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Re: "Loans in Areas Having Special Flood Hazards".

OCC: Docket ID OCC-2014-0016

Board: Docket No. R-1498  
RIN 7100-AE22

FDIC: "Loans in Areas Having Special Flood Hazards".

FCA: "Law & Regulations" / "FCA Regulations" / "Public Comments"

NCUA: RIN 3133-AE40

To the Agencies:

SUMMARY OF MY COMMENTS IN THIS LETTER:

- (1) The Agencies' Joint Notice of Proposed Rulemaking makes clear that flood insurance required under the National Flood Insurance Act and Flood Disaster Protection Act, as amended by the Homeowner Flood Insurance Affordability Act of 2014, is not required for any structure that is part of any residential property but is detached from the primary residential structure of such property and does not serve as a residence. This is not clear in the Agencies' Joint Proposed Rule however. The proposal in my first Comment would make this clear in the proposed Rule and, since compliance with the Act and Rule does not require flood insurance for such structures, then a lender's or servicer's requirement that a borrower obtain flood insurance for such structures is not immunized either by the Act or by the Rule.
- (2) My second Comment adds a provision which would clarify the standard which a lender or servicer must meet in complying with the proposed escrow requirement. The standard which such a lender or servicer must meet is the standard of conduct of a fiduciary in its dealings with the borrower's flood insurance escrow account which the proposed Rule will now require.

- (3) The proposed Rule sets forth a new Notice which mortgage lenders or servicers will be required to send to borrowers concerning the limits of flood insurance coverage required by the Act and the Rule. If the lender or servicer wants to obtain limits of flood insurance coverage greater than the required minimum, then the lender or servicer, as the case may be, may purchase the difference between the required minimum and the maximum which the lender or servicer desires.

These Comments are in response to your Joint Notice of Proposed Rulemaking published beginning at 79 Federal Register 64518 (Oct. 30, 2014).

- (1) My first Comment is in response in particular to your joint solicitation for comment on whether Section 13 of HFIAA should be clarified. Section 13(a) of HFIAA in particular amends Section 102 of the Flood Disaster Protection Act of 1973 (found at 42 USC § 4012a(c)), by adding the new paragraph which appears in the proposed Rule at this time. In order to clarify the proposed Rule, I would also add the following language which is consistent with Section 13 of HFIAA in this regard. I have printed the language I propose in boldfaced type for your ease of reference:

**Borrowers may still wish to obtain, and mortgage lenders may still require borrowers to maintain, flood insurance even when it is not required by the National Flood Insurance Act or National Flood Insurance Plan or Flood Disaster Protection Act, all as amended. However, if a mortgage lender requires a borrower to maintain flood insurance even when it is not required, the mortgage lender is not immunized from liability in that respect since flood insurance is not required by the NFIA or by the NFIP or by the FDPA and no basis for extending immunity from any liability exists in the event that a mortgage lender requires a borrower to maintain flood insurance even when it is not required.**

The Agencies' Joint Notice of Proposed Rulemaking makes it clear that flood insurance is not required for any structure that is part of any residential property but is detached from the primary residential structure of such property and does not serve as a residence, as do the Agencies' proposed Rules. The Agencies' Joint Notice of Proposed Rulemaking also makes it clear that mortgage lenders may require borrowers to obtain additional flood insurance even when it is not required by the Act, but the proposed Rules do not make this clear. Consistent with both of the two Subsections of Section 13, Subsections 13(a) and (b) of HFIAA, the language proposed above clarifies that mortgage lenders may require borrowers to obtain additional flood insurance even when it is not required by the Act.

Further, where the Act, as amended, does not apply, of course neither do its provisions or authorizations for immunity regarding compliance with its provisions apply, since the Act by definition does not require any conduct in that situation. The proposed language makes that equally clear to borrowers and mortgage lenders alike.

This provision would set forth a new subparagraph in the following Rules of the five (5) respective joint Agencies involved:

1. OCC: This would add a new 12 CFR § 22.4(d).
2. Board: This would add a new 12 CFR § 208.25(d)(4).
3. FDIC: This would add a new 12 CFR § 339.4(d).
4. FCA: This would add a new 12 CFR § 614.4930(c)(4).
5. NCUA: This would add a new 12 CFR § 760.4(d).

(2) My second Comment concerns the new escrow requirement. I would add a new provision to the proposed Rule, as follows:

**The escrow account required in the first paragraph of this section, and by the Flood Disaster Protection Act, as amended, of all premiums and fees for any flood insurance required under these Rules and by the FDPA, as amended, shall be maintained by the mortgage lender or servicer as a fiduciary of the funds of the borrower.**

This provision would establish the responsibility required by the escrow requirement in a single standard of performance. The FDPA, as amended, and the proposed Rule establish the required escrow account. It clearly sets out the measure of behavior which must be met by any mortgage lender or servicer which is thereby required to manage the newly required escrow account.

This provision set out in my second Comment would set forth a new provision in the following Rules of the five (5) respective joint Agencies involved:

1. OCC: This would add a new 12 CFR § 22.5(a)(4).
2. Board: This would add a new 12 CFR § 208.25(e)(1)(iv).
3. FDIC: This would add a new 12 CFR § 339.5(a)(4).
4. FCA: This would add a new 12 CFR § 614.4935(a)(4).
5. NCUA: This would add a new 12 CFR § 760.5(a)(4).

(3) My final Comment at this time would add a provision to be appended to the end of the following language in the new Notice required by the proposed Rule:

At a minimum, flood insurance purchased must cover the *lesser* of:

- (1) The outstanding principal balance of the loan; *or*
- (2) The maximum amount of coverage allowed for the type of property under the NFIP.

**Your lender may require, at its own expense, additional amounts of flood insurance to cover the *greater* of these two amounts.**

This new language would clarify for the mortgage lender or servicer, and the borrower alike, that what the requirement of the “lesser,” means that the “lesser” is what is required. Or, put another way, that “minimum” means “minimum,” not “maximum.” If the lender or servicer wants the “greater” or “maximum” flood insurance coverage, it may purchase the amount which is the difference between the required minimum and the maximum which the lender or servicer desires.

This provision proposed in my third Comment would set forth a new sentence in the following Rules of the five (5) respective joint Agencies involved, specifically, the Appendixes to the following Rules which set forth the text of the Notice which lenders and servicers would now be required to send to borrowers:

1. OCC: This would add one new sentence to Appendix A to Part 22.
2. Board: This would add one new sentence to Appendix A to § 208.25.
3. FDIC: This would add one new sentence to Appendix A to Part 339.
4. FCA: This would add one new sentence to Appendix A to Part 614.
5. NCUA: This would add one new sentence to Appendix A to Part 760.

I would like to conclude by respectfully pointing out that none of the provisions proposed in my above Comments would change the Agencies’ joint conclusion that the estimated total costs associated with this NPRM excludes “costs specifically related to requirements set forth in Biggert-Waters and HFIAA”. 79 Federal Register at 64528.

Thank you for your consideration of these Comments. Should you have any questions or concerns, I would be glad to address them.

Sincerely Yours,  
*Dennis J. Wall, Esquire*  
Dennis J. Wall

DJW/jm