Consumer Mortgage Coalition

December 29, 2014

Legislative and Regulatory Activities Division
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Washington, D.C. 20219
Docket ID OCC-2014-0016
Regs.comments@occ.treas.gov

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Docket No. R-1498
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Dear Sir or Madam:

The Consumer Mortgage Coalition ("CMC"), a trade association of national mortgage lenders, servicers, and service providers, appreciates the opportunity to submit comments on this interagency proposed regulation to implement the Homeowner Flood Insurance Affordability Act of 2014 ("HFIAA"). This proposal would establish requirements for escrows of flood insurance premiums when flood insurance is required in connection with a consumer mortgage loan.

Background

This rulemaking is the result of statutory amendments, as well as of an earlier proposed regulation.

Biggert-Waters Flood Insurance Reform Act of 2012 (the "Biggert-Waters Act").[1] The Biggert Waters Act, among many other changes, required federal regulators, by regulation, to require escrows for flood insurance premiums in connection with residential mortgage loans, with an exception for small servicers, effective two years after enactment.[2] The law permitted servicers to charge for lender-placed coverage as of the date the borrower's coverage was insufficient and required termination of lender-placed flood coverage within 30 days of confirmation of a borrower's policy, with refund of premiums during a period of overlapping coverage. It required lenders to accept private flood insurance that meets coverage requirements.

HFIAA. The HFIAA exempted from the Biggert-Waters escrow requirement the following:

- Loans subordinate to a lien on the same property "for which flood insurance is being provided at the time of the origination of the loan;"
- Loans on a condominium, cooperative, or project if the association or cooperative purchases sufficient coverage;
- Loans on property used for commercial purpose;
- Home equity lines of credit ("HELOCs");
- Nonperforming loans; and
- Loans with a term of a year or less.

These HFIAA amendments apply to loans originated, refinanced, increased, extended, or renewed on or after January 1, 2016. For loans outstanding on that date, and to which the escrow requirement would have applied had the loan been made after that date, lenders must offer an optional escrow for flood insurance premiums.

The HFIAA repealed the two-year effective date for the Biggert-Waters Act escrow requirement.

It also exempted from the flood insurance requirement structures on residential properties that are detached from the primary residential structure and that does not serve as a residence.

2013 Proposed Rulemaking. In October 2013, the Agencies proposed a regulation to implement the Biggert-Waters amendments, but did not finalize that proposal due to the March 2014 enactment of the HFIAA.

The present rulemaking covers flood insurance premium escrows and detached structures, but not lender-place insurance coverage or private insurance.

[1] Pub. L. No. 112-141, 126 Stat. 916.
[2] *Id.* at § 100209, 126 Stat. 916, 920.

Comments on the Proposal

We generally support the proposal, and offer only a few comments for clarification.

Exemptions

The proposal would exempt from the general flood insurance requirements (12 C.F.R. § 22.3 in the Comptroller's national bank regulation) a "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."[3] The Agencies request comment on the definition of residential property.

> "For example, the term 'residential' may refer not only to the type of property securing the loan, but also to the purpose of the loan. Thus, the Agencies could clarify that the exemption is only available if the detached structure does not secure a loan that is an extension of credit for a primarily business, commercial, or agricultural purpose."[4]

Exempting from mandatory coverage structures that are not attached to the residence would provide welcome flexibility. A property may have a detached structure, such as a garage, cabana, or even a child's treehouse, that the homeowner prefers not to insure because it is old, was designed for only temporary use, or is otherwise not worth insuring. As long as the servicer meets the required flood insurance coverage, it would be helpful not to require insurance for inconsequential structures that the borrower wishes not to insure.

At the same time, lenders may need to require flood insurance for a detached, nonresidential structure for safety and soundness purposes. We agree with the Agencies that:

> "[S]ome detached structures might be of relatively high value, such as a detached greenhouse. While the statute does not require flood insurance for such structures, as a matter of safety and soundness, lenders may nevertheless require flood insurance on these detached structures. Requiring flood insurance even when the statute does not mandate it may also be in the borrower's interest. The Agencies note that section 13(b) of HFIAA . . . amends section 5(b) of RESPA to require a related disclosure to borrowers informing them that they may still wish to obtain, and mortgage lenders may still require borrowers to maintain, flood insurance even when it is not required by the FDPA."[5]

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[3] Proposed 12 C.F.R. § 22.4(c). (Citations in this letter to the proposed regulation are to the Comptroller's version for ease of reference.)
[4] 79 Fed. Reg. 64518, 64523 (October 30, 2014).
[5] 79 Fed. Reg. 64518, 64522 (October 30, 2014).

We are concerned that this safety and soundness principle may be confused by the following language from the section-by-section analysis in the proposal:

> "Because flood insurance is not required on such properties and structures, determination of whether such properties or structures are located in an SFHA is unnecessary, which will, in turn, prevent borrowers being charged unnecessary flood hazard determination fees."[6]

This language could imply that lenders may not determine whether properties or structures are in a special flood hazard area and may not charge borrowers for fees for these determinations. We therefore request that a final rule be explicit that lenders may complete a flood determination, and may charge the borrower for such a flood determination, even if the property or structure qualifies for the exemption.

These clarifications would help avoid litigation over the appropriateness of flood insurance coverage.

Escrow Requirement

The proposal would require escrows of required flood insurance premiums for loans secured by residential real estate or a mobile home that are made, increased, extended, or renewed on or after January 1, 2016. The HFIAA uses the phrase "originated, refinanced, increased, extended, or renewed" for the trigger. The Agencies explain that they proposed "trigger" language that is consistent with their existing regulations.[7] This does not alter the meaning but maintains regulatory consistency, and is helpful.

The proposal would exempt from the escrow requirement loans that are primarily for a "business, commercial, or agricultural purposes, to be consistent with RESPA and TILA.[8] This is avoids unnecessary compliance complications and is helpful.

The HFIAA exempts loans subordinate to a lien on the same property "for which flood insurance is being provided at the time of the origination of the loan[.]" The proposal would exempt from the escrow requirement loans:

> "in a subordinate position to a senior lien secured by the same residential improved real estate or mobile home for which the borrower has obtained flood insurance coverage that meets the [applicable requirements[.]"[9]

Omission of the reference to coverage at loan origination is helpful because flood insurance is often required after an initial policy expires.

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[6] 79 Fed. Reg. 64518, 64526 (October 30, 2014).
[7] *See* 12 C.F.R. § 22.5.
[8] Proposed 12 C.F.R. § 22.5(a)(2)(i). This is consistent with 12 C.F.R. §§ 1024.5(b)(2) and 1026.3(a)(1).
[9] Proposed § 22.5(a)(2)(ii).

However, the proposed language could require the borrower to pay twice for insurance in some cases. If there are two loans on one property on which flood insurance is required, the lender or servicer of the senior loan will require flood insurance coverage. The servicer of the junior loan, if a different servicer, does not always know whether the borrower, as opposed to the servicer, has obtained flood insurance coverage. However, if the borrower does not obtain and demonstrate sufficient coverage, the servicer of the senior loan will obtain the coverage. Whether the borrower or the servicer of the senior loan obtained the coverage, there is no reason for the servicer of the junior loan to require the borrower to pay flood insurance premiums into an escrow account, although the proposed language would apparently require this. There cannot be two overlapping policies on the same property, so it is not clear what the servicer of the junior loan would do with the collected funds. Even if the servicer of the senior loan is a small servicer exempt from the escrow requirement, that servicer is still subject to the requirement to ensure flood insurance coverage. For this reason, we recommend that the regulation exempt loans that are subordinate when they are originated from the flood insurance escrow requirement altogether. This exemption should remain for the life of the loan because the servicer is not alerted if the senior loan is paid in full.

The proposal would exempt from the escrow requirement home equity lines of credit ("HELOCs"), nonperforming loans, defined as 90 or more days past due; and loans with a term not longer than 12 months. These are helpful.

The proposal would not require a servicer to advance insurance premiums when a loan is more than 30 days past due, as the CFPB requires for hazard insurance premiums.[10] This can be an appropriate safety and soundness protection in some cases. Importantly the proposal would not prohibit servicers from advancing premiums in this circumstance.

We request clarification that a loan that becomes 90 days past due remains exempt from the escrow requirement. A borrower may make intermittent payments, and this could cause the escrow requirement to come into and go out of effect repeatedly. As a practical matter, servicers would need to retain the escrow even when not required just in case the loan becomes less than 90 days past due. This would defeat the purpose of the exemption, and would not benefit a struggling borrower.

[10] 12 C.F.R. § 1024.17(k).

Option to Escrow Should be a Borrower's Option

The proposal would require servicers to offer the option to escrow flood insurance premiums for borrowers whose loans are outstanding on January 1, 2016. Notice of this option would be required by March 31, 2016, and, for borrowers who exercise this option, the "servicer must begin escrowing premiums and fees for flood insurance as soon as reasonably practicable" after request.

The timing flexibility is welcome because would permit servicers to schedule the escrow notices and to establish the escrow accounts in a manner that is operationally feasible.

We request clarification that if a borrower elects this optional escrow for flood insurance premiums, that the borrower, and not the servicer, selects the coverage amount, and that the servicer cannot be liable for the borrower's decision. That is, this regulation should not supersede the statutory requirement that lenders must require flood insurance only when a loan is made, increased, extended, or renewed. In the case of a loan that is outstanding on January 1, 2016, there is no triggering event to require flood insurance.

For example, for an existing loan on a property that would be required to have $250,000 coverage if a new loan were originated, no escrow is required because there is no new loan. The homeowner may elect an escrow but purchase coverage for an amount lesser than $250,000. In this case, if the servicer were to insist on more coverage, the homeowner would reject the escrow. Congress required servicers to offer escrow accounts on existing loans as a convenience for borrowers. We do not believe Congress thereby required servicers to force-place flood insurance coverage on a wide scale on every unwilling borrower on every existing loan in every special flood hazard area in the country. For these reasons, we have two requests:

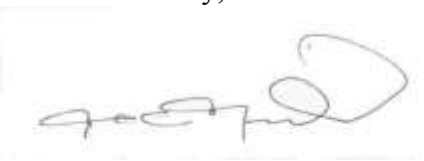
- A final regulation should be explicit that servicers cannot be liable for the amount of coverage, either too much or too little, when servicers offer the optional HFIAA escrow accounts; and
- Servicers should not be required to verify flood insurance coverage on existing loans when the escrow option becomes effective.

We also recommend a revision to require the servicer only to have the escrow in place by the deadline, not that the escrow account be funded. The borrower may at any time elect not to send the premiums to the escrow, and the borrower's decision not to fund the escrow should not be a violation of law. Congress intended to provide borrowers with an option and not a mandate.

Conclusion

We appreciate your consideration of our comments on the proposed interagency regulations.

Sincerely,



Anne C. Canfield
Executive Director