFIP is not available because the community does not participate in the NFIP. If the nonparticipating community has been identified for at least one year as containing an SFHA, properties located in the community will not be eligible for federal disaster relief assistance in the event of a federally declared disaster.

Because of the lack of NFIP flood insurance coverage and limited federal disaster assistance available, a lender should carefully evaluate the risk involved in making such a loan. A lender making a loan in a nonparticipating community may want to require the purchase of private flood insurance, if available. Also, a lender with significant lending in nonparticipating communities should establish procedures to ensure that such loans do not constitute an unacceptably large portion of the financial institution's loan portfolio.

Federal agency lenders such as the FHA, the SBA and the VA will not subsidize, insure or guarantee any loan if the property securing the loan is in a SFHA of a community not participating in the NFIP. In addition, Freddie Mac and Fannie Mae will not purchase mortgages secured by improved properties located in SFHAs in nonparticipating communities.

#### Special Situation—Table Funded Loans

In the typical table funding situation, the party providing the funding reviews and approves the credit standing of the borrower and issues a commitment to the broker or dealer to purchase the loan at the time the loan is originated. Frequently, all loan documentation and other statutorily mandated notices are supplied by the party providing the funding, rather than the broker or dealer. The funding party provides the original funding "at the table" when the broker or dealer and the borrower close the loan. Concurrent with the loan closing, the funding party acquires the loan from the broker or dealer.

For flood hazard determination purposes, the substance of the table funded transaction should control and the typical table funded transaction should be considered a loan made, rather than purchased, by the entity that actually supplies the funds. Regulated institutions that provide table funding to close loans originated by a mortgage broker or mobile home dealer will be considered to be "making" a loan for purposes of the flood insurance requirements.

Treating table funded loans as loans made by the funding entity need not result in duplication of flood hazard determinations and borrower notices. The funding entity may delegate to the broker or dealer originating the transaction the responsibility for fulfilling the flood insurance requirements or may otherwise divide the responsibilities with the broker or dealer.

### Exemptions to the Purchase Requirement

The flood insurance purchase requirement does not apply to the following three loan situations:

- Loans on state-owned property covered under an adequate policy of self-insurance satisfactory to the Administrator of FEMA. The Administrator will periodically publish a list of state property falling within this exemption.
- Loans with an original principal balance of \$5,000 or less, and having an original repayment term of one year or less.
- Any structure that is a part of any residential property but is detached from the primary residential structure of such property and does not serve as a residence.
  - A structure that is part of a residential property is a structure used primarily for personal, family, or household purposes, and not used primarily for agricultural, commercial, industrial, or other business purposes. It is detached from the primary residential structure if it is not joined by any structural connection to that structure.
  - Whether a structure serves as a residence is based on the institution's good faith determination that the structure is intended for residential use or actually used as a residence, which generally includes sleeping, bathroom, or kitchen facilities, but not necessarily all three.

### Amount of Flood Insurance Required

The minimum amount of flood insurance required must be at least equal to the lesser of the outstanding principal balance of the loan, the maximum amount available under the NFIP for the type of structure, or the insurable value of the property. Flood insurance coverage under the NFIP is limited to the building or mobile home and any personal property that secures the loan and not the land itself.

The limits of coverage for flood policies are:

- \$250,000 for residential property structures and \$100,000 for personal contents.
- \$500,000 for non-residential structures and \$500,000 for contents.
- \$500,000 for non-condominium residential buildings of five units or greater and \$100,000 for personal contents.<sup>5</sup>

### Acceptance of Private Insurance Policies

A regulated lending institution is required to accept a private insurance policy to satisfy the flood insurance purchase requirement if the policy meets the definition of "private flood insurance" as set forth in the regulation (mandatory acceptance).

A regulated lending institution may choose to accept certain flood insurance policies that do not meet the definition of "private flood insurance" set forth in the regulation if the policy meets certain criteria (discretionary acceptance). A regulated lending institution may also exercise its discretion to accept certain plans providing flood coverage issued by "mutual aid societies" provided that certain criteria are met.

### Mandatory Acceptance

- Under the regulation, "private flood insurance" means an insurance policy that: is issued by an insurance company that is licensed, admitted or otherwise approved to engage in the business of insurance by the insurance regulator of the State or jurisdiction in which the property to be insured is located, or
- is recognized, or not disapproved as a surplus lines insurer by the insurance regulator of the State or jurisdiction in which the property to be insured is located in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property;
- provides flood insurance coverage that is at least as broad as the coverage provided under the NFIP's Standard Flood Insurance Policy (SFIP) for the same type of property, including when considering deductibles, exclusions and conditions offered by the insurer; to be at least as broad as the coverage provided under an SFIP, the policy must at a minimum:
  - define the term "flood" to include the events defined as "flood" in an SFIP;
  - contain the coverage specified in an SFIP, including that relating to building property coverage; personal property coverage; other coverages; and increased cost of compliance coverage;
  - contain deductibles no higher than the specified maximum, and include similar non-applicability provisions, as under an SFIP, for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the institution;
  - provide coverage for direct physical loss caused by a flood and may only exclude other causes of loss that are excluded in an

<sup>5</sup> This amount was increased from \$250,000 to \$500,000 as of June 1,

2014.

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SFIP. Any exclusions other than those in an SFIP may pertain only to coverage that is in addition to the amount and type of coverage that could be provided by an SFIP or have the effect of providing broader coverage to the policyholder; and

- not contain conditions that narrow the coverage provided in an SFIP;
- provides that the insurer will give written notice 45 days before cancellation or non-renewal of flood insurance coverage to the insured and the regulated lending institution, or servicer acting on its behalf;
- includes information about the availability of flood insurance coverage under the NFIP;
- includes a mortgage interest clause similar to the clause contained in an SFIP; includes a provision requiring an insured to file suit not later than one year after the date of a written denial of all or part of a claim under the policy; and
- contains cancellation provisions that are as restrictive as the provisions in an SFIP.

For purposes of the definition of “private flood insurance,” the SFIP is the policy that is in effect as of the date the private flood insurance policy is provided to the regulated lending institution. The SFIP is available on the FEMA website: <https://www.fema.gov/national-flood-insurance-program/standard-flood-insurance-policy-forms>. The regulation includes a compliance aid provision to help a regulated lending institution determine whether a flood insurance policy meets the definition of “private flood insurance” and must be accepted under the regulation. A regulated lending institution may determine that a policy meets the definition of “private flood insurance” without further review of the policy if the policy or an endorsement to the policy states: “This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation.”

### Discretionary Acceptance

Under the regulation, a regulated lending institution may, at its discretion, accept a flood insurance policy issued by a private insurer, even if the policy does not meet the statutory and regulatory definition of “private flood insurance” as set forth above. A regulated lending institution, may, at its discretion, accept a private flood insurance policy in satisfaction of the flood insurance purchase requirement if the policy:

- provides coverage in the amount as required under the regulation;
- is issued by an insurer that is licensed, admitted or otherwise approved to engage in the business of insurance by the insurance regulator of the State or jurisdiction in which the property to be insured is located; or in the case of a policy of difference in conditions, multiple peril, all risk or other blanket

coverage insuring nonresidential commercial property, is issued by a surplus lines insurer recognized, or not disapproved by the insurance regulator of the State or jurisdiction where the property to be insured is located;

- covers both the mortgagor(s) and the mortgagee(s) as loss payees, except in the case of a policy that is provided by a condominium association, cooperative, homeowners association, or other applicable group and for which the premium is paid by the condominium association, cooperative, homeowners association, or other applicable group as a common expense; and
- provides sufficient protection of the designated loan, consistent with general safety and soundness principles, and the regulated lending institution documents its conclusion regarding sufficiency of the protection of the loan in writing.

Some factors that a regulated lending institution could consider in determining whether a flood insurance policy provides sufficient protection of a loan include:

- whether the flood insurance policy’s deductibles are reasonable based on the borrower’s financial condition;
- whether the insurer provides adequate notice of cancellation to the mortgagor and mortgagee to ensure timely force placement of flood insurance, if necessary;
- whether the terms and conditions of the flood insurance policy with respect to payment per occurrence or per loss and aggregate limits are adequate to protect the regulated lending institution’s interest in the collateral;
- whether the flood insurance policy complies with applicable State insurance laws; and
- whether the private insurance company has the financial solvency, strength, and ability to satisfy claims.

### Plans Provided by Mutual Aid Societies

The regulation defines a “mutual aid society” as an organization: (1) whose members share a common religious, charitable, educational, or fraternal bond; (2) that covers losses caused by damage to members’ property pursuant to an agreement, including damages caused by flooding, in accordance with this common bond; and (3) that has a demonstrated history of fulfilling the terms of agreements to cover losses to members’ property caused by flooding. A regulated lending institution may, at its discretion, accept a plan issued by a mutual aid society in satisfaction of the flood insurance purchase requirement, if the following criteria are met:

- the regulated lending institution’s primary Federal supervisory agency has determined that such plans qualify as flood insurance for purposes of the Federal flood insurance statute;
- the plan provides coverage in the amount required under the regulation;

- the plan covers both the mortgagor(s) and the mortgagee(s) as loss payees; and
- the plan provides sufficient protection of the designated loan, consistent with general safety and soundness principles, and the regulated lending institution documents its conclusion regarding sufficiency of the protection of the loan in writing.

### FDIC Instructions for the Qualification of Plans Provided by Mutual Aid Societies

In general, FDIC examiners will evaluate whether mutual aid society plans qualify as flood insurance on a case-by-case basis. To satisfy the first criterion listed above for the acceptance of plans offered by a mutual aid society, a plan can be deemed to qualify as flood insurance for purposes of the Flood Disaster Protection Act of 1973, if either the:

- (1) *mutual aid society* issuing the plan is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the state or jurisdiction in which the property to be insured is located; or
  - (2) *mutual aid plan* is considered and regulated as insurance by that state or jurisdiction in which the property to be insured is located.
- When a financial institution uses its discretion to accept a mutual aid society plan, FDIC examiners will rely on the requirements of individual states' laws and the financial institution's due diligence when assessing compliance with the final rule's first criterion. Evidence of compliance may include, among other things, for example, a certificate or other documentation indicating that *either* the mutual aid society is licensed, admitted, or otherwise approved to engage in the business of insurance in the state or jurisdiction in which the property to be insured is located, *or* the mutual aid plan is considered and regulated as insurance by that state or jurisdiction.

### Waiting Period

NFIP flood insurance policies that are not issued in conjunction with the making, increasing, extending or renewing of a loan have a 30-day waiting period. The congressional intent behind this requirement was to prevent the purchase of flood insurance (and any direct loss to the U.S. government) in times of imminent loss. However, if the initial purchase of flood insurance is made during the 13-month period following revision or update of a Flood Insurance Rate Map for the community, there is a one-day waiting period.

There is no waiting period when an additional amount of NFIP insurance is required in connection with the making, increasing, extending or renewing of a loan, such as a second mortgage, home equity loan, or refinancing.

### Special Situations—Second Mortgages/Home Equity Loans

Both second mortgages and home equity loans are transactions that may be subject to the mandatory purchase requirements of the FDPA. Because only one NFIP flood insurance policy can be issued on a building, an institution should not request a new NFIP flood insurance policy if one already exists. Instead, the institution should have the borrower contact the insurance agent:

- To inform the agent of the intention to obtain a loan involving a subordinate lien
- To obtain verification of the existence of a flood insurance policy, and
- To check whether the amount of insurance covers all loan amounts.

After obtaining this information, the insurance agent should increase the amount of NFIP coverage if necessary and issue an endorsement that will reflect the institution as a lien holder.

As an alternative, the borrower may also consider obtaining a private flood insurance policy in the proper amount.

For loans with approved lines of credit to be used in the future, it may be difficult to calculate the amount of insurance for the loan since the borrower will be drawing down differing amounts on the line at different times. If there is no policy on the collateral, the borrower must, at a minimum, obtain a policy as a requirement for drawing on the line. As a matter of administrative convenience to ensure compliance with the requirements, an institution may take the following alternative approaches:

- As part of its procedures, an institution should review its records periodically so that as draws are made against the line or repayments made to the account, the appropriate amount of insurance coverage can be maintained; or
- Upon origination, require the purchase of flood insurance for the total amount of the line, the value of the improved property or the maximum amount of flood insurance coverage available, whichever is less.

### Special Situations—Condominium Policies

FEMA's condominium master policy is called a Residential Condominium Building Association Policy (RCBAP). The RCBAP covers both the common and individually owned building elements within the units, improvements within the units, and contents owned in common if contents coverage is purchased. The maximum amount of building flood insurance coverage that can be purchased under an RCBAP is either 100 percent of the replacement cost value of the building, or the total number of units in the condominium building times \$250,000, whichever is less.

An institution must ensure that the minimum amount of flood

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insurance covering the condominium unit is the lesser of:

- the outstanding principal balance of the loan, or
- the maximum amount of insurance available under the NFIP which is the lesser of:
  - the maximum limit available for the residential condominium unit, or
  - the insurable value allocated to the residential condominium unit which is the replacement cost value of the condominium building divided by the number of units.

Therefore, an institution must require a borrower whose loan is secured by a residential condominium unit to either:

- Ensure the condominium owners association has purchased an RCBAP, or other flood insurance policy, covering either 100 percent of the replacement cost value of the building, or the total number of units in the condominium building times \$250,000, whichever is less; or
- Obtain a Dwelling Policy if the condominium owners association has not purchased flood insurance as described above or if that coverage is less than either 100 percent of the replacement cost value of the building or the total number of units in the condominium building times \$250,000, whichever is less. The amount of coverage under a Dwelling Policy required to be purchased by the individual unit owner would be the difference between the condominium policy's coverage allocated to that unit and the mandatory flood insurance purchase requirements discussed above.

For instance, the maximum amount of coverage on a 50-unit condominium building would be \$12,500,000 (\$250,000 x 50). If the replacement cost value of the building was \$10,000,000, the condominium association could purchase a policy of \$10,000,000. This amount of insurance would meet the requirements of the regulations for any individual unit insurance requirement in the condominium.

Non-residential condominium buildings are not eligible for coverage under the RCBAP. The NFIP offers a maximum amount of building coverage up to \$500,000 for these buildings and \$500,000 for commonly owned contents. Under the NFIP, the owner of a non-residential condominium unit within a non-residential condominium building may purchase only contents coverage for that unit. Building coverage may not be purchased in the name of the unit owner. The maximum allowable contents coverage for non-residential owners is \$500,000.

### Other Special Situations

- *Multiple Structures*— Multiple structures that secure a loan located in an SFHA must each be covered by flood insurance, even though the value of one structure may be sufficient to cover the loan amount.

Under the NFIP, FEMA generally requires one policy per building, but also permits borrowers to insure non-residential buildings using one policy with a schedule separately listing each building. This coverage alternative may be especially useful for loans secured by agricultural properties and improvements.

- *Other Real Estate Owned*— An institution with other real estate owned (OREO) in SFHAs should, as a prudent practice, purchase flood insurance policies on its OREO property, although it is not required to do so by the regulations.

### Escrow Requirements

The regulations require the escrowing of flood insurance premiums and fees for designated loans secured by residential improved real estate or a mobile home made, increased, renewed, or extended on or after January 1, 2016. In addition, institutions must offer and make available the option to escrow for flood insurance premiums and fees to borrowers with designated loans secured by residential improved real estate or a mobile home outstanding as of January 1, 2016. The escrow provisions are designed to improve compliance with flood insurance requirements by ensuring that borrowers with designated loans secured by residential improved real estate or a mobile home set aside funds to maintain flood insurance for the life of the loan.

While the escrow requirement pertains generally to any designated loan secured by residential improved real estate or a mobile home, there are two types of exceptions: a small lender exception and a loan-type exception. The regulation provides that an institution is not required to escrow if it has total assets of less than \$1 billion as of December 31 of either of the two prior calendar years and, as of July 6, 2012:

- The institution was not required by Federal or State law to escrow taxes, insurance premiums, fees, or any other charges for the term of the loan; and
- The institution did not have a policy of uniformly and consistently escrowing the same.

If an excepted institution no longer qualifies for the exception because its assets exceeded the threshold for two consecutive calendar year ends, it must begin escrowing for any designated loan secured by residential improved real estate or a mobile home made, increased, extended, or renewed on or after July 1 of the first calendar year of changed status. If a financial institution provides escrow accounts only upon requests from borrowers, this does not constitute a uniform or consistent policy of requiring escrows.

In addition, the escrow requirement does not apply to the following types of loans:

- Extensions of credit primarily for business, commercial, or agricultural purposes even if secured by residential real estate;

- Loans in a subordinate position to a senior lien secured by the same property upon which the borrower has obtained sufficient flood insurance;
- Loans secured by a property that is covered by a flood insurance policy with sufficient flood insurance coverage, which is provided by a condominium, cooperative, or homeowners association;
- Home equity lines of credit;
- Nonperforming loans; or
- Loans with a term of no longer than 12 months.

A nonperforming loan in this instance is a loan that is 90 or more days past due and remains nonperforming until it is permanently modified or until the entire amount past due, including principal, accrued interest, and penalty interest incurred as the result of the past due status, is collected or otherwise discharged in full.

A loan that has a term exceeding 12 months does not qualify for the 12 month exception, even if one phase of the loan is for 12 months or less.

If the institution determines that a loan no longer qualifies for one of these loan-type exceptions, the institution must begin escrowing as soon as reasonably practicable.

**Option to escrow:** An institution (or its servicer) must offer and make available to borrowers the option to escrow flood insurance premiums and fees for designated loans secured by residential improved real estate or a mobile home that are outstanding as of January 1, 2016. In addition, an institution must provide the option to escrow notice to borrowers by June 30, 2016. A model clause for the notice on the option to escrow is provided in Appendix B of the regulations.

An institution that no longer qualifies for the small lender exception must provide a notice of the option to escrow flood insurance premiums and fees for loans outstanding on July 1 of the first calendar year in which it has a change in status by September 30 of that year. Further, the financial institution must begin escrowing as soon as reasonably practicable after receiving a borrower's request to escrow. The notice regarding the option to escrow does not have to be provided in conjunction with any other disclosure or be segregated from other information provided to the borrower. An institution may choose whether to provide a separate notice or add it to any other disclosure the lender provides the borrower, such as a periodic statement.

### Standard Flood Hazard Determination Form

When an institution makes, increases, extends, or renews any loan secured by improved real estate or by a mobile home, it **must** use the standard flood hazard determination form (SFHDF) developed by FEMA<sup>6</sup> to determine whether the

building or mobile home offered as security property is or will be located in an SFHA in which flood insurance is available under the Federal flood insurance statutes.

An institution can use a printed, computerized, or electronic form. It must retain a copy of the completed form, in either hard copy or electronic format, for the period of time it owns the loan. FEMA has stated that if an electronic format is used, the format and exact layout of the SFHDF is not required, but the fields and elements listed on the form are required. Accordingly, any electronic format used by an institution must contain all mandatory fields indicated on the SFHDF.

The SFHDF is available on the FEMA Website at: <http://www.fema.gov/media-library/assets/documents/225>

Decisions as to the applicability of flood insurance may not be based on an institution's unilateral determination of elevations at which floods may occur. Official elevation determinations and, therefore, map revisions or amendments, Letter of Map Revision (LOMR) or Letter of Map Amendment (LOMA), respectively, may be performed only by FEMA.

#### *Letter of Map Amendment (LOMA)*

- A flood map will occasionally show a property as being in an SFHA, even though the building on the property is actually above the base flood elevation. In practice, flood insurance maps do not reflect every rise in terrain, and there may be instances of high ground inadvertently included in the SFHAs. Nevertheless, lenders are bound by the information shown on the FEMA maps until the map is changed by FEMA.
- To resolve such a situation, a property owner can submit elevation materials with a request to FEMA for a LOMA to remove the property from the SFHA. The request must be submitted on the appropriate FEMA application form available at: <https://www.fema.gov/flood-mapping-related-forms>.
- Upon receiving a complete application package, FEMA will normally complete its review and issue its determination within 4-6 weeks.
- After obtaining a LOMA, a borrower must submit it to the lender for the flood insurance requirement to be waived. The lender has the discretion to continue to require flood insurance if the lender determines it is prudent to do so.

#### *Letter of Map Revision (LOMR)*

- A LOMR is appropriate when physical changes are necessary to raise the land above the base flood elevation 100-year flood level. For example, a LOMR request is appropriate when a property, located within a SFHA, is graded and filled to raise the level of the land above the base flood elevation

<sup>6</sup> See 63 FR 27857 (May 21, 1998) (codified at 44 CFR § 65.16).

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100-year flood level. The request for a LOMR must be initiated and approved by the community since changes in land level may affect other property owners. Community approval also confirms that the change in the land has been reviewed and is compatible with the community's planning.

- A LOMR request must be submitted to FEMA on the appropriate form, available at: <https://www.fema.gov/flood-mapping-related-forms>.
- After obtaining a LOMR, the borrower must submit it to the lender before the flood insurance requirement is waived. The lender has the discretion to continue to require flood insurance if the lender determines that it is prudent to do so.

Flood maps, Standard Flood Hazard Determination forms, and Community Status Books may be obtained from FEMA by:

- Calling: **1-800-358-9616** or **1-800-611-6125**, or
- Ordering online: [www.msc.fema.gov](http://www.msc.fema.gov)

To obtain information on a community's participation status, contact a FEMA representative at 1-800-358-9616 to request a community status book. Information on community status is also available on the Internet at [www.fema.gov/national-flood-insurance-program/national-flood-insurance-program-community-status-book](http://www.fema.gov/national-flood-insurance-program/national-flood-insurance-program-community-status-book).

### Reliance on prior determination

An institution may rely on a prior flood determination, whether or not the security property is located in an SFHA, and it is exempt from liability for errors in the previous determination if:

- The previous determination is not more than seven years old, and
- The basis for the previous determination was recorded on the SFHDF.

There are, however some circumstances in which an institution may not rely on a previous determination, such as:

- If FEMA's map revisions or updates show that the security property has been remapped into an SFHA, or
- If the lender contacts FEMA and discovers that map revisions or updates affecting the security property have been made after the date of the previous determination.

An institution may also rely on a previous determination, which is not more than seven years old and is set forth on an SFHDF, when it increases, extends, renews, or purchases a loan. The making of a loan is not listed as a permissible event that permits an institution to rely on a previous determination. However, when the loan involves a refinancing or assumption by the same lender who obtained the original flood determination on the same property, the institution may rely on the previous determination, but only

if the original determination was made not more than seven years before the date of the transaction, the basis for the determination was set forth on the SFHDF, and there were no map revisions affecting the property since the original determination was made. The same is true for multiple loans made by the same lender to the same borrower secured by the same property. A new determination is required when a loan refinancing or assumption is made by a lender different from the one who obtained the original determination because this constitutes a new loan.

### Force Placement Requirements

An institution is not required to monitor for map changes, and flood determinations are not required to be made at any time other than when a loan is made, increased, extended, or renewed. If, however, at any time during the life of the loan the institution or its servicer determines that required flood insurance is deficient, the Agencies' regulations require initiation of force placement procedures.

An institution or a servicer acting on its behalf is required to purchase or "force place" flood insurance for the borrower if the institution or the servicer determines that coverage is inadequate. An institution, or servicer acting on its behalf, upon discovering that the security property is not covered by an adequate amount of flood insurance, must provide notice to the borrower that the borrower should obtain flood insurance. If the borrower fails to purchase flood insurance in the appropriate amount within 45 days, the lender must purchase insurance on the borrower's behalf. If there is a brief delay in force placing coverage, the Agencies expect the lender to be able to provide a reasonable explanation, for example, because the lender uses batch processing when purchasing force-placed flood insurance policies.

An institution or its servicer continues to be responsible for ensuring that if flood insurance was required at origination, the borrower renews the flood insurance policy and continues to renew it for as long as flood insurance is required for the security property. If a borrower allows a policy to lapse when insurance is required, the institution or its servicer is required to commence force placement procedures.

Under the Biggert-Waters Act, an institution may force place and charge for insurance beginning on the date on which flood insurance coverage lapsed or did not provide a sufficient coverage amount. The Biggert-Waters Act also provides that an institution must terminate force-placed insurance within 30 days of receipt of confirmation of a borrower's existing flood insurance coverage. Additionally, an institution must refund to the borrower all premiums and fees for force-placed insurance paid by the borrower during any period of overlap between the borrower's policy and the force-placed policy. Because an insurer is the entity that actually cancels the policy, an institution need only



notify the insurer to terminate the force-placed policy in order to comply with the termination requirement.

Force placement authority is designed to be used if, over the term of the loan, the institution or its servicer determines that flood insurance coverage on the security property is deficient; that is, whenever the amount of coverage in place is not equal to the lesser of the outstanding principal balance of the loan or the maximum coverage available under the NFIP. If a borrower fails to obtain the required amount of flood insurance coverage upon notification by an institution or its servicer, the amount that must be force placed is equal to the difference between the present amount of coverage, if any, and the lesser of the outstanding principal balance or the maximum coverage limit.

There is no required form of notice to borrowers for use in connection with the force placement procedures. An institution or its servicer may choose to send the notice directly or may use the insurance company that issues the force placement policy to send the notice. Force-placed flood insurance policies are available through private insurers or through the NFIP. FEMA has developed the Mortgage Portfolio Protection Program (MPPP) to assist lenders in connection with force placement procedures. For information concerning the MPPP, lenders and others should consult FEMA's Website.<sup>7</sup>

### Determination Fees

The regulations permit an institution or its servicer to charge a reasonable fee to the borrower for the costs of making a flood hazard determination under the following circumstances:

- The borrower initiates a transaction (making, increasing, extending, or renewing a loan) that triggers a flood hazard determination;
- There is a revision or updating of floodplain areas or risk zones by FEMA;
- The determination is due to FEMA's publication of a notice that affects the area in which the loan is located; or
- The determination results in the purchase of flood insurance under the force placement provision.

The loan agreement or other contractual documents between the parties may also permit the imposition of fees.

The authority to charge a borrower a reasonable fee for a flood hazard determination extends to a fee for life-of-loan monitoring by either the institution, its servicer, or by a third party, such as a flood hazard determination company.

### Truth in Lending Act Issues

The Commentary to Regulation Z states that a fee for services that will be performed periodically during the loan term is a finance charge, regardless of whether the fee is imposed at closing, or when the service is performed. This would include the fee for life-of-loan monitoring. The fee for the original flood determination (i.e., whether a security property is in an SFHA) is excluded from the finance charge. The Commentary further indicates that any portion of a fee that does not relate to the initial decision to grant credit must be included in the finance charge.<sup>8</sup> If creditors are uncertain about what portion of a fee is related to the initial decision to grant credit, the entire fee may be treated as a finance charge.

### Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

When an institution makes, increases, extends or renews a loan secured by property that is or will be located in a SFHA, the institution must provide a written notice of special flood hazards to the borrower and the servicer, if there is one. This notice of special flood hazards must be provided regardless of whether the security property is located in a participating or non-participating community. The written notice must contain the following information:

- A warning that the building or mobile home is or will be located in a SFHA.
- A description of the flood purchase requirements contained in section 102(b) of the FDPA, as amended.
- A statement, if applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers.
- A statement that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP.
- A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company.
- A statement that the borrower is encouraged to compare flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies, and that the borrower should inquire about the availability, cost, and comparisons of flood insurance coverage to an insurance agent.
- A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home, caused by flooding in a Federally declared disaster.

<sup>7</sup> [http://www.fema.gov/media-library-data/1444065610669-6de95573a833329e4a889e95569d5d9b/11\\_mppp\\_508\\_nov2015.pdf](http://www.fema.gov/media-library-data/1444065610669-6de95573a833329e4a889e95569d5d9b/11_mppp_508_nov2015.pdf).

<sup>8</sup> See 12 CFR part 1026, supplement 1, comment 4(c)(7)-3.

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For any loan for which an institution is required to escrow under the regulations, the institution must provide a written notice with the notice of special flood hazards informing the borrower that the institution is required to escrow all premiums and fees for flood insurance required under the regulations. The language in the notice about escrow should be substantially similar to the model clauses provided in Appendix A of the regulations, under the section titled “Escrow Requirements for Residential Loans.” The escrow notice may be provided in the notice of special flood hazards or separately.

An institution may use the sample form contained in Appendix A to the regulations to comply with the notice requirements. The sample form is an example of an acceptable form the notice may take and contains additional information not required under the regulations. Lenders may also personalize, change the format of, and add information to the sample form if they wish to do so. However, to ensure compliance with the notice requirements, a lender-revised notice form must provide the borrower, at a minimum, with the information required by the regulations.

The regulations permit an institution to rely on assurances from a seller or lessor that the seller or lessor has provided the requisite notice to the purchaser or lessee. As an example, this alternate form of notice might arise in a situation in which the lender is providing financing through a developer for the purchase of condominium units by multiple borrowers. The lender may not deal directly with the individual condominium unit purchaser and need not provide notice to each purchaser but may instead rely on the developer/seller’s assurances that the developer/seller has given the required notice.

Delivery of the notice of special flood hazards must take place within a “reasonable time” before the completion of the transaction. What constitutes “reasonable” notice will necessarily vary according to the circumstances of particular transactions. An institution should bear in mind, however, that a borrower should receive notice timely enough to ensure that:

- The borrower has the opportunity to become aware of the borrower’s responsibilities under the NFIP; and
- Where applicable, the borrower can purchase flood insurance before completion of the loan transaction.

The Agencies generally regard ten days as a “reasonable” time interval.

### Notice to Servicer

Loan servicers must also be notified of special flood hazards. In many cases, the servicer’s identity will not be known until well after the loan closing; consequently, notification to the servicer in advance of the loan closing would not be possible or would serve no purpose. Notice to the servicer is required as promptly as practicable after the institution provides notice to

the borrower, and must be given no later than at the time the lender transmits to the servicer other loan data concerning hazard insurance and taxes. Delivery to the servicer of a copy of the borrower’s notice suffices as notice to the servicer.

### Notice to the Administrator of FEMA

An institution must notify the Administrator of FEMA, or the Administrator’s designee, of the identity of the loan servicer and of any change in the servicer. FEMA has designated the insurance carrier as its designee to receive notice of the servicer’s identity and of any change thereof, and at FEMA’s request this designation is stated in the regulations. Notice of the identity of the servicer will enable FEMA’s designee to provide notice to the servicer of a loan 45 days before the expiration of a flood insurance contract. Notice is required to be sent within 60 days of the effective date of the transfer of servicing. No standard form of notice is required to be used; however, the information should be sufficient for the Administrator, or the Administrator’s designee, to identify the security property and the loan, as well as the new servicer and its address.

### Notice of Option to Escrow

When an institution must offer and make available to a borrower the option to escrow flood insurance premiums and fees, the institution is required to mail or deliver to the borrower a written notice of the option to escrow for required flood insurance. The language in this notice must be similar to the language in the model clause of Appendix B of the regulations. The notice must also include the method(s) by which the borrower may request the escrow. Institutions must mail or deliver the notice no later than June 30, 2016 for any loan covered by flood insurance and outstanding on January 1, 2016.

Institutions that no longer qualify for the small lender exception must mail or deliver, for any loan covered by flood insurance and outstanding on July 1 of the first calendar year in which the institution had a change in status, the notice by September 30 of that year.

### Record-Keeping Requirements

The record keeping requirements of the regulations include retention of:

- Copies of completed SFHDFs in either hard copy or electronic form, for as long as the institution owns the loan; and
- Records of the receipt of the notice of special flood hazards to the borrower and the servicer for as long as the institution owns the loan.

There is no particular form required for the record of receipt; however, it should contain a statement from the borrower indicating that the borrower has received the notification. Examples of records of receipt may include:

- A borrower's signed acknowledgment on a copy of the notice,
- A borrower-initialed list of documents and disclosures that the lender provided the borrower, or
- A scanned electronic image of a receipt or other document signed by the borrower.

An institution may keep the record of receipt provided by the borrower and the servicer in the form that best suits the institution's business. Institutions that retain these records electronically must be able to retrieve them within a reasonable time.

### Penalties and Liabilities

The FDPA provides penalties for violations of:

- Mandatory flood purchase requirement;
- Escrow requirements;
- Notice requirements; and
- Force placement requirements.

If an institution is found to have a pattern or practice of committing any of these violations, the Agencies are required to assess civil money penalties in an amount not to exceed \$2,000 per violation. Any penalty assessed will be paid into the FEMA National Flood Mitigation Fund. Liability for violations cannot be transferred to a subsequent purchaser of a loan. No penalty may be imposed after the expiration of four years beginning on the date of the occurrence of the violation.

### Examination Objectives

1. To determine whether an institution performs required flood determinations for loans secured by improved real estate or a mobile home affixed to a permanent foundation in accordance with the regulations.
2. To determine if the institution requires flood insurance in the correct amount when it makes, increases, extends, or renews a loan secured by improved real estate or a mobile home located or to be located in a SFHA in a participating community.
3. To determine if the institution provides the required notices to the borrower and servicer when the property is located in a SFHA, and to the Administrator of FEMA whenever flood insurance is required as a condition of the loan.
4. To determine if the institution requires flood insurance premiums to be escrowed when required by law.
5. To determine if the institution complies with the force placement provisions if, at any time during the term of a loan, it determines that flood insurance on the loan is not sufficient to meet the requirements of the regulation.

6. To determine if the institution complies with the private flood insurance requirements of the regulation.
7. To require corrective action when policies or internal controls are deficient, or when violations of law are identified.

### Examination Procedures<sup>9</sup>

The following procedures should be performed, as appropriate:

- By reviewing previous examinations and supervisory correspondence;
- By obtaining and reviewing the institution's policies, procedures, and other pertinent information;
- By reviewing the institution's system of internal controls;
- By reviewing consumer complaints submitted to the institution.<sup>10</sup>
- By discussing procedures with management; and
- By reviewing a sample of loan files.

### Coverage and Internal Control

1. Determine if the institution has effective internal controls in place through appropriate policies, procedures, training, and monitoring to ensure compliance with the requirements of the regulations.
2. Determine the method(s) used by the institution to ascertain whether improved real estate or mobile homes are or will be located in an SFHA.
3. Verify that the process used accurately identifies special flood hazard areas.
4. For those special flood hazard areas identified, determine if the communities in which they are located participate in the NFIP.
5. If the detached structure is not covered by flood insurance, review the institution's documented conclusion and verify that the structure meets the exemption.
6. If the institution provides "table funding" to close loans originated by mortgage brokers or dealers, verify that it complies with regulatory requirements.
7. If the institution purchases servicing rights, review the contractual obligations placed on the institution as servicer by the owner of the loans to ascertain if flood insurance requirements are identified and compliance responsibilities are adequately addressed.
8. If the institution utilizes a third party to service loans, review the contractual obligations between the parties to ascertain that flood insurance requirements are identified and compliance responsibilities are adequately addressed.

<sup>9</sup> These reflect the interagency examination procedures in their entirety.

<sup>10</sup> Consumer complaints can be a source of information about private flood

policies that the institution did not accept.

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### Property Determination Requirements

1. Verify that flood zone determinations are accurately recorded on the SFHDF. (Note: An institution is required to prepare a flood hazard determination for all detached structures, including those that may not be in a SFHA or require flood insurance coverage. Because a flood hazard determination is often needed to identify the number and types of structures on the property, conducting a flood hazard determination remains necessary to ensure compliance with the flood insurance requirements.)
2. Verify that the institution relies on a previous determination only if it is not more than seven years old; the determination was recorded on the SFHDF; and the determination is not on a property located in a community that has been remapped.
3. If the institution utilizes a third party to prepare flood zone determinations, review the contractual obligations between the parties to ascertain that flood insurance requirements are identified and compliance responsibilities are adequately covered, including the extent of the third party's guarantee of work and the procedures in place to resolve disputes relating to determinations.
4. Verify that the institution retains a copy of the completed SFHDF, in either hard copy or electronic form, for as long as it owns the loan.

### Purchase Requirements

1. For loans that require flood insurance, determine that sufficient insurance was obtained prior to loan closing and is maintained for the life of the loan.
  - a. If the institution accepted a private flood insurance policy in accordance with the mandatory acceptance requirements, verify that the policy either: (a) contains the compliance aid assurance clause exactly as follows: "This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation" or (b) that the policy meets the definition of "private flood insurance" as set forth in the regulation.
  - b. If the institution accepted a flood insurance policy issued by a private insurer in accordance with the discretionary acceptance requirements, verify the following:
    - the policy provides a sufficient amount of insurance;
    - the policy is issued by an insurer permitted under the regulation;
    - the policy covers both the mortgagor(s) and the mortgagee(s) as loss payees; and
    - the institution determined that the policy provides sufficient protection

of the designated loan, consistent with general safety and soundness principles, and that the institution documented its conclusion regarding sufficiency of the protection of the loan in writing.

- c. If the institution accepted a plan issued by a mutual aid society in accordance with the requirements for acceptance of such a plan, verify the following:
  - the institution's regulator has determined that such plans qualify as flood insurance;
    - for FDIC-regulated institutions, assess whether the regulated lending institution has completed the due diligence necessary to determine that the mutual aid plan is considered insurance under applicable state law. (See page 5 for more information)
  - the plan provides coverage in the amount required;
  - the plan covers both the mortgagor(s) and the mortgagee(s) as loss payees; and
  - the institution documented in writing its conclusion that the plan provides sufficient protection of the designated loan, consistent with general safety and soundness principles.
2. In connection with a residential property, if flood insurance was not required for a detached structure, determine whether the institution followed its internal policies and procedures and verify that the institution documented its decision in writing not to require insurance for such structure at the time of loan origination.
3. If the institution makes loans insured or guaranteed by a government agency (SBA, VA, or FHA) determine how it complies with the prohibition against making these loans if the security property is in an SFHA within a non-participating community.

### Determination Fee Requirements

1. Determine that any fees charged to the borrower by the institution for flood zone determinations (absent some other authority such as contract language) are charged only when a loan:
  - Is made, increased, renewed, or extended;
  - Is made in response to a remapping by FEMA;
  - or
  - Results in the purchase of flood insurance under the force placement provisions.

2. If other authority permits the institution to charge fees for determinations in situations other than the ones listed above, determine if the institution is consistent in this practice.
3. Determine the reasonableness of any fees charged to a borrower for flood determinations by evaluating the method used by the institution to determine the amount of the charge. Consider, for example, the relationship of the fees charged to the cost of services provided.

### Notice Requirements

#### *Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance*

1. Ascertain that when an institution makes, increases, extends or renews a loan secured by property located in an SFHA, written notice is mailed or delivered to the borrower within a reasonable time prior to completion of the transaction.
2. Verify that the notice contains:
  - A warning that the property securing the loan is or will be located in an SFHA;
  - A description of the flood insurance purchase requirements;
  - A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers, if applicable;
  - A statement that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP;
  - A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company;
  - A statement that the borrower is encouraged to compare flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies, and that the borrower should inquire about the availability, cost, and comparisons of flood insurance coverage to an insurance agent;
  - A statement whether Federal disaster relief assistance may be available in the event of damage to the property caused by flooding in a federally declared disaster, if applicable.
3. If an institution is required to escrow under the regulations, verify that the institution provided a written notice with the notice of special flood hazards informing the borrower that the institution is required to escrow all premiums and fees for flood insurance, similar to the model clause in Appendix A of the regulations.
4. If the seller or lessor provided the notice to the purchaser or lessee, verify that the institution obtained satisfactory written assurance that the notice was provided within a

reasonable time before the completion of the sale or lease transaction.

5. Verify that the institution retains a record of receipt of the notice provided to the borrower for as long as it owns the loan.
6. If applicable, verify that the institution provided written notice to the servicer of the loan within the prescribed time frames and that the institution retains a record of receipt of the notice for as long as it owns the loan.

#### *Notice of the Option to Escrow*

1. If the institution is required to send a notice of option to escrow flood insurance premiums and fees, ascertain that written notice is mailed or delivered to the borrower: 1) by June 30, 2016 for any loan covered by flood insurance and outstanding on January 1, 2016; or, if applicable, 2) by September 30 of the first calendar year in which the institution has had a change in status and no longer qualifies for the small lender exception for any loan covered by flood insurance and outstanding as of July 1 of that calendar year.
2. Verify that the notice contains:
  - A statement that the borrower has an option to escrow required flood insurance premiums and fees.
  - A statement about the methods the borrower may use to request the escrow.

#### *Notice of Servicer's Identity*

If the institution transfers servicing of loans to another servicer, ascertain whether it provides notice of the new servicer's identity to the flood insurance carrier (the Administrator of FEMA's designee) within prescribed time frames.

### Escrow Requirements

1. Verify that the institution escrows for flood insurance premiums and fees for designated loans made, increased, renewed, or extended on or after January 1, 2016 unless the loan qualifies for one of the exceptions or the institution qualifies for the small lender exception.
2. If a designated loan no longer qualifies for a loan-related exception, verify that the institution established an escrow account as soon as reasonably practicable.
3. If the institution no longer qualifies for the small lender exception, verify that the institution started requiring escrow on designated loans made, increased, extended or renewed on or after July 1 of the first calendar year of changed status.
4. Verify that an institution (or its servicer) offered and made available to borrowers the option to escrow flood insurance premiums and fees for loans secured by residential improved real estate or a mobile home that are outstanding as of January 1, 2016. In addition, verify that an institution started escrowing

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as soon as reasonably practicable after receiving the borrower's request to escrow.

5. Verify that, for institutions that no longer qualify for the small lender exception, the institution mailed or delivered, for any loan covered by flood insurance and outstanding on July 1 of the first calendar year in which the institution no longer qualifies for the small lender exception, the notice of the option to escrow by September 30 of that year. In addition, verify that the institution started escrowing as soon as reasonably practicable after receiving a borrower's request to escrow.
6. Verify that the institution's escrow procedures comply with section 10 of RESPA.

### Force Placement Requirements

1. If the institution determines that flood insurance coverage is less than the amount required by the FDPA, ascertain that it has appropriate policies and procedures in place to exercise its force placement authority.
2. If the institution is required to force place insurance, verify:
  - That it provides written notice to the borrower that flood insurance is required, and
  - That if the required insurance is not purchased by the borrower within 45 days from the time that the institution provides the written notice, that the institution purchases the required insurance on the borrower's behalf.
3. If the institution purchases required flood insurance on the borrower's behalf and charges the borrower for premiums and fees incurred for coverage, verify that within 30 days of receiving confirmation of a borrower's existing flood insurance coverage, the institution:
  - Notifies the insurance provider to terminate the existing force-placed insurance, and
  - Refunds to the borrower all force-placed insurance premiums and any fees paid for by the borrower during any period of overlap between the borrower's policy and the force-placed policy.

### FDPA Examination Checklist

The following questions are designed to be used in conjunction with the Examination Procedures to guide the examiner in a comprehensive review of the requirements of the regulation as it is applied to depository institutions:

#### Coverage

1. Does the institution offer or extend credit (consumer or commercial) that is secured by improved real estate or mobile homes as defined in the regulations? If yes, complete the remainder of this checklist.

2. If the institution provides "table funding" to close loans originated by mortgage brokers or dealers, does it have procedures to ensure that the requirements of the regulations are followed?
3. If the institution purchases servicing rights to loans covered by the regulation, do the documents between the parties specify the contractual obligations on the institution with respect to flood insurance compliance?
4. If the institution utilizes third parties to service loans covered by the regulation, do the contractual documents between the parties require the servicer to meet the requirements of the regulations?

### Property Determination

1. If the institution utilizes a third-party to prepare flood zone determinations, do the contractual documents between the parties:
  - Provide for the third-party's guarantee of work?
  - Contain provisions to resolve disputes relating to determinations, to allocate responsibility for compliance, and to address which party will be responsible for penalties incurred for noncompliance?
2. Are the determinations prepared on the SFHDF developed and authorized by FEMA?
  - If the form is maintained in an electronic format does it contain the elements required by FEMA?
3. Does the institution maintain a record of the SFHDF either in hard copy or electronic form for as long as it owns the loan?
4. When increasing, extending, renewing, or purchasing a loan (not making a loan), does the institution rely on a prior determination only if it is made on the SFHDF, is no more than seven years old, and the community has not been remapped?

### Determination Fees

1. Absent some other authority (such as contract language) does the institution charge a fee to the borrower for a flood determination only when:
  - It is made when a loan is made, increased, renewed or extended, or
  - It is made in response to a remapping by FEMA, or
  - It results in the purchase of flood insurance under the force placement provisions?
2. If the institution has other authority to charge fees for determinations in situations other than those noted above, is the practice followed consistently?
3. For those loans subject to TILA, if the institution requires the borrower to obtain life-of-loan monitoring and passes that charge along to the borrower, does it either:
  - Break out the original determination charge from the charge for life-of-loan monitoring or

- Include the full amount of the charge as a finance charge?
4. Are the fees charged by the institution for making a flood determination reasonable?

### Notice Requirements

#### *Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance*

1. Are borrowers whose security property is located in an SFHA provided written notice of special flood hazards within a reasonable time prior to loan closing?
2. Does the notice contain the following required information?
  - A warning that the building or mobile home is located in a SFHA;
  - A description of the flood insurance requirements;
  - A statement that flood insurance is available under the NFIP and is also available from private insurers;
  - A statement that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP;
  - A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company;
  - A statement that the borrower is encouraged to compare flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies, and that the borrower should inquire about the availability, cost, and comparisons of flood insurance coverage to an insurance agent;
  - A statement whether Federal disaster relief assistance may be available in the event of damage to the property caused by flooding in a federally declared disaster, if applicable.
3. If an institution is required to escrow under the regulations, verify that the institution provided a written notice with the notice of special flood hazards informing the borrower that the institution is required to escrow all premiums and fees for flood insurance, similar to the model clause in Appendix A of the regulations.
4. If the institution uses the alternate notice procedures in certain instances as permitted by the regulation, does it obtain the required satisfactory written assurance from the seller or lessor?

5. Does the institution provide a copy of the notice of special flood hazards to the servicer of the loan within the required time frames?
6. Does the institution retain a record of receipt of the notifications provided to the borrower and the servicer for as long as it owns the loan?

#### *Notice of Option to Escrow*

1. If the institution is required to mail or deliver a notice of the option to escrow flood insurance premiums and fees, ascertain that written notice is mailed or delivered to the borrower: 1) by June 30, 2016 for any loan covered by flood insurance and outstanding as of January 1, 2016; or 2) if applicable, by September 30 of the first calendar year in which the institution has had a change in status and no longer qualifies for the small lender exception in the regulation for any loan covered by flood insurance and outstanding on July 1 of that calendar year.
2. Verify that the notice contains:
  - A statement that the borrower has an option to escrow required flood insurance premiums and fees.
  - A statement about the methods the borrower may use to request the escrow.

### Insurance Requirements

1. If an improved property or mobile home is located in an SFHA and flood insurance is required, does the institution have the borrower obtain a policy, with the institution as loss payee, in the correct amount prior to closing?
2. When multiple properties securing the loan are located in SFHAs, does the institution have sufficient insurance, either through a single policy with a scheduled list of several buildings or multiple policies, to meet the minimum requirements of the regulation? (See narrative for description of minimum requirements.)
3. If the institution accepts a private flood insurance policy in accordance with the mandatory acceptance requirements set forth in the regulation, does the institution verify that either: (a) the policy or an endorsement to the policy contains the compliance aid assurance clause exactly as follows: "This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation"; or (b) the policy meets the definition of "private flood insurance" as set forth in the regulation?
4. If the institution exercises its discretion to accept flood insurance issued by a private insurer that does not meet the statutory definition of private flood insurance, does the institution comply with the regulation's discretionary acceptance requirements?

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5. If the institution accepts mutual aid plans, are the plans accepted in accordance with the regulation's requirements?

### Escrow Requirements

1. Does the institution require the escrow of premiums and fees for flood insurance on designated loans secured by residential improved real estate or a mobile home made, increased, extended, or renewed after January 1, 2016 unless the loan qualifies for one of the exceptions or the institution qualifies for the small lender exception?
2. If a designated loan secured by residential improved real estate or a mobile home no longer qualifies for the loan-related exception, does the lender establish an escrow as soon as reasonably practicable?
3. If the institution no longer qualifies for the small lender exception, did the lender begin requiring escrow on designated loans secured by residential improved real estate or a mobile home made, increased, extended, or renewed on or after July 1 of the first calendar year of changed status?
4. Did the institution (or its servicer) offer and make available to borrowers the option to escrow flood insurance premiums and fees for designated loans secured by residential improved real estate or a mobile home that are outstanding as of January 1, 2016? In addition, did the institution start escrowing as soon as reasonably practicable after receiving a borrower's request to escrow?
5. If the institution no longer qualifies for the small lender exception, did the institution mail or deliver, for any loan covered by flood insurance and outstanding on July 1 of the first calendar year in which the institution no longer qualifies for the small lender exception, the notice of the option to escrow by September 30 of that year? In addition, did the institution start escrowing as soon as reasonably practicable after receiving a borrower's request to escrow?
6. Does the institution comply with the provisions of section 10 of RESPA (12 CFR §1024.17 of Regulation X) for escrows?

### Force Placement Requirements

1. If at any time during the life of the loan, the institution determines that property securing a designated loan lacks adequate flood insurance coverage:
  - Does the institution provide written notice to the borrower stating that the necessary coverage must be obtained or the institution will purchase it on the borrower's behalf?
  - Does the institution purchase the coverage on the borrower's behalf if the borrower does not obtain the required policy 45 days after the notice to the borrower has been sent?
2. If the institution purchases required flood insurance on the borrower's behalf and charges the borrower for premiums and fees incurred for coverage, verify that within 30 days of receiving confirmation of a borrower's existing flood insurance coverage, the institution:
  - Notifies the insurance provider to terminate the existing force-placed insurance, and
  - Refunds to the borrower all force-placed insurance premiums and any fees paid for by the borrower during any period of overlap between the borrower's policy and the force-placed policy.

### Notice to Administrator of FEMA

1. Does the institution provide the appropriate notice to the carrier of the insurance policy (the Administrator of FEMA's designee) regarding the identity of the servicer of a designated loan?
2. If the institution sells or transfers the servicing of designated loans to another party, does it have procedures in place to provide the appropriate notice to the Administrator's designee within 60 days of the effective date of the transfer of the servicing?



**References**

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*Flood Disaster Protection Act of 1973, as amended*

*12 CFR Part 339: Loans in Areas Having Special Flood Hazards*

*Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies*

*Advisory Opinion 96-10: Loans Made by Insured Depository Institutions for Properties Located in Communities Not Participating In the National Flood Insurance Program*

*2009 Interagency Flood Insurance Questions and Answers*

*2011 Interagency Flood Insurance Questions and Answers*

*FIL-42-2009 Flood Insurance: Revised Interagency Questions and Answers Regarding Flood Insurance*

*FIL-14-2013 Interagency Statement on the Impact of Biggert-Waters Act*

*FIL 28-2014: Interagency Statement on Increased Maximum Flood Insurance Coverage for "Other Residential Buildings"*

### Loans in Areas Having Special Flood Hazards; Interagency Questions and Answers Regarding Flood Insurance

#### Background

The National Flood Insurance Reform Act of 1994 (the Reform Act) (Title V of the Riegle Community Development and Regulatory Improvement Act of 1994) comprehensively revised the two federal flood insurance statutes, the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973. The Reform Act required the OCC, Board, FDIC, and NCUA to revise their flood insurance regulations and required the FCA to promulgate a flood insurance regulation for the first time. The OCC, Board, FDIC, NCUA, and FCA (collectively, “the Agencies”) fulfilled these requirements by issuing a joint final rule in the summer of 1996. See 61 FR 45684 (August 29, 1996).

In connection with the 1996 joint rulemaking process, the Agencies received a number of requests to clarify specific issues covering a wide spectrum of the proposed rule’s provisions. The Agencies addressed many of these requests in the preamble to the joint final rule. The Agencies concluded, however, that given the number, level of detail, and diversity of the requests, guidance addressing the technical compliance issues would be helpful and appropriate. Consequently, the Agencies decided to issue guidance to address these technical issues subsequent to the promulgation of the final rule (61 FR at 45685-86). The Federal Financial Institutions Examination Council (FFIEC) fulfilled that objective through the initial release of the Interagency Questions and Answers in 1997 (1997 Interagency Questions and Answers). 62 FR 39523 (July 23, 1997).

After notice and comment, on July 21, 2009, the Agencies updated the interagency guidance (2009 Interagency Questions and Answers). See 74 FR 35914 (July 21, 2009). In this publication, the Agencies also proposed five new questions and answers for comment. See 74 FR 35931. The proposed questions and answers addressed issues related to insurable value and force placement of flood insurance.

Two questions and answers were adopted as final on October 1, 2011, to supplement the 2009 Interagency Questions and Answers and other guidance or interpretations issued by the Agencies and FEMA.

Since the publication of the latest Interagency Questions and Answers Regarding Flood insurance in 2011, FEMA has

rescinded the Mandatory Purchase of Flood Insurance Guidelines (FEMA Guidelines). Several flood insurance requirements were also amended by the Biggert-Waters Act and the HFIAA.

#### Interagency Questions and Answers Regarding Flood Insurance

The Interagency Questions and Answers are organized by topic. Each topic addresses a major area of the Act and Regulation. For ease of reference, the following terms are used throughout this document: “Act” refers to the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as revised by the National Flood Insurance Reform Act of 1994 (codified at 42 U.S.C. 4001 et seq.). “Regulation” refers to each agency’s current final rule.<sup>1</sup> The agencies are providing answers to questions pertaining to the following topics:

6. Determining when certain loans are designated loans for which flood insurance is required under the Act and Regulation.
7. Determining the appropriate amount of flood insurance required under the Act and Regulation.
8. Exemptions from the mandatory flood insurance requirements.
9. Flood insurance requirements for construction loans.
10. Flood insurance requirements for nonresidential buildings.
11. Flood insurance requirements for residential condominiums.
12. Flood insurance requirements for home equity loans, lines of credit, subordinate liens, and other security interests in collateral located in an SFHA.
13. Flood insurance requirements in the event of the sale or transfer of a designated loan and/or its servicing rights.
14. Escrow requirements.
15. Force placement of flood insurance.
16. Private insurance policies.
17. Required use of Standard Flood Hazard Determination Form (SFHDF).
18. Flood determination fees.
19. Flood zone discrepancies.
20. Notice of special flood hazards and availability of Federal disaster relief.
21. Mandatory civil money penalties.

***Determining when certain loans are designated loans for which flood insurance is required under the Act and Regulation***

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<sup>1</sup> See note 1 above.

1. *Does the Regulation apply to a loan where the building or mobile home securing such loan is located in a community that does not participate in the National Flood Insurance Program (NFIP)?*

Answer: Yes. The Regulation does apply; however, a lender need not require borrowers to obtain flood insurance for a building or mobile home located in a community that does not participate in the NFIP, even if the building or mobile home securing the loan is located in a Special Flood Hazard Area (SFHA). Nonetheless, a lender, using the standard Special Flood Hazard Determination Form (SFHDF), must still determine whether the building or mobile home is located in an SFHA. If the building or mobile home is determined to be located in an SFHA, a lender is required to notify the borrower. In this case, a lender, generally, may make a conventional loan without requiring flood insurance, if it chooses to do so. However, a lender may not make a government-guaranteed or insured loan, such as a Small Business Administration, Veterans Administration, or Federal Housing Administration loan secured by a building or mobile home located in an SFHA in a community that does not participate in the NFIP. See 42 U.S.C. 4106(a). Also, a lender is responsible for exercising sound risk management practices to ensure that it does not make a loan secured by a building or mobile home located in an SFHA where no flood insurance is available, if doing so would be an unacceptable risk.

2. *What is a lender's responsibility if a particular building or mobile home that secures a loan, due to a map change, is no longer located within an SFHA?*

Answer: The lender is no longer obligated to require mandatory flood insurance; however, the borrower can elect to convert the existing NFIP policy to a Preferred Risk Policy. For risk management purposes, the lender may, by contract, continue to require flood insurance coverage.

3. *Does a lender's purchase of a loan, secured by a building or mobile home located in an SFHA in which flood insurance is available under the Act, from another lender trigger any requirements under the Regulation?*

Answer: No. A lender's purchase of a loan, secured by a building or mobile home located in an SFHA in which flood insurance is available under the Act, alone, is not an event that triggers the Regulation's requirements, such as making a new flood determination or requiring a borrower to purchase flood insurance. Requirements under the Regulation, generally, are triggered when a lender makes, increases, extends, or renews a designated loan. A lender's purchase of a loan does not fall within any of those categories.

However, if a lender becomes aware at any point during the life of a designated loan that flood insurance is required, the lender must comply with the Regulation, including force placing insurance, if necessary.

Depending upon the circumstances, safety and soundness considerations may sometimes necessitate such due diligence upon purchase of a loan as to put the lender on notice of lack of adequate flood insurance. If the purchasing lender subsequently extends, increases, or renews a designated loan, it must also comply with the Regulation.

4. *How do the Agencies enforce the mandatory purchase requirements under the Act and Regulation when a lender participates in a loan syndication or participation?*

Answer: As with purchased loans, the acquisition by a lender of an interest in a loan either by participation or syndication after that loan has been made does not trigger the requirements of Act or Regulation, such as making a new flood determination or requiring a borrower to purchase flood insurance. Nonetheless, as with purchased loans, depending upon the circumstances, safety and soundness considerations may sometimes necessitate that the lender undertake due diligence to protect itself against the risk of flood or other types of loss.

Lenders who pool or contribute funds that will be simultaneously advanced to a borrower or borrowers as a loan secured by improved real estate would all be subject to the requirements of Act or Regulation. Federal flood insurance requirements would also apply to those situations where such a group of lenders decides to extend, renew, or increase a loan. Although the agreement among the lenders may assign compliance duties to a lead lender or agent, and include clauses in which the lead lender or agent indemnifies participating lenders against flood losses, each participating lender remains individually responsible for ensuring compliance with the Act and Regulation. Therefore, the Agencies will examine whether the regulated institution/participating lender has performed upfront due diligence to ensure both that the lead lender or agent has undertaken the necessary activities to ensure that the borrower obtains appropriate flood insurance and that the lead lender or agent has adequate controls to monitor the loan(s) on an ongoing basis for compliance with the flood insurance requirements. Further, the Agencies expect the participating lender to have adequate controls to monitor the activities of the lead lender or agent to ensure compliance with flood insurance requirements over the term of the loan.

5. *Does the Regulation apply to loans that are being restructured or modified?*

Answer: It depends. If the loan otherwise meets the definition of a designated loan and if the lender increases the amount of the loan, or extends or renews the terms of the original loan, then the Regulation applies.

6. *Are table funded loans treated as new loan originations?*

Answer: Yes. Table funding, as defined under Real Estate Settlement Procedure Act (RESPA) rule, 12 CFR 1024.2, is a settlement at which a loan is funded by a contemporaneous advance of loan funds and the

## V. Lending — Flood Insurance Questions & Answers

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assignment of the loan to the person advancing the funds. A loan made through a table funding process is treated as though the party advancing the funds has originated the loan. The funding party is required to comply with the Regulation. The table funding lender can meet the administrative requirements of the Regulation by requiring the party processing and underwriting the application to perform those functions on its behalf.

7. *Is a lender required to perform a review of its, or of its servicer's, existing loan portfolio for compliance with the flood insurance requirements under the Act and Regulation?*

Answer: No. Apart from the requirements mandated when a loan is made, increased, extended, or renewed, a regulated lender need only review and take action on any part of its existing portfolio for safety and soundness purposes, or if it knows or has reason to know of the need for NFIP coverage. Regardless of the lack of such requirement in the Act and Regulation, however, sound risk management practices may lead a lender to conduct scheduled periodic reviews that track the need for flood insurance on a loan portfolio.

### Determining the appropriate amount of flood insurance required under the Act and Regulation

8. *The Regulation states that the amount of flood insurance required "must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act." What is meant by the "maximum limit of coverage available for the particular type of property under the Act"?*

Answer: "The maximum limit of coverage available for the particular type of property under the Act" depends on the value of the secured collateral. First, under the NFIP, there are maximum caps on the amount of insurance available. For single-family and two-to-four family dwellings and other residential buildings located in a participating community under the regular program, the maximum cap is \$250,000. For nonresidential structures located in a participating community under the regular program, the maximum cap is \$500,000. (In participating communities that are under the emergency program phase, the caps are \$35,000 for single-family and two-to-four family dwellings and other residential structures, and \$100,000 for nonresidential structures).

In addition to the maximum caps under the NFIP, the Regulation also provides that "flood insurance coverage

under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located," which is commonly referred to as the "insurable value" of a structure. The NFIP does not insure land; therefore, land values should not be included in the calculation.

An NFIP policy will not cover an amount exceeding the "insurable value" of the structure. In determining coverage amounts for flood insurance, lenders often follow the same practice used to establish other hazard insurance coverage amounts. However, unlike the insurable valuation used to underwrite most other hazard insurance policies, the insurable value of improved real estate for flood insurance purposes also includes the repair or replacement cost of the foundation and supporting structures. It is very important to calculate the correct insurable value of the property; otherwise, the lender might inadvertently require the borrower to purchase too much or too little flood insurance coverage. For example, if the lender fails to exclude the value of the land when determining the insurable value of the improved real estate, the borrower will be asked to purchase coverage that exceeds the amount the NFIP will pay in the event of a loss. (Please note, however, when taking a security interest in improved real estate where the value of the land, excluding the value of the improvements, is sufficient collateral for the debt, the lender must nonetheless require flood insurance to cover the value of the structure if it is located in a participating community's SFHA).

9. *What is insurable value?*

Answer: The insurable value of a building is the same as the overall value of a property minus the land on which the property is located. FEMA's Mandatory Purchase of Flood Insurance Guidelines state that the insurable value of a building is the same as 100 percent replacement cost value (RCV) of the insured building, which is defined as "[t]he cost to replace property with the same kind of material and construction without deduction for depreciation."<sup>2</sup> FEMA's guidelines, however, also provide that lenders should avoid creating a situation in which the insured pays for more coverage than the NFIP would pay in the event of a loss.<sup>3</sup> Strictly linking insurable value to RCV is not practical in all cases. In cases involving certain residential or condominium properties, insurance policies should be written to, and the insurance loss payout usually would be the equivalent of, RCV.<sup>4</sup> However, in cases involving nonresidential properties, and even some residential

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<sup>2</sup> FEMA, Mandatory Purchase of Flood Insurance Guidelines, at GLS 10.

<sup>3</sup> FEMA, Mandatory Purchase of Flood Insurance Guidelines, at 27.

<sup>4</sup> A single-family dwelling, including a single-family unit in a building under a condominium form of ownership, used as the insured's primary residence is covered under the NFIP's Dwelling Policy and, upon loss, payment is settled at RCV if the dwelling is insured for at least the lesser of 80 percent of the dwelling's full RCV or the maximum limit of coverage under the NFIP. Losses

on other residential properties are settled at actual cash value. See FEMA, Flood Insurance Manual, at POL 3-20. Residential condominium buildings are covered under the NFIP's Residential Condominium Building Association Policy (RCBAP). Losses on residential condominium buildings are settled at RCV, unless subject to a co-insurance penalty, which applies when the building coverage is less than the lesser of 80 percent of full RCV or the

properties, where the insurance loss payout would normally be based on actual cash value, which is RCV less physical depreciation,<sup>5</sup> insurance policies written at RCV may require an insured to pay for coverage that exceeds the amount the NFIP would pay in the event of a loss. Therefore, it is reasonable for lenders, in determining the amount of flood insurance required, to consider the extent of recovery allowed under the NFIP policy for the type of property being insured. This allows the lender to assist the borrower in avoiding situations in which the insured pays for coverage that exceeds the amount the NFIP will pay in the event of a loss. Lenders need to be equally mindful of avoiding situations in which, as a result of insuring at a level below RCV, they underinsure property.

In calculating the amount of insurance to require, the lender and borrower (either by themselves or in consultation with the flood insurance provider or other appropriate professional) may choose from a variety of approaches or methods to establish the insurable value. They may use an appraisal based on a cost-value (not market-value) approach, a construction-cost calculation, the insurable value used in a hazard insurance policy (recognizing that the insurable value for flood insurance purposes may differ from the coverage provided by the hazard insurance and that adjustments may be necessary; for example, most hazard policies do not cover foundations), or any other reasonable approach, so long as it can be supported.

10. *Are there any alternatives to the definition of insurable value?*

Answer: [Reserved]

11. *What are examples of residential buildings?*

Answer: Residential buildings include one-to-four family dwellings; apartment or other residential buildings containing more than four dwelling units; condominiums and cooperatives in which at least 75 percent of the square footage is residential; hotels or motels where the normal occupancy of a guest is six months or more; and rooming houses that have more than four roomers. A residential building may have incidental nonresidential use, such as an office or studio, as long as the total area of such incidental occupancy is limited to less than 25 percent of the square footage of the building, or 50 percent for single-family dwellings.

12. *What are examples of nonresidential buildings?*

Answer: Nonresidential buildings include those used for small businesses, churches, schools, farm activities (including grain bins and silos), pool houses, clubhouses, recreation, mercantile structures, agricultural and industrial structures, warehouses, hotels and motels with normal room rentals for less than six months' duration,

nursing homes, and mixed-use buildings with less than 75 percent residential square footage.

13. *How much insurance is required on a building located in an SFHA in a participating community?*

Answer: The amount of insurance required by the Act and Regulation is the lesser of:

- The outstanding principal balance of the loan(s) or
- The maximum amount of insurance available under the NFIP, which is the lesser of:
  - The maximum limit available for the type of structure or
  - The “insurable value” of the structure.

Example: (calculating insurance required on a nonresidential building):

Loan security includes one equipment shed located in an SFHA in a participating community under the regular program.

- Outstanding loan principal is \$300,000
- Maximum amount of insurance available under the NFIP:
  - Maximum limit available for type of structure is \$500,000 per building (nonresidential building)
  - Insurable value of the equipment shed is \$30,000

The minimum amount of insurance required by the Regulation for the equipment shed is \$30,000.

14. *Is flood insurance required for each building when the real estate security contains more than one building located in an SFHA in a participating community? If so, how much coverage is required?*

Answer: Yes. The lender must determine the amount of insurance required on each building and add these individual amounts together. The total amount of required flood insurance is the lesser of:

- The outstanding principal balance of the loan(s) or
- The maximum amount of insurance available under the NFIP, which is the lesser of:
  - The maximum limit available for the type of structures or
  - The “insurable value” of the structures.

The amount of total required flood insurance can be allocated among the secured buildings in varying amounts, but all buildings in an SFHA must have some coverage.

Example: Lender makes a loan in the principal amount of \$150,000 secured by five nonresidential buildings, only three of which are located in SFHAs within participating communities.

- Outstanding loan principal is \$150,000

maximum limit of coverage under the NFIP. See id. at POL 43–60.

<sup>5</sup> FEMA, Mandatory Purchase of Flood Insurance Guidelines, at GLS 1.

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- Maximum amount of insurance available under the NFIP
  - Maximum limit available for the type of structure is \$500,000 per building (nonresidential buildings); or
  - Insurable value (for each nonresidential building for which insurance is required, which is \$100,000, or \$300,000 total)

Amount of insurance required for the three buildings is \$150,000. This amount of required flood insurance could be allocated among the three buildings in varying amounts, so long as each is covered by flood insurance.

15. *If the insurable value of a building or mobile home, located in an SFHA in which flood insurance is available under the Act, securing a designated loan is less than the outstanding principal balance of the loan, must a lender require the borrower to obtain flood insurance up to the balance of the loan?*

Answer: No. The Regulation provides that the amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for a particular type of property under the Act. The Regulation also provides that flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the building or mobile home is located. Since the NFIP policy does not cover land value, lenders should determine the amount of insurance necessary based on the insurable value of the improvements.

16. *Can a lender require more flood insurance than the minimum required by the Regulation?*

Answer: Yes. Lenders are permitted to require more flood insurance coverage than required by the Regulation. The borrower or lender may have to seek such coverage outside the NFIP. Each lender has the responsibility to tailor its own flood insurance policies and procedures to suit its business needs and protect its ongoing interest in the collateral. However, lenders should avoid creating situations where a building is “over-insured.”

17. *Can a lender allow the borrower to use the maximum deductible to reduce the cost of flood insurance?*

Answer: Yes. However, it is not a sound business practice for a lender to allow the borrower to use the maximum deductible amount in every situation. A lender should determine the reasonableness of the deductible on a case-by-case basis, taking into account the risk that such a deductible would pose to the borrower and lender. A lender may not allow the borrower to use a deductible amount equal to the insurable value of the property to avoid the mandatory purchase requirement for flood insurance.

### Exemptions from the mandatory flood insurance requirements

18. *What are the exemptions from coverage?*

Answer: There are only two exemptions from the purchase requirements. The first applies to state-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA. The second applies if both the original principal balance of the loan is \$5,000 or less, and the original repayment term is one year or less.

### Flood insurance requirements for construction loans

19. *Is a loan secured only by land that is located in an SFHA in which flood insurance is available under the Act and that will be developed into buildable lot(s) a designated loan that requires flood insurance?*

Answer: No. A designated loan is defined as a loan secured by a building or mobile home that is located or to be located in an SFHA in which flood insurance is available under the Act. Any loan secured only by land that is located in an SFHA in which flood insurance is available is not a designated loan since it is not secured by a building or mobile home.

20. *Is a loan secured or to be secured by a building in the course of construction that is located or to be located in an SFHA in which flood insurance is available under the Act a designated loan?*

Answer: Yes. Therefore, a lender must always make a flood determination prior to loan origination to determine whether a building to be constructed that is security for the loan is located or will be located in an SFHA in which flood insurance is available under the Act. If so, then the loan is a designated loan and the lender must provide the requisite notice to the borrower prior to loan origination that mandatory flood insurance is required. The lender must then comply with the mandatory purchase requirement under the Act and Regulation.

21. *Is a building in the course of construction that is located in an SFHA in which flood insurance is available under the Act eligible for coverage under an NFIP policy?*

Answer: Yes. [FEMA's Flood Insurance Manual](#), under general rules, states:

Buildings in the course of construction that have yet to be walled and roofed are eligible for coverage except when construction has been halted for more than 90 days and/or if the lowest floor used for rating purposes is below the Base Flood Elevation (BFE). Materials or supplies intended for use in such construction, alteration, or repair are not insurable unless they are contained within an enclosed building on the premises or adjacent to the premises.

FEMA, Flood Insurance Manual at p. GR 4 (FEMA's Flood Insurance Manual is updated every six months). The definition section of the Flood Insurance Manual defines “start of construction” in the case of new construction as “either the first placement of permanent

construction of a building on site, such as the pouring of a slab or footing, the installation of piles, the construction of columns, or any work beyond the stage of excavation; or the placement of a manufactured (mobile) home on a foundation.” FEMA, *Flood Insurance Manual*, at p. DEF 9. While an NFIP policy may be purchased prior to the start of construction, as a practical matter, coverage under an NFIP policy is not effective until actual construction commences or when materials or supplies intended for use in such construction, alteration, or repair are contained in an enclosed building on the premises or adjacent to the premises.

22. *When must a lender require the purchase of flood insurance for a loan secured by a building in the course of construction that is located in an SFHA in which flood insurance is available?*

Answer: Under the Act, as implemented by the Regulation, a lender may not make, increase, extend, or renew any loan secured by a building or a mobile home, located or to be located in an SFHA in which flood insurance is available, unless the property is covered by adequate flood insurance for the term of the loan. One way for lenders to comply with the mandatory purchase requirement for a loan secured by a building in the course of construction that is located in an SFHA is to require borrowers to have a flood insurance policy in place at the time of loan origination.

Alternatively, a lender may allow a borrower to defer the purchase of flood insurance until either a foundation slab has been poured and/or an elevation certificate has been issued or, if the building to be constructed will have its lowest floor below the Base Flood Elevation, when the building is walled and roofed.<sup>6</sup> However, the lender must require the borrower to have flood insurance in place before the lender disburses funds to pay for building construction (except as necessary to pour the slab or perform preliminary site work, such as laying utilities, clearing brush, or the purchase and/or delivery of building materials) on the property securing the loan. If the lender elects this approach and does not require flood insurance to be obtained at loan origination, then it must have adequate internal controls in place at origination to ensure that the borrower obtains flood insurance no later than when the foundation slab has been poured and/or an elevation certificate has been issued.

23. *Does the 30-day waiting period apply when the purchase of the flood insurance policy is deferred in connection with a construction loan?*

Answer: No. The NFIP will rely on an insurance agent’s representation on the application for flood insurance that the purchase of insurance has been properly deferred unless there is a loss during the first 30 days of the policy period. In that case, the NFIP will require documentation

of the loan transaction, such as settlement papers, before adjusting the loss.

### Flood insurance requirements for nonresidential buildings

24. *Some borrowers have buildings with limited utility or value and, in many cases; the borrower would not replace them if lost in a flood. Is a lender required to mandate flood insurance for such buildings?*

Answer: Yes. Under the Regulation, lenders must require flood insurance on real estate improvements when those improvements are part of the property securing the loan and are located in an SFHA and in a participating community. The lender may consider “carving out” buildings from the security it takes on the loan. However, the lender should fully analyze the risks of this option. In particular, a lender should consider whether it would be able to market the property securing its loan in the event of foreclosure. Additionally, the lender should consider any local zoning issues or other issues that would affect its collateral.

25. *What are a lender’s requirements under the Regulation for a loan secured by multiple buildings located throughout a large geographic area where some of the buildings are located in an SFHA in which flood insurance is available and other buildings are not? What if the buildings are located in several jurisdictions or counties where some of the communities participate in the NFIP and others do not?*

Answer: A lender is required to make a determination as to whether the improved real property securing the loan is in an SFHA. If secured improved real estate is located in an SFHA, but not in a participating community, no flood insurance is required, although a lender can require the purchase of flood insurance (from a private insurer) as a matter of safety and soundness. Conversely, where secured improved real estate is located in a participating community but not in an SFHA, no insurance is required. A lender must provide appropriate notice and require the purchase of flood insurance for designated loans located in an SFHA in a participating community.

### Flood insurance requirements for residential condominiums

26. *Are residential condominiums, including multi-story condominium complexes, subject to the statutory and regulatory requirements for flood insurance?*

Answer: Yes. The mandatory flood insurance purchase requirements under the Act and Regulation apply to loans secured by individual residential condominium units, including those located in multi-story condominium complexes, located in an SFHA in which flood insurance is available under the Act. The mandatory purchase

<sup>6</sup> FEMA, *Mandatory Purchase of Flood Insurance Guidelines*, at 30

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requirements also apply to loans secured by other condominium property, such as loans to a developer for construction of the condominium or loans to a condominium association.

27. *What is an NFIP Residential Condominium Building Association Policy (RCBAP)?*

Answer: The RCBAP is a master policy for residential condominiums issued by FEMA. A residential condominium building is defined as having 75 percent or more of the building's floor area in residential use. It may be purchased only by condominium owners associations. The RCBAP covers both the common and individually owned building elements within the units, improvements within the units, and contents owned in common (if contents coverage is purchased). The maximum amount of building coverage that can be purchased under an RCBAP is either 100 percent of the replacement cost value of the building, including amounts to repair or replace the foundation and its supporting structures, or the total number of units in the condominium building times \$250,000, whichever is less. RCBAP coverage is available only for residential condominium buildings in Regular Program communities.

28. *What is the amount of flood insurance coverage that a lender must require with respect to residential condominium units, including those located in multi-story condominium complexes, to comply with the mandatory purchase requirements under the Act and the Regulation?*

Answer: To comply with the Regulation, the lender must ensure that the minimum amount of flood insurance covering the condominium unit is the lesser of:

- The outstanding principal balance of the loan(s) or
- The maximum amount of insurance available under the NFIP, which is the lesser of:
  - The maximum limit available for the residential condominium unit or
  - The "insurable value" allocated to the residential condominium unit, which is the replacement cost value of the condominium building divided by the number of units.

Effective October 1, 2007, FEMA required agents to provide on the declaration page of the RCBAP the replacement cost value of the condominium building and the number of units. Lenders may rely on the replacement cost value and number of units on the RCBAP declaration page in determining insurable value unless they have reason to believe that such amounts clearly conflict with other available information. If there is a conflict, the lender should notify the borrower of the facts that cause the lender to believe there is a conflict. If the lender believes that the borrower is underinsured, it should require the purchase of a Dwelling Policy for supplemental coverage.

Assuming that the outstanding principal balance of the loan is greater than the maximum amount of coverage

available under the NFIP, the lender must require a borrower whose loan is secured by a residential condominium unit to either:

Ensure the condominium owners association has purchased an NFIP Residential Condominium Building Association Policy (RCBAP) covering either 100 percent of the insurable value (replacement cost) of the building, including amounts to repair or replace the foundation and its supporting structures, or the total number of units in the condominium building times \$250,000, whichever is less; or

Obtain a dwelling policy if there is no RCBAP, as explained in question and answer 29, or if the RCBAP coverage is less than 100 percent of the replacement cost value of the building or the total number of units in the condominium building times \$250,000, whichever is less, as explained in question and answer 30.

Example: Lender makes a loan in the principal amount of \$300,000 secured by a condominium unit in a 50-unit condominium building, which is located in an SFHA within a participating community, with a replacement cost of \$15 million and insured by an RCBAP with \$12.5 million of coverage.

- Outstanding principal balance of loan is \$300,000
- Maximum amount of coverage available under the NFIP, which is the lesser of:
  - Maximum limit available for the residential condominium unit is \$250,000; or
  - Insurable value of the unit based on 100 percent of the building's replacement cost value (\$15 million ÷ 50 = \$300,000).

The lender does not need to require additional flood insurance since the RCBAP's \$250,000 per unit coverage (\$12.5 million ÷ 50 = \$250,000) satisfies the Regulation's mandatory flood insurance requirement. (This is the lesser of the outstanding principal balance (\$300,000), the maximum coverage available under the NFIP (\$250,000), or the insurable value (\$300,000)).

The guidance in this question and answer will apply to any loan that is made, increased, extended, or renewed after the effective date of this revised guidance. This revised guidance will not apply to any loans made prior to the effective date of this guidance until a trigger event occurs (that is, the loan is refinanced, extended, increased, or renewed) in connection with the loan. Absent a new trigger event, loans made prior to the effective date of this new guidance will be considered compliant if they complied with the Agencies' previous guidance, which stated that an RCBAP that provided 80 percent RCV coverage was sufficient.

29. *What action must a lender take if there is no RCBAP coverage?*



Answer: If there is no RCBAP, either because the condominium association will not obtain a policy or because individual unit owners are responsible for obtaining their own insurance, then the lender must require the individual unit owner/borrower to obtain a dwelling policy in an amount sufficient to meet the requirements outlined in Question 28.

A dwelling policy is available for condominium unit owners' purchase when there is no or inadequate RCBAP coverage. When coverage by an RCBAP is inadequate, the dwelling policy may provide individual unit owners with supplemental building coverage to the RCBAP. The RCBAP and the dwelling policy are coordinated such that the dwelling policy purchased by the unit owner responds to shortfalls on building coverage pertaining either to improvements owned by the insured unit owner or to assessments. However, the dwelling policy does not extend the RCBAP limits, nor does it enable the condominium association to fill in gaps in coverage.

Example: The lender makes a loan in the principal amount of \$175,000 secured by a condominium unit in a 50-unit condominium building, which is located in an SFHA within a participating community, with a replacement cost value of \$10 million; however, there is no RCBAP.

- Outstanding principal balance of loan is \$175,000
- Maximum amount of coverage available under the NFIP, which is the lesser of:
  - Maximum limit available for the residential condominium unit is \$250,000; or
  - Insurable value of the unit based on 100 percent of the building's replacement cost value (\$10 million ÷ 50 = \$200,000).

The lender must require the individual unit owner/borrower to purchase a flood insurance dwelling policy in the amount of at least \$175,000, since there is no RCBAP, to satisfy the Regulation's mandatory flood insurance requirement. (This is the lesser of the outstanding principal balance (\$175,000), the maximum coverage available under the NFIP (\$250,000), or the insurable value (\$200,000).)

30. *What action must a lender take if the RCBAP coverage is insufficient to meet the Regulation's mandatory purchase requirements for a loan secured by an individual residential condominium unit?*

Answer: If the lender determines that flood insurance coverage purchased under the RCBAP is insufficient to meet the Regulation's mandatory purchase requirements, then the lender should request that the individual unit owner/borrower ask the condominium association to obtain additional coverage that would be sufficient to meet the Regulation's requirements (see question and answer 28). If the condominium association does not obtain sufficient coverage, then the lender must require the individual unit owner/borrower to purchase a dwelling policy in an amount sufficient to meet the Regulation's

flood insurance requirements. The amount of coverage under the dwelling policy required to be purchased by the individual unit owner would be the difference between the RCBAP's coverage allocated to that unit and the Regulation's mandatory flood insurance requirements (see question and answer 29).

Example: Lender makes a loan in the principal amount of \$300,000 secured by a condominium unit in a 50-unit condominium building, which is located in an SFHA within a participating community, with a replacement cost value of \$10 million; however, the RCBAP is at 80 percent of replacement cost value (\$8 million or \$160,000 per unit).

22. Outstanding principal balance of loan is \$300,000

23. Maximum amount of coverage available under the NFIP, which is the lesser of:

- Maximum limit available for the residential condominium unit is \$250,000; or
- Insurable value of the unit based on 100 percent of the building's replacement value (\$10 million ÷ 50 = \$200,000).

The lender must require the individual unit owner/borrower to purchase a flood insurance dwelling policy in the amount of \$40,000 to satisfy the Regulation's mandatory flood insurance requirement of \$200,000. (This is the lesser of the outstanding principal balance (\$300,000), the maximum coverage available under the NFIP (\$250,000), or the insurable value (\$200,000).) The RCBAP fulfills only \$160,000 of the Regulation's flood insurance requirement.

While the individual unit owner's purchase of a separate dwelling policy that provides for adequate flood insurance coverage under the Regulation will satisfy the Regulation's mandatory flood insurance requirements, the lender, and the individual unit owner/borrower may still be exposed to additional risk of loss. Lenders are encouraged to apprise borrowers of this risk. The dwelling policy provides individual unit owners with supplemental building coverage to the RCBAP. The policies are coordinated such that the dwelling policy purchased by the unit owner responds to shortfalls on building coverage pertaining either to improvements owned by the insured unit owner or to assessments. However, the dwelling policy does not extend the RCBAP limits, nor does it enable the condominium association to fill in gaps in coverage.

The risk arises because the individual unit owner's dwelling policy may contain claim limitations that prevent the dwelling policy from covering the individual unit owner's share of the co-insurance penalty, which is triggered when the amount of insurance under the RCBAP is less than 80 percent of the building's replacement cost value at the time of loss. In addition, following a major flood loss, the insured unit owner may have to rely upon the condominium association's and other unit owners'

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financial ability to make the necessary repairs to common elements in the building, such as electricity, heating, plumbing, and elevators. It is incumbent on the lender to understand these limitations.

31. *What must a lender do when a loan secured by a residential condominium unit is in a complex whose condominium association allows its existing RCBAP to lapse?*

Answer: If a lender determines at any time during the term of a designated loan that the loan is not covered by flood insurance or is covered by such insurance in an amount less than that required under the Act and the Regulation, the lender must notify the individual unit owner/borrower of the requirement to maintain flood insurance coverage sufficient to meet the Regulation's mandatory requirements. The lender should encourage the individual unit owner/borrower to work with the condominium association to acquire a new RCBAP in an amount sufficient to meet the Regulation's mandatory flood insurance requirement (see question and answer 28). Failing that, the lender must require the individual unit owner/borrower to obtain a flood insurance dwelling policy in an amount sufficient to meet the Regulation's mandatory flood insurance requirement (see questions and answers 29 and 30). If the borrower/unit owner or the condominium association fails to purchase flood insurance sufficient to meet the Regulation's mandatory requirements within 45 days of the lender's notification to the individual unit owner/borrower of inadequate insurance coverage, the lender must force place the necessary flood insurance.

32. *How does the RCBAP's co-insurance penalty apply in the case of residential condominiums, including those located in multi-story condominium complexes?*

Answer: In the event the RCBAP's coverage on a condominium building at the time of loss is less than 80 percent of either the building's replacement cost or the maximum amount of insurance available for that building under the NFIP (whichever is less), then the loss payment, which is subject to a co-insurance penalty, is determined as follows (subject to all other relevant conditions in this policy, including those pertaining to valuation, adjustment, settlement, and payment of loss):

- A. Divide the actual amount of flood insurance carried on the condominium building at the time of loss by 80 percent of either its replacement cost or the maximum amount of insurance available for the building under the NFIP, whichever is less.
- B. Multiply the amount of loss, before application of the deductible, by the figure determined in A above.
- C. Subtract the deductible from the figure determined in B above.

The policy will pay the amount determined in C above, or the amount of insurance carried, whichever is less.

Example 1: (inadequate insurance amount to avoid penalty)

Replacement value of the building	\$250,000
80% of replacement value of the building	\$200,000
Actual amount of insurance carried	\$180,000
Amount of the loss	\$150,000
Deductible	\$ 500

Step A:  $180,000 \div 200,000 = .90$

(90% of what should be carried to avoid co-insurance penalty)

Step B:  $150,000 \times .90 = 135,000$

Step C:  $135,000 - 500 = 134,500$

The policy will pay no more than \$134,500. The remaining \$15,500 is not covered due to the co-insurance penalty (\$15,000) and application of the deductible (\$500). Unit owners' dwelling policies will not cover any assessment that may be imposed to cover the costs of repair that are not covered by the RCBAP.

Example 2: (adequate insurance amount to avoid penalty)

Replacement value of the building	\$250,000
80% of replacement value of the building	\$200,000
Actual amount of insurance carried	\$200,000
Amount of the loss	\$150,000
Deductible	\$ 500

Step A:  $200,000 \div 200,000 = 1.00$

(100% of what should be carried to avoid co-insurance penalty)

Step B:  $150,000 \times 1.00 = 150,000$

Step C:  $150,000 - 500 = 149,500$  In this example there is no co-insurance penalty, because the actual amount of insurance carried meets the 80 percent requirement to avoid the co-insurance penalty.

The policy will pay no more than \$149,500 (\$150,000 amount of loss minus the \$500 deductible). This example also assumes a \$150,000 outstanding principal loan balance.

33. *What are the major factors involved with the individual unit owner's dwelling policy's coverage limitations with respect to the condominium association's RCBAP coverage?*

Answer: The following examples demonstrate how the unit owner's dwelling policy may cover in certain loss situations:

Example 1: (RCBAP insured to at least 80 percent of building replacement cost)

- If the unit owner purchases building coverage under the dwelling policy and if there is an RCBAP covering at least 80 percent of the building replacement cost value, the loss assessment coverage under the dwelling policy will pay that part of a loss

that exceeds 80 percent of the association's building replacement cost allocated to that unit.

- The loss assessment coverage under the dwelling policy will not cover the association's policy deductible purchased by the condominium association.
- If building elements within units have also been damaged, the dwelling policy pays to repair building elements after the RCBAP limits that apply to the unit have been exhausted. Coverage combinations cannot exceed the total limit of \$250,000 per unit.

Example 2: (RCBAP insured to less than 80 percent of building replacement cost)

- If the unit owner purchases building coverage under the dwelling policy and there is an RCBAP that was insured to less than 80 percent of the building replacement cost value at the time of loss, the loss assessment coverage cannot be used to reimburse the association for its co-insurance penalty.
- Loss assessment is available only to cover the building damages in excess of the 80-percent required amount at the time of loss. Thus, the covered damages to the condominium association building must be greater than 80 percent of the building replacement cost value at the time of loss before the loss assessment coverage under the dwelling policy becomes available. Under the dwelling policy, covered repairs to the unit, if applicable, would have priority in payment over loss assessments against the unit owner.

Example 3: (No RCBAP)

- If the unit owner purchases building coverage under the dwelling policy and there is no RCBAP, the dwelling policy covers assessments against unit owners for damages to common areas up to the dwelling policy limit.
- However, if there is damage to the building elements of the unit as well, the combined payment of unit building damages, which would apply first, and the loss assessment may not exceed the building coverage limit under the dwelling policy.

**Flood insurance requirements for home equity loans, lines of credit, subordinate liens, and other security interests in collateral located in an SFHA.**

34. *Is a home equity loan considered a designated loan that requires flood insurance?*

Answer: Yes. A home equity loan is a designated loan, regardless of the lien priority, if the loan is secured by a building or a mobile home located in an SFHA in which flood insurance is available under the Act.

35. *Does a draw against an approved line of credit secured by a building or mobile home, which is located in an*

*SFHA in which flood insurance is available under the Act, require a flood determination under the Regulation?*

Answer: No. While a line of credit secured by a building or mobile home located in an SFHA in which flood insurance is available under the Act is a designated loan and, therefore, requires a flood determination before the loan is made, draws against an approved line do not require further determinations. However, a request made for an increase in an approved line of credit may require a new determination, depending upon whether a previous determination was done. (See response to question 68 in Section XIII Required use of Standard Flood Hazard Determination Form.)

36. *When a lender makes, increases, extends, or renews a second mortgage secured by a building or mobile home located in an SFHA, how much flood insurance must the lender require?*

Answer: The lender must ensure that adequate flood insurance is in place or require that additional flood insurance coverage be added to the flood insurance policy in the amount of the lesser of either the combined total outstanding principal balance of the first and second loan, the maximum amount available under the Act (currently \$250,000 for a residential building and \$500,000 for a nonresidential building), or the insurable value of the building or mobile home. The junior lienholder should also ensure that the borrower adds the junior lienholder's name as mortgagee/loss payee to the existing flood insurance policy. Given the provisions of NFIP policies, a lender cannot comply with the Act and Regulation by requiring the purchase of an NFIP flood insurance policy only in the amount of the outstanding principal balance of the second mortgage without regard to the amount of flood insurance coverage on a first mortgage.

A junior lienholder should work with the senior lienholder, the borrower, or with both of these parties, to determine how much flood insurance is needed to cover improved real estate collateral. A junior lienholder should obtain the borrower's consent in the loan agreement or otherwise for the junior lienholder to obtain information on balance and existing flood insurance coverage on senior lien loans from the senior lienholder.

Junior lienholders also have the option of pulling a borrower's credit report and using the information from that document to establish how much flood insurance is necessary upon increasing, extending or renewing a junior lien, thus protecting the interests of the junior lienholder, the senior lienholders, and the borrower. In the limited situation where a junior lienholder or its servicer is unable to obtain the necessary information about the amount of flood insurance in place on the outstanding balance of a senior lien (for example, in the context of a loan renewal), the lender may presume that the amount of insurance coverage relating to the senior lien in place at the time the junior lien was first established (provided that the amount

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of flood insurance relating to the senior lien was adequate at the time) continues to be sufficient.

Example 1: Lender A makes a first mortgage with a principal balance of \$100,000, but improperly requires only \$75,000 of flood insurance coverage, which the borrower satisfied by obtaining an NFIP policy. Lender B issues a second mortgage with a principal balance of \$50,000. The insurable value of the residential building securing the loans is \$200,000. Lender B must ensure that flood insurance in the amount of \$150,000 is purchased and maintained. If Lender B were to require additional flood insurance only in an amount equal to the principal balance of the second mortgage (\$50,000), its interest in the secured property would not be fully protected in the event of a flood loss because Lender A would have prior claim on \$100,000 of the loss payment towards its principal balance of \$100,000, while Lender B would receive only \$25,000 of the loss payment toward its principal balance of \$50,000.

Example 2: Lender A, who is not directly covered by the Act or Regulation, makes a first mortgage with a principal balance of \$100,000 and does not require flood insurance. Lender B, who is directly covered by the Act and Regulation, issues a second mortgage with a principal balance of \$50,000. The insurable value of the residential building securing the loans is \$200,000. Lender B must ensure that flood insurance in the amount of \$150,000 is purchased and maintained. If Lender B were to require flood insurance only in an amount equal to the principal balance of the second mortgage (\$50,000) through an NFIP policy, then its interest in the secured property would not be protected in the event of a flood loss because Lender A would have prior claim on the entire \$50,000 loss payment towards its principal balance of \$100,000.

Example 3: Lender A made a first mortgage with a principal balance of \$100,000 on improved real estate with a fair market value of \$150,000. The insurable value of the residential building on the improved real estate is \$90,000; however, Lender A improperly required only \$70,000 of flood insurance coverage, which the borrower satisfied by purchasing an NFIP policy. Lender B later takes a second mortgage on the property with a principal balance of \$10,000. Lender B must ensure that flood insurance in the amount of \$90,000 (the insurable value) is purchased and maintained on the secured property to comply with the Act and Regulation. If Lender B were to require flood insurance only in an amount equal to the principal balance of the second mortgage (\$10,000), its interest in the secured property would not be protected in the event of a flood loss because Lender A would have prior claim on the entire \$70,000 loss payment towards the insurable value of \$90,000.

37. *If a borrower requesting a loan secured by a junior lien provides evidence that flood insurance coverage is in place, does the lender have to make a new determination? Does the lender have to adjust the insurance coverage?*

Answer: It depends. Assuming the requirements in Section 528 of the Act (42 U.S.C. 4104b) are met and the same lender made the first mortgage, then a new determination may not be necessary, when the existing determination is not more than seven years old, there have been no map changes, and the determination was recorded on an SFHDF. If, however, a lender other than the one that made the first mortgage loan is making the junior lien loan, a new determination would be required because this lender would be deemed to be “making” a new loan. In either situation, the lender will need to determine whether the amount of insurance in force is sufficient to cover the lesser of the combined outstanding principal balance of all loans (including the junior lien loan), the insurable value, or the maximum amount of coverage available on the improved real estate. This will hold true whether the subordinate lien loan is a home equity loan or some other type of junior lien loan.

38. *If the loan request is to finance inventory stored in a building located within an SFHA, but the building is not security for the loan, is flood insurance required?*

Answer: No. The Act and the Regulation provide that a lender shall not make, increase, extend, or renew a designated loan, that is a loan secured by a building or mobile home located or to be located in an SFHA, “unless the building or mobile home and any personal property securing such loan” is covered by flood insurance for the term of the loan. In this example, the collateral is not the type that could secure a designated loan because it does not include a building or mobile home; rather, the collateral is the inventory alone.

39. *Is flood insurance required if a building and its contents both secure a loan, and the building is located in an SFHA in which flood insurance is available?*

Answer: Yes. Flood insurance is required for the building located in the SFHA and any contents stored in that building.

Example: Lender A makes a loan for \$200,000 that is secured by a warehouse with an insurable value of \$150,000 and inventory in the warehouse worth \$100,000. The Act and Regulation require that flood insurance coverage be obtained for the lesser of the outstanding principal balance of the loan or the maximum amount of flood insurance that is available under the NFIP. The maximum amount of insurance that is available for both building and contents is \$500,000 for each category. In this situation, federal flood insurance requirements could be satisfied by placing \$150,000 worth of flood insurance coverage on the warehouse, thus insuring it to its insurable value, and \$50,000 worth of contents flood insurance coverage on the inventory, thus providing total coverage in the amount of the outstanding principal balance of the loan. Note that this holds true even though the inventory is worth \$200,000.

40. *If a loan is secured by Building A, which is located in an SFHA, and contents, which are located in Building B, is flood insurance required on the contents securing a loan?*

Answer: No. If collateral securing the loan is stored in Building B, which does not secure the loan, then flood insurance is not required on those contents whether or not Building B is located in an SFHA.

41. *Does the Regulation apply where the lender takes a security interest in a building or mobile home located in an SFHA only as an “abundance of caution”?*

Answer: Yes. The Act and Regulation look to the collateral securing the loan. If the lender takes a security interest in improved real estate located in an SFHA, then flood insurance is required.

42. *If a borrower offers a note on a single-family dwelling as collateral for a loan but the lender does not take a security interest in the dwelling itself, is this a designated loan that requires flood insurance?*

Answer: No. A designated loan is a loan secured by a building or mobile home. In this example, the lender did not take a security interest in the building; therefore, the loan is not a designated loan.

43. *If a lender makes a loan that is not secured by real estate, but is made on the condition of a personal guarantee by a third party who gives the lender a security interest in improved real estate owned by the third party that is located in an SFHA in which flood insurance is available, is it a designated loan that requires flood insurance?*

Answer: Yes. The making of a loan on condition of a personal guarantee by a third party and further secured by improved real estate, which is located in an SFHA, owned by that third party is so closely tied to the making of the loan that it is considered a designated loan that requires flood insurance.

**Flood insurance requirements in the event of the sale or transfer of a designated loan and/or its servicing rights.**

44. *How do the flood insurance requirements under the Regulation apply to regulated lenders under the following scenarios involving loan servicing?*

Scenario 1: A regulated lender originates a designated loan secured by a building or mobile home located in an SFHA in which flood insurance is available under the Act. The regulated lender makes the initial flood determination, provides the borrower with appropriate notice, and flood insurance is obtained. The regulated lender initially services the loan; however, the regulated lender subsequently sells both the loan and the servicing rights to a nonregulated party. What are the regulated lender’s requirements under the Regulation? What are the regulated lender’s requirements under the Regulation if it only transfers or sells the servicing rights, but retains ownership of the loan?

Answer: The regulated lender must comply with all requirements of the Regulation, including making the initial flood determination, providing appropriate notice to the borrower, and ensuring that the proper amount of insurance is obtained. In the event the regulated lender sells or transfers the loan and servicing rights, the regulated lender must provide notice of the identity of the new servicer to FEMA or its designee. Once the regulated lender has sold the loan and the servicing rights, the lender has no further obligation regarding flood insurance on the loan.

If the regulated lender retains ownership of the loan and only transfers or sells the servicing rights to a non-regulated party, the regulated lender must notify FEMA or its designee of the identity of the new servicer. The servicing contract should require the servicer to comply with all the requirements that are imposed on the regulated lender as owner of the loan, including escrow of insurance premiums and force placement of insurance, if necessary.

Generally, the Regulation does not impose obligations on a loan servicer independent from the obligations it imposes on the owner of a loan. Loan servicers are covered by the escrow, force placement, and flood hazard determination fee provisions of the Act and Regulation primarily so that they may perform the administrative tasks for the regulated lender, without fear of liability to the borrower for the imposition of unauthorized charges. It is the Agencies’ longstanding position, as described in the preamble to the Regulation that the obligation of a loan servicer to fulfill administrative duties with respect to the flood insurance requirements arises from the contractual relationship between the loan servicer and the regulated lender or from other commonly accepted standards for performance of servicing obligations. The regulated lender remains ultimately liable for fulfillment of those responsibilities, and must take adequate steps to ensure that the loan servicer will maintain compliance with the flood insurance requirements.

Scenario 2: A non-regulated lender originates a designated loan, secured by a building or mobile home located in an SFHA in which flood insurance is available under the Act. The non-regulated lender does not make an initial flood determination or notify the borrower of the need to obtain insurance. The non-regulated lender sells the loan and servicing rights to a regulated lender. What are the regulated lender’s requirements under the Regulation? What are the regulated lender’s requirements if it only purchases the servicing rights?

Answer: A regulated lender’s purchase of a loan and servicing rights, secured by a building or mobile home located in an SFHA in which flood insurance is available under the Act, is not an event that triggers any requirements under the Regulation, such as

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making a new flood determination or requiring a borrower to purchase flood insurance. The Regulation's requirements are triggered when a regulated lender makes, increases, extends, or renews a designated loan. A regulated lender's purchase of a loan does not fall within any of those categories. However, if a regulated lender becomes aware at any point during the life of a designated loan that flood insurance is required, then the regulated lender must comply with the Regulation, including force placing insurance, if necessary. Depending upon the circumstances, safety and soundness considerations may sometimes necessitate that the lender undertake sufficient due diligence upon purchase of a loan as to put the lender on notice of lack of adequate flood insurance. If the purchasing lender subsequently extends, increases, or renews a designated loan, it must also comply with the Act and Regulation. Where a regulated lender purchases only the servicing rights to a loan originated by a non-regulated lender, the regulated lender is obligated only to follow the terms of its servicing contract with the owner of the loan. In the event the regulated lender subsequently sells or transfers the servicing rights on that loan, the regulated lender must notify FEMA or its designee of the identity of the new servicer, if required to do so by the servicing contract with the owner of the loan.

45. *When a regulated lender makes a designated loan and will be servicing that loan, what are the requirements for notifying the Director of FEMA or the Director's designee?*

Answer: FEMA stated in a June 4, 1996, letter that the Director's designee is the insurance company issuing the flood insurance policy. The borrower's purchase of a policy (or the regulated lender's force placement of a policy) will constitute notice to FEMA when the regulated lender is servicing that loan.

In the event the servicing is subsequently transferred to a new servicer, the regulated lender must provide notice to the insurance company of the identity of the new servicer no later than 60 days after the effective date of such a change.

46. *Would a RESPA Notice of Transfer sent to the Director of FEMA (or the Director's designee) satisfy the regulatory provisions of the Act?*

Answer: Yes. The delivery of a copy of the Notice of Transfer or any other form of notice is sufficient if the sender includes, on or with the notice, the following information that FEMA has indicated is needed by its designee:

24. Borrower's full name;
25. Flood insurance policy number;
26. Property address (including city and state);
27. Name of lender or servicer making notification;
28. Name and address of new servicer; and

29. Name and telephone number of contact person at new servicer.

47. *Can delivery of the notice be made electronically, including batch transmissions?*

Answer: Yes. The Regulation specifically permits transmission by electronic means. A timely batch transmission of the notice would also be permissible, if it is acceptable to the Director's designee.

48. *If the loan and its servicing rights are sold by the regulated lender, is the regulated lender required to provide notice to the Director or the Director's designee?*

Answer: Yes. Failure to provide such notice would defeat the purpose of the notice requirement because FEMA would have no record of the identity of either the owner or servicer of the loan.

49. *Is a regulated lender required to provide notice when the servicer, not the regulated lender, sells or transfers the servicing rights to another servicer?*

Answer: No. After servicing rights are sold or transferred, subsequent notification obligations are the responsibility of the new servicer. The obligation of the regulated lender to notify the Director or the Director's designee of the identity of the servicer transfers to the new servicer. The duty to notify the Director or the Director's designee of any subsequent sale or transfer of the servicing rights and responsibilities belongs to that servicer. For example, a financial institution makes and services the loan. It then sells the loan in the secondary market and also sells the servicing rights to a mortgage company. The financial institution notifies the Director's designee of the identity of the new servicer and the other information requested by FEMA so that flood insurance transactions can be properly administered by the Director's designee. If the mortgage company later sells the servicing rights to another firm, the mortgage company, not the financial institution, is responsible for notifying the Director's designee of the identity of the new servicer.

50. *In the event of a merger or acquisition of one lending institution with another, what are the responsibilities of the parties for notifying the Director's designee?*

Answer: If an institution is acquired by or merges with another institution, the duty to provide notice for the loans being serviced by the acquired institution will fall to the successor institution in the event that notification is not provided by the acquired institution prior to the effective date of the acquisition or merger.

### Escrow Requirements

51. *Are multi-family buildings or mixed-use properties included in the definition of "residential improved real estate" under the Regulation for which escrows are required?*

Answer: "Residential improved real estate" is defined under the Regulation as "real estate upon which a home or other residential building is located or to be located." A

loan secured by residential improved real estate located or to be located in an SFHA in which flood insurance is available is a designated loan. Lenders are required to escrow flood insurance premiums and fees for mandatory flood insurance for such loans if the lender requires the escrow of taxes, hazard insurance premiums or any other charges for loans secured by residential improved real estate. A lender is not required to escrow flood insurance premiums and fees for a particular loan if it does not require escrowing of any other charges for that loan.

*Multi-family buildings.* For the purposes of the Act and the Regulation, the definition of residential improved real estate does not make a distinction between whether a building is single- or multi-family, or whether a building is owner- or renter-occupied. Single-family dwellings (including mobile homes), two-to-four family dwellings, and multi-family properties containing five or more residential units are covered under the Act's escrow provisions. If the building securing the loan meets the Regulation's definition of residential improved real estate and the lender requires the escrow of any other charges such as taxes or hazard insurance premiums, then the lender is required to also escrow premiums and fees for flood insurance.

*Mixed-use properties.* The lender should look to the primary use of a building to determine whether it meets the definition of "residential improved real estate." (See questions and answers 11 and 12 for guidance on residential and nonresidential buildings.) If the primary use of a mixed-use property is for residential purposes, the Regulation's escrow requirements apply.

52. *When must escrow accounts be established for flood insurance purposes?*

Answer: If a lender requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home, the lender must also require the escrow of all flood insurance premiums and fees. When administering loans secured by one-to-four family dwellings, lenders should look to the definition of "federally related mortgage loan" contained in the Real Estate Settlement Procedures Act (RESPA) to see whether a particular loan is subject to the escrow requirements in Section 10 of RESPA. (This includes individual units of condominiums. Individual units of cooperatives, although covered by Section 10 of RESPA, are not insurable under the NFIP and are not covered by the Regulation.) Loans on multi-family dwellings with five or more units are not covered by RESPA requirements. Pursuant to the Regulation, however, lenders must escrow premiums and fees for any required flood insurance if the lender requires escrows for other purposes, such as hazard insurance or taxes.

53. *Do voluntary escrow accounts established at the request of the borrower trigger a requirement for the lender to escrow premiums for required flood insurance?*

Answer: No. If escrow accounts for other purposes are established at the voluntary request of the borrower, the

lender is not required to establish escrow accounts for flood insurance premiums. Examiners should review the loan policies of the lender and the underlying legal obligation between the parties to the loan to determine whether the accounts are, in fact, voluntary. For example, when a lender's loan policies require borrowers to establish escrow accounts for other purposes and the contractual obligation permits the lender to establish escrow accounts for those other purposes, the lender will have the burden of demonstrating that an existing escrow was made pursuant to a voluntary request by the borrower.

54. *Will premiums paid for credit life insurance, disability insurance, or similar insurance programs be viewed as escrow accounts requiring the escrow of flood insurance premiums?*

Answer: No. Premiums paid for these types of insurance policies will not trigger the escrow requirement for flood insurance premiums.

55. *Will escrow-type accounts for commercial loans, secured by multi-family residential buildings, trigger the escrow requirement for flood insurance premiums?*

Answer: It depends. Escrow-type accounts established in connection with the underlying agreement between the buyer and seller, or that relate to the commercial venture itself, such as "interest reserve accounts," "compensating balance accounts," "marketing accounts," and similar accounts are not the type of accounts that constitute escrow accounts for the purpose of the Regulation. However, escrow accounts established for the protection of the property, such as escrows for hazard insurance premiums or local real estate taxes, are the types of escrow accounts that trigger the requirement to escrow flood insurance premiums.

56. *Which requirements for escrow accounts apply to properties adequately covered by RCBAPs?*

Answer: RCBAPs (Residential Condominium Building Association Policies) are policies purchased by the condominium association on behalf of itself and the individual unit owners in the condominium. A portion of the periodic dues paid to the association by the condominium owners applies to the premiums on the policy. When a lender makes, increases, renews, or extends a loan secured by a condominium unit that is adequately covered by an RCBAP and dues to the condominium association apply to the RCBAP premiums, an escrow account is not required. However, if the RCBAP coverage is inadequate and the unit is also covered by a dwelling form policy, premiums for the dwelling form policy would need to be escrowed if the lender requires escrow for other purposes, such as hazard insurance or taxes. Lenders should exercise due diligence with respect to continuing compliance with the insurance requirements on the part of the condominium association.

#### Force placement of flood insurance

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57. *What is the requirement for the force placement of flood insurance under the Act and Regulation?*

Answer: [Reserved]

58. *Can a servicer force place on behalf of a lender?*

Answer: Yes. Assuming the statutory prerequisites for force placement are met, and subject to the servicing contract between the lender and the servicer, the Act clearly authorizes servicers to force place flood insurance on behalf of the lender, following the procedures set forth in the Regulation.

59. *When force placement occurs, what is the amount of insurance required to be placed?*

Answer: The amount of flood insurance coverage required is the same regardless of how the insurance is placed. (See Section II. Determining the appropriate amount of flood insurance required under the Act and Regulation and also Section VII. Flood Insurance Requirements for Home Equity Loans, Lines of Credit, Subordinate Liens, and Other Security Interests in Collateral Located in an SFHA.)

60. *Can the 45-day notice period be accelerated by sending notice to the borrower prior to the actual date of expiration of flood insurance coverage?*

Answer: [Reserved]

61. *Is a reasonable period of time allowed after the end of the 45-day notice period for a lender or its servicer to implement force placement?*

Answer: The Regulation provides that the lender or its servicer shall purchase insurance on the borrower's behalf if the borrower fails to obtain flood insurance within 45 days after notification. However, where there is a brief delay in force placing required insurance, the Agencies will expect the lender to provide a reasonable explanation for the delay, for example, where a lender uses batch processing to purchase force-placed flood insurance policies.

62. *Does a lender or its servicer have the authority to charge a borrower for the cost of insurance coverage during the 45-day notice period?*

Answer: [Reserved]

### Private insurance policies

63. *May a lender rely on a private insurance policy to meet its obligation to ensure that its designated loans are covered by an adequate amount of flood insurance?*

Answer: It depends. A private insurance policy may be an adequate substitute for NFIP insurance if it meets the criteria set forth by FEMA in its Mandatory Purchase of Flood Insurance Guidelines. Similarly, a private insurance policy may be used to supplement NFIP insurance for designated loans where the property is underinsured if it meets the criteria set forth by FEMA in

its Mandatory Purchase of Flood Insurance Guidelines. FEMA states that, to the extent that a private policy differs from the NFIP Standard Flood Insurance Policy, the differences should be carefully examined before the policy is accepted as sufficient protection under the law. FEMA also states that the suitability of private policies need only be considered when the mandatory purchase requirement applies.

64. *When may a lender rely on a private insurance policy that does not meet the criteria set forth by FEMA?*

Answer: A lender may rely on a private insurance policy that does not meet the criteria set forth by FEMA only in limited circumstances. For example, when a flood insurance policy has expired and the borrower has failed to renew coverage, private insurance policies that do not meet the criteria set forth by FEMA, such as private insurance policies providing portfolio-wide blanket coverage, may be useful protection for the lender for a gap in coverage in the period of time before a force placed policy takes effect. However, the lender must still force place adequate coverage in a timely manner, as required, and may not rely on a private insurance policy that does not meet the criteria set forth by FEMA on an ongoing basis.

### Required use of Standard Flood Hazard Determination Form (SFHDF)

65. *Does the SFHDF replace the borrower notification form?*

Answer: No. The SFHDF is used by the lender to determine whether the building or mobile home offered as collateral security for a loan is or will be located in an SFHA in which flood insurance is available under the Act. The notification form, on the other hand, is used to notify the borrower(s) that the building or mobile home is or will be located in an SFHA and to inform them about flood insurance requirements and the availability of Federal disaster relief assistance.

66. *May a lender provide the SFHDF to the borrower?*

Answer: Yes. While not a statutory requirement, a lender may provide a copy of the flood determination to the borrower so the borrower can provide it to the insurance agent in order to minimize flood zone discrepancies between the lender's determination and the borrower's policy. A lender would also need to make the determination available to the borrower in case of a special flood hazard determination review, which must be requested jointly by the lender and the borrower. In the event a lender provides the SFHDF to the borrower, the signature of the borrower is not required to acknowledge receipt of the form.

67. *May the SFHDF be used in electronic format?*

Answer: Yes. In the final rule adopting the SFHDF, FEMA stated: "If an electronic format is used, the format and exact layout of the Standard Flood Hazard Determination Form is not required, but the fields and



elements listed on the form are required. Any electronic format used by lenders must contain all mandatory fields indicated on the form.” It should be noted, however, that the lender must be able to reproduce the form upon receiving a document request by its federal supervisory agency.

68. *May a lender rely on a previous determination for a refinancing or assumption of a loan or multiple loans to the same borrower secured by the same property?*

Answer: It depends. Section 528 of the Act, 42 U.S.C. 4104b(e), permits a lender to rely on a previous flood determination using the SFHDF when it is increasing, extending, renewing, or purchasing a loan secured by a building or a mobile home. Under the Act, the “making” of a loan is not listed as a permissible event that permits a lender to rely on a previous determination. When the loan involves a refinancing or assumption by the same lender who obtained the original flood determination on the same property, the lender may rely on the previous determination only if the original determination was made not more than seven years before the date of the transaction, the basis for the determination was set forth on the SFHDF, and there were no map revisions or updates affecting the security property since the original determination was made. A loan refinancing or assumption made by a lender different from the one who obtained the original determination constitutes a new loan, thereby requiring a new determination. Further, if the same lender makes multiple loans to the same borrower secured by the same improved real estate, the lender may rely on its previous determination if the original determination was made not more than seven years before the date of the transaction, the basis for the determination was set forth on the SFHDF, and there were no map revisions or updates affecting the security property since the original determination was made.

#### Flood determination fees

69. *When can lenders or servicers charge the borrower a fee for making a determination?*

Answer: There are four instances under the Act and Regulation when the borrower can be charged a specific fee for a flood determination:

30. When the determination is made in connection with the making, increasing, extending, or renewing of a loan that is initiated by the borrower;
31. When the determination is prompted by a revision or updating by FEMA of floodplain areas or flood-risk zones;
32. When the determination is prompted by FEMA’s publication of notices or compendia that affect the area in which the security property is located; or
33. When the determination results in force placement of insurance.

Loan or other contractual documents between the parties may also permit the imposition of fees.

70. *May charges made for life-of-loan reviews by flood determination firms be passed along to the borrower?*

Answer: Yes. In addition to the initial determination at the time a loan is made, increased, renewed, or extended, many flood determination firms provide a service to the lender to review and report changes in the flood status of a dwelling for the entire term of the loan. The fee charged for the service at loan closing is a composite one for conducting both the original and subsequent reviews. Charging a fee for the original determination is clearly within the permissible purpose envisioned by the Act. The Agencies agree that a determination fee may include, among other things, reasonable fees for a lender, servicer, or third party to monitor the flood hazard status of property securing a loan in order to make determinations on an ongoing basis.

However, the life-of-loan fee is based on the authority to charge a determination fee and, therefore, the monitoring fee may be charged only if the events specified in the answer to Question 69 occur. Further, a lender may not charge a composite determination and life-of-loan fee if the loan does not close, because the life-of-loan fee would be an unearned fee in violation of the Real Estate Settlement Procedures Act.

#### Flood zone discrepancies

71. *What should a lender do when there is a discrepancy between the flood hazard zone designation on the flood determination form and the flood insurance policy?*

Answer: A lender should only be concerned about a discrepancy on the Standard Flood Hazard Determination Form (the SFHDF) and the one on the flood insurance policy if the discrepancy is between a high-risk zone (A or V) and a low- or moderate-risk zone (B, C, D, or X). In other words, a lender need not be concerned about subcategory differences between flood zones on these two documents. Once in possession of a copy of the flood insurance policy, a lender should systematically compare the flood zone designation on the policy with the zone shown on the SFHDF. If the flood insurance policy shows a lower risk zone than the SFHDF, then lender should investigate. As noted in FEMA’s Mandatory Purchase of Flood Insurance Guidelines, federal law sets the ultimate responsibility to place flood insurance on the lender, with limited reliance permitted on third parties to the extent that the information that those third parties provide is guaranteed.

A lender should first determine whether the difference results from the application of the NFIP’s “Grandfather Rule.” This rule provides for the continued use of a rating on an insured property when the initial flood insurance policy was issued prior to changes in the hazard rating for the particular flood zone where the property is located.

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The Grandfather Rule allows policyholders who have maintained continuous coverage and/or who have built in compliance with the Flood Insurance Rate Map to continue to benefit from the prior, more favorable rating for particular pieces of improved property. A discrepancy resulting from application of the NFIP's Grandfather Rule is reasonable and acceptable, but the lender should substantiate these findings.

A lender should also determine whether a difference in flood zone designations is the result of a mistake. To do so, a lender should facilitate communication between itself or the third-party service provider that performed the flood hazard determination for the lender. If it appears that the discrepancy is the result of a mistake, a lender should recheck its determination. If there still appears to be a discrepancy after this step has been taken, a lender and borrower may jointly request that FEMA review the determination to confirm or review the accuracy of the original determination performed by a lender or on the lender's behalf. However, FEMA will only conduct this review if the request is submitted within 45 days of the date the lender notified the borrower that a building or manufactured home is in an SFHA and flood insurance is required.

If, despite these efforts, the discrepancy is not resolved, or in the course of attempting to resolve a discrepancy, a borrower or an insurance company or its agent is uncooperative in assisting a lender in this attempt, the lender should notify the insurance agent about the insurer's duty pursuant to FEMA's letter of April 16, 2008 (W-08021), to write a flood insurance policy that covers the most hazardous flood zone. When providing this notification, the lender should include its zone information and it should also notify the insurance company itself. The lender should substantiate these communications in its loan file.

72. *Can a lender be found in violation of the requirements of the Regulation if, despite the lender's diligence in making the flood hazard determination, notifying the borrower of the risk of flood and the need to obtain flood insurance, and requiring mandatory flood insurance, there is a discrepancy between the flood hazard zone designation on the flood determination form and the flood insurance policy?*

Answer: As noted in question and answer 71 above, lenders should have a process in place to identify and resolve flood zone discrepancies. A lender is in the best position to coordinate between the various parties involved in a mortgage loan transaction to resolve any flood zone discrepancy. If a lender is able to substantiate in its loan file a bona fide effort to resolve a discrepancy, either by finding a legitimate reason for such discrepancy or by attempting to resolve the discrepancy, for example, by contacting FEMA to review the determination, no violation will be cited. If a pattern or practice of unresolved discrepancies is found in a lender's loan portfolio due to a lack of effort on the lender's part to

resolve such discrepancies, the Agencies may cite the lender for a violation of the mandatory purchase requirements.

### **Notice of special flood hazards and availability of Federal disaster relief**

73. *Does the notice have to be provided to each borrower for a real estate related loan?*

Answer: No. In a transaction involving multiple borrowers, the lender need only provide the notice to any one of the borrowers in the transaction. Lenders may provide multiple notices if they choose. The lender and borrower(s) typically designate the borrower to whom the notice will be provided. The notice must be provided to a borrower when the lender determines that the property securing the loan is or will be located in an SFHA.

74. *Lenders making loans on mobile homes may not always know where the home is to be located until just prior to, or sometimes after, the time of loan closing. How is the notice requirement applied in these situations?*

Answer: When it is not reasonably feasible to give notice before the completion of the transaction, the notice requirement can be met by lenders in mobile home loan transactions if notice is provided to the borrower as soon as practicable after determination that the mobile home will be located in an SFHA. Whenever time constraints can be anticipated, regulated lenders should use their best efforts to provide adequate notice of flood hazards to borrowers at the earliest possible time. In the case of loan transactions secured by mobile homes not located on a permanent foundation, the Agencies note that such "home only" transactions are excluded from the definition of mobile home and the notice requirements would not apply to these transactions.

However, as indicated in the preamble to the Regulation, the Agencies encourage a lender to advise the borrower that if the mobile home is later located on a permanent foundation in an SFHA, flood insurance will be required. If the lender, when notified of the location of the mobile home subsequent to the loan closing, determines that it has been placed on a permanent foundation and is located in an SFHA in which flood insurance is available under the Act, flood insurance coverage becomes mandatory and appropriate notice must be given to the borrower under those provisions. If the borrower fails to purchase flood insurance coverage within 45 days after notification, the lender must force place the insurance.

75. *When is the lender required to provide notice to the servicer of a loan that flood insurance is required?*

Answer: Because the servicer of a loan is often not identified prior to the closing of a loan, the Regulation requires that notice be provided no later than the time the lender transmits other loan data, such as information concerning hazard insurance and taxes, to the servicer.

76. *What will constitute appropriate form of notice to the servicer?*

Answer: Delivery to the servicer of a copy of the notice given to the borrower is appropriate notice. The Regulation also provides that the notice can be made either electronically or by a written copy.

77. *In the case of a servicer affiliated with the lender, is it necessary to provide the notice?*

Answer: Yes. The Act requires the lender to notify the servicer of special flood hazards and the Regulation reflects this requirement. Neither contains an exception for affiliates.

78. *How long does the lender have to maintain the record of receipt by the borrower of the notice?*

Answer: The record of receipt provided by the borrower must be maintained for the time that the lender owns the loan. Lenders may keep the record in the form that best suits the lender's business practices. Lenders may retain the record electronically, but they must be able to retrieve the record within a reasonable time pursuant to a document request from their federal supervisory agency.

79. *Can a lender rely on a previous notice if it is less than seven years old, and it is the same property, same borrower, and same lender?*

Answer: No. The preamble to the Regulation states that subsequent transactions by the same lender with respect to the same property will be treated as a renewal and will require no new determination. However, neither the Regulation nor the preamble addresses waiving the requirement to provide the notice to the borrower. Therefore, the lender must provide a new notice to the borrower, even if a new determination is not required.

80. *Is use of the sample form of notice mandatory?*

Answer: No. Although lenders are required to provide a notice to a borrower when it makes, increases, extends, or renews a loan secured by an improved structure located in an SFHA, use of the sample form of notice provided in Appendix A of the Regulation or in Appendix 4 of FEMA's Mandatory Purchase of Flood Insurance Guidelines is not mandatory. It should be noted that the sample form includes other information in addition to what is required by the Act and the Regulation. Lenders may personalize, change the format of, and add information to the sample form of notice, if they choose. However, a lender-revised notice must provide the borrower with at least the minimum information required by the Act and Regulation. Therefore, lenders should consult the Act and Regulation to determine the information needed.

### Mandatory civil money penalties

81. *Which violations of the Act can result in a mandatory civil money penalty?*

Answer: A pattern or practice of violations of any of the following requirements of the Act and their implementing Regulation triggers a mandatory civil money penalty:

34. Purchase of flood insurance where available (42 U.S.C. 4012a(b));
35. Escrow of flood insurance premiums (42 U.S.C. 4012a(d));
36. Force placement of flood insurance (42 U.S.C. 4012a(e));
37. Notice of special flood hazards and the availability of Federal disaster relief assistance (42 U.S.C. 4104a(a)); and
38. Notice of servicer and any change of servicer (42 U.S.C. 4101a(b)).

82. *What constitutes a "pattern or practice" of violations for which civil money penalties must be imposed under the Act?*

Answer: The Act does not define "pattern or practice." The Agencies make a determination of whether a pattern or practice exists by weighing the individual facts and circumstances of each case. In making the determination, the Agencies look both to guidance and experience with determinations of pattern or practice under other regulations (such as Regulation B (Equal Credit Opportunity) and Regulation Z (Truth in Lending)), as well as Agencies' precedents in assessing civil money penalties for flood insurance violations.

The *Policy Statement on Discrimination in Lending* (Policy Statement) provided the following guidance on what constitutes a pattern or practice:

Isolated, unrelated, or accidental occurrences will not constitute a pattern or practice. However, repeated, intentional, regular, usual, deliberate, or institutionalized practices will almost always constitute a pattern or practice. The totality of the circumstances must be considered when assessing whether a pattern or practice is present.

In determining whether a financial institution has engaged in a pattern or practice of flood insurance violations, the Agencies' considerations may include, but are not limited to, the presence of one or more of the following factors:

- Whether the conduct resulted from a common cause or source within the financial institution's control;
- Whether the conduct appears to be grounded in a written or unwritten policy or established practice;
- Whether the noncompliance occurred over an extended period of time;
- The relationship of the instances of noncompliance to one another (for example, whether the instances of noncompliance occurred in the same area of a financial institution's operations);
- Whether the number of instances of noncompliance is significant relative to the total number of

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applicable transactions. (Depending on the circumstances, however, violations that involve only a small percentage of an institution's total activity could constitute a pattern or practice);

- Whether a financial institution was cited for violations of the Act and Regulation at prior examinations and the steps taken by the financial institution to correct the identified deficiencies;
- Whether a financial institution's internal and/or external audit process had not identified and addressed deficiencies in its flood insurance compliance; and
- Whether the financial institution lacks generally effective flood insurance compliance policies and procedures and/or a training program for its employees.

Although these guidelines and considerations are not dispositive of a final resolution, they do serve as a reference point in assessing whether there may be a pattern or practice of violations of the Act and Regulation in a particular case. As previously stated, the presence or absence of one or more of these considerations may not eliminate a finding that a pattern or practice exists.