



American
Bankers
Association®



MORTGAGE BANKERS ASSOCIATION

April 8, 2024

Federal Emergency Management Agency
500 C St SW
Washington, DC 20024

Via Electronic Submission

***Re: National Flood Insurance Program: Standard Flood Insurance Policy,
Homeowner Flood Form; Docket ID: FEMA-2024-0004; RIN 1660-AB06***

To Whom It May Concern:

The American Bankers Association¹ and Mortgage Bankers Association² (the Associations) appreciate the opportunity to comment on the Federal Emergency Management Agency's (FEMA's) proposal³ to revise the Standard Flood Insurance Policy (SFIP) form, which has not been substantially updated since 2000. The SFIP defines the coverage, limitations, and exclusions for National Flood Insurance Program (NFIP) policies and includes terms and conditions that are unique to the NFIP. Currently, FEMA's SFIP outlines flood insurance coverage for a one-year policy term under three different forms: (1) the Dwelling Form; (2) the General Property Form; and (3) the Residential Condominium Building Association Policy (RCBAP) Form.

¹ The American Bankers Association (ABA) is the voice of the nation's \$23.7 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard \$18.8 trillion in deposits and extend \$12.5 trillion in loans.

² The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

³ See 89 Fed. Reg. 8282 (proposed Feb. 6, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-02-06/pdf/2024-02204.pdf>. If the proposed rule is finalized, the new Form and its accompanying endorsements will be added to FEMA's regulation at 44 CFR 61 Appendix A(4).

FEMA is now proposing to create a new, fourth SFIP form—the Homeowner Flood Form (hereafter referred to as the “new Form”)—to supersede the existing Dwelling Form⁴ in providing coverage for homeowners of one-to-four family residences. FEMA's proposal also introduces five new endorsements,⁵ specifically tailored for use exclusively with this new Form. According to FEMA, the new Form and its accompanying endorsements are designed to more closely align with property and casualty homeowners insurance policies and to provide increased options and coverage in a more user-friendly and comprehensible format. Additionally, these new endorsements are designed to provide policyholders with the flexibility to customize their coverage to align with the individual risks of their property.

While the Associations acknowledge that the proposed Form is generally more user-friendly and may improve policyholder comprehension, we have two primary concerns. First, certain changes may have the opposite effect and may inadvertently increase confusion for policyholders. In the following comments, the Associations identify these specific areas of concern and offers recommendations to FEMA to bolster clarity and understanding for policyholders.

Second, aspects of the new Form are unclear, which will present challenges for lenders and servicers charged with complying with the Flood Disaster Protection Act (FDPA). These include: (1) the revised definitions; (2) the new Coverage B section; (3) the new provision assigning replacement cost value as the default loss settlement methodology; (4) the new provision on advanced payments; and (5) the new endorsements. Because our members are mortgage lenders and servicers subject to supervision and examination by federal consumer compliance and prudential regulators and to requirements issued by the Federal Housing Administration, Department of Veteran Affairs, Department of Agriculture, and government-sponsored entities (GSEs), the majority of our comments concentrate on areas necessitating additional guidance from these regulators. Before FEMA finalizes its proposal, it is essential that FEMA collaborate with these regulators and issue guidance to ensure that the lending community's implementation and utilization of the new Form is consistent with the Flood Disaster Protection Act (FDPA) and its implementing regulations.

I. FEMA Proposes to Revise, Eliminate, and Create Key Definitions in the New Form.

In Section II of the new Form, FEMA proposes to revise, eliminate, and create several new definitions in the current Dwelling Form. Most significantly, FEMA proposes to make substantive changes to the definition of “Flood,” “Building,” and “Basement,” and proposes to add a definition for “Enclosure.”⁶ The table below compares of the current and proposed definitions.

	Current Definition in Dwelling Form	Proposed Definition
Flood	1.A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more	1.A general and temporary condition of partial or complete inundation of normally dry land from any of the following: a. Overflow of inland or tidal waters;

⁴ If the new form is adopted, the existing Dwelling Form will no longer be used to cover homeowners of one-to-four family site-built residential buildings. However, it will continue to be used to insure landlords, renters, and owners of mobile homes, travel trailers, and condominium units.

⁵ An endorsement is a written document attached to an insurance policy that modifies the policy by changing the coverage provided by the policy.

⁶ 89 Fed. Reg. at 8291-92.

	<p>properties (at least one of which is your property) from:</p> <ul style="list-style-type: none"> a. Overflow of inland or tidal waters; b. Unusual and rapid accumulation or runoff of surface waters from any source; c. Mudflow <p>2. Collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined in A.1.a. above.</p>	<ul style="list-style-type: none"> b. Unusual and rapid accumulation or runoff of surface waters from any source; c. Mudflow, which is a river of liquid and flowing mud on the surface of normally dry land, as when earth is carried by a current of water; or d. Sudden erosion or undermining of land along the shore of a lake or similar body of water caused by waves or currents of water exceeding anticipated cyclical levels that causes collapse or subsidence of land resulting in a <i>flood</i>.
<p style="text-align: center;">Building</p>	<ul style="list-style-type: none"> a. A structure with two or more outside rigid walls and a fully secured roof, that is affixed to a permanent site; b. A manufactured home (a “manufactured home,” also known as a mobile home, is a structure: built on a permanent chassis, transported to its site in one or more sections, and affixed to a permanent foundation); or c. A travel trailer without wheels, built on a chassis and affixed to a permanent foundation, that is regulated under the community’s floodplain management and building ordinances or laws. <p>Building does not mean a gas or liquid storage tank or a recreational vehicle, park trailer, or other similar vehicle, except as described in B.6.c. above.</p>	<p>A structure, the construction of which has been completed, that has a fully secured roof and sold, vertical, load-bearing walls, and is affixed to a permanent site.</p>
<p style="text-align: center;">Basement</p>	<p>Any area of the building, including any sunken room or sunken portion of a room, having its floor below ground level (subgrade) on all sides.</p>	<p>Any area of a <i>building</i> having its floor level below ground level on all sides, regardless of design or use.</p> <ul style="list-style-type: none"> a. An area of a <i>building</i> is below ground level when the land touching the exterior of the <i>building</i> is above its floor level. b. An area of a <i>building</i> is presumed to be below ground level when it is necessary to walk up steps or a slope to reach the land surrounding the <i>building</i>. A professional land survey or report may rebut this presumption.
<p style="text-align: center;">Enclosure</p>	<p>Not currently defined in the Dwelling Form.</p>	<p>An area that exists below the dwelling and used in accordance with local floodplain</p>

management ordinances or law for the parking of vehicles, building access, or storage. The *enclosure* is shown on the declarations page.

FEMA asserts that these modifications will enhance simplicity and clarity for policyholders. However, having varied definitions for the same term based on the type of coverage is likely to increase confusion rather than alleviate it for policyholders. For instance, FEMA proposes changing the definition of “Flood,” deeming the current definition “unnecessarily restrictive.” If a borrower has coverage under the new Form for their primary residence and coverage under the Dwelling Form for an outbuilding (not eligible for Coverage B), then their primary residence is covered after a flooding event, but the outbuilding is unprotected. Lenders and servicers will face the challenge of explaining these discrepancies to borrowers. To mitigate this confusion, FEMA should adopt programmatic definitions for these terms that apply universally across coverage types, rather than defining fundamental terms differently in each policy form.

The proposed new definition of “Flood” will create other operational challenges and may increase litigation risk. Under the flood regulations, the definition of “private flood insurance” policy is explicitly tied to the SFIP and generally requires that a private flood policy provide coverage that is “at least as broad as” the coverage provided under the SFIP issued by the NFIP.⁷ For example, FEMA states that it is proposing the change to the definition of “Flood” because it finds the current definition “unnecessarily restrictive.” At the same time, the proposal states that FEMA does not intend to broaden or narrow coverage based on this definition change. If the definition is finalized, some attorneys or regulators may argue that a private flood policy that did not expand the definition to the new SFIP definition is no longer equivalent to the SFIP issued by the NFIP, as the old definition is “unnecessarily restrictive.”

FEMA also needs to clarify the proposed definition of “Building.” In the new Form, FEMA defines a building as “a structure, the construction of which has been **completed...**” (emphasis added) However, there is currently no definition of “completed.” In fact, whether a building is substantially completed for construction purposes has long been disputed and is a subject of litigation. Without a definition, individual insurers will be left to decide when a building is complete, which may result in policyholders’ claims being denied on an inconsistent, discretionary basis. If FEMA adopts this definition of “building” in the new Form, FEMA should either revise the definition of building to clarify what it means for a building to be “completed,” or define “completed” in the new Form.

Additionally, the prudential regulators will need to provide guidance on how these newly proposed definitions will affect private flood policies and how the change in the definition of building will impact compliance with the mandatory purchase requirement.

First, the definition of “private flood insurance” is explicitly tied to the SFIP. Given this connection, the prudential regulators, federally regulated guarantee agencies, and the GSEs will need to provide guidance on whether private flood insurance policies must be revised to align with new definitions to ensure that their coverage is as comprehensive as that offered by the SFIP. Should such updates be mandated, it is imperative for prudential regulators to offer

⁷ See, e.g., 12 C.F.R. § 22.2(k)(2).

detailed guidance to lenders on verifying these changes across private policies. Many lenders manage thousands of these policies, thus the task of confirming each policy's compliance could be considerable. Therefore, FEMA should encourage prudential regulators to provide efficient methods for lenders to ascertain whether an insurer has updated their policy forms. For instance, it would be helpful if lenders could obtain a compliance aid statement that certifies that the previous certification has been updated.

Second, lenders will need guidance on how the new definition of building will impact compliance with the mandatory purchase requirement. According to the FDPA, if NFIP insurance coverage is unavailable for a property, the mandatory purchase requirement would not apply.⁸ With the proposed definition of “building” in the new Form (excluding any endorsements), the NFIP would be unavailable to all incomplete one-to-four family site-built residential buildings. Consequently, construction-to-permanent loans would not be classified as designated loans, exempting them from the mandatory purchase requirement.

This would contradict the current Construction Q&As, which state that a loan secured by a building in the course of construction that is located or to be located in a special flood hazard area is a designated loan and that a lender is required to comply with the mandatory purchase requirement under the Act.⁹ To address this discrepancy, regulators must revise the current Q&As to explain how these changes affect the mandatory purchase requirement for construction loans. Furthermore, guidance is needed on how any change will affect existing construction loans. This topic is discussed further in Section V, as it relates to the proposed Builder’s Risk Endorsement.

II. FEMA Proposes to Revise Coverage B Section to Cover “Other Buildings.”

FEMA proposes to change Coverage B from “Personal Property” to “Other Buildings.”¹⁰ Under this newly revised section, Coverage B would provide coverage to restore certain other buildings to a functional level located at the described location. The coverage would contain fewer limitations than the Dwelling Form, while still maintaining the same 10 percent limit of the face amount of the policy. FEMA states that the purpose of Coverage B is to “extend coverage to other buildings that may have a residential use, such as a living space built above a detached garage.” Other examples provided by the proposed rule include carports, garages, and guest houses. This section does not cover other buildings held or used for commercial purposes, and would not cover anything already excluded under Coverage A.

If FEMA finalizes this proposed change, FEMA should work with the prudential regulators to clarify how this new Coverage will impact the detached structure exemption. Specifically, structures such as carports and garages, which are physically separated from the main residential building and do not function as living spaces, would be eligible for coverage under this new section. Nevertheless, these same structures could also fall under the existing definition of a detached structure according to FDPA regulations, thereby qualifying them for an exemption from mandatory flood insurance coverage.¹¹ To facilitate lenders’ ability to advise

⁸ See 42 U.S.C. § 4012a(b)(1)(A).

⁹ See Loans in Areas Having Special Flood Hazards; Interagency Questions and Answers Regarding Flood Insurance, 87 Fed. Reg. 32826, 32880 (May 31, 2022) (Construction 2), <https://www.govinfo.gov/content/pkg/FR-2022-05-31/pdf/2022-10414.pdf>.

¹⁰ 89 Fed. Reg. at 8295-96.

¹¹ See 87 Fed. Reg. at 32870 (Exemption 1).

policyholders which structures must be insured under the new Form, it is crucial that prudential regulators update the Q&As to explain the effects of the new Coverage B section on the detached structure exemption.

III. FEMA Proposes to Allow an Insurer to Make Advance Payments to Policyholders.

Under a new section titled “Disaster Conditions,” FEMA proposes to allow insurers to accept and make payment on the adjuster’s reports, which will allow FEMA to issue special terms for advance payments not currently provided in the Dwelling Form. Specifically, the new section would allow an insurer to make an advance payment for up to 5 percent of the Coverage A limit to a policyholder without having to include a mortgagee on the check. By allowing for advance payment, FEMA anticipates that policyholders without contents coverage will be able to hire a contractor without utilizing out-of-pocket funds, without affecting the mortgagee’s ability to file its own claim.

The Associations agree with FEMA that this provision would enhance policyholders' capacity to initiate repairs promptly following a flood-related loss. However, we request that FEMA revise this section to mandate that lenders are informed whenever an advance payment is issued. This change would enable lenders to accurately monitor the progress and distribution of loss settlement payouts, ensuring a smoother, more transparent process for all parties involved.

IV. FEMA Proposes to Assign RCV as the New Default Loss Settlement Method.

Like the Dwelling Form, the new Form would include a section titled “Loss Settlement,” which describes FEMA’s methods for settling losses. However, unlike the Dwelling Form, the new Form would make clear that replacement cost value (RCV), rather than actual cost value (ACV), will be the default loss settlement.¹² Under the new Form, FEMA would apply RCV to the dwelling, if at the time of loss, “the coverage limit that applies to the dwelling is 80 percent or more of full replacement cost immediately before the loss or is the maximum coverage limit available under the NFIP.” It would also apply RCV to claims arising under Coverage B or C of the policy. If the policy does not qualify for RCV or the ACV endorsement (discussed below) is applied, then ACV will be used. The new form would remove all mention of special situations where only ACV applies. Additionally, FEMA proposes to remove the distinction between primary and nonprimary residences, indicating that RCV would be the default for both types of properties.

If adopted as proposed, FEMA and the prudential regulators must provide guidance on the adoption of this new loss settlement method. FEMA must provide guidance on which RCV should be used for the new Form to address potential discrepancies where lenders and insurers might have independently established varying RCVs for the identical property. The prudential regulators must provide guidance on how this change will affect non-primary residences that have previously been underwritten based on ACV. As noted above, the new Form would remove the distinction between primary and nonprimary residences, meaning RCV will now be the default loss settlement for both types of properties. Since most non-primary residences currently are underwritten to ACV, FEMA should work with prudential regulators to guide lenders through the process of transitioning these policies to RCV. This guidance should include

¹² 89 Fed. Reg. at 8304-05.

specifics on the timing for such transitions, such as whether they should occur immediately or coincide with policy renewal phases.

V. FEMA Proposes to Create Five Accompanying Endorsements for the New Form.

FEMA proposes to create five accompanying endorsements to allow homeowners to expand or exclude coverage based on risk. If finalized, these new endorsements will be available only to amend the Homeowner Flood Form; they would not be available to amend the current SFIP forms for other types of policyholders. According to FEMA, the new endorsements will provide policyholders with “a more personalized, customizable product than the NFIP has offered during its 50 years.”¹³ The five proposed endorsements are:

- (1) *Increased Cost of Compliance Endorsement*: Under this endorsement, when an insured building sustains a flood loss and the community declares the building substantially or repetitively damaged, ICC coverage will pay up to \$30,000 for the cost to elevate, demolish, or relocate the building. Similar to the current Dwelling Form, FEMA proposes to offer this additional coverage for the cost to comply with State or community floodplain management laws or ordinances after a direct loss from flood. However, now ICC coverage will be provided as part of an endorsement, instead of within the policy form itself. For any homeowner policyholder who could receive ICC benefits, FEMA would automatically add the ICC endorsement to the policy—which makes this endorsement the only endorsement considered mandatory by FEMA.
- (2) *Actual Cash Value Loss Settlement Endorsement*: As noted above, in the new Form, replacement cost value (RCV), rather than actual cost value (ACV) would be the default loss settlement method. In making this decision, FEMA noted that it believes most property owners intend to insure buildings for replacement cost or up to the statutory limit of \$250,000 for a single-family building in order to come as close as possible to being made whole. Nevertheless, FEMA proposes to add an ACV Loss Settlement endorsement to offer policyholders the choice of insuring their building for ACV for a reduced premium.
- (3) *Temporary Housing Expense Endorsement*: FEMA proposes creating an endorsement that would provide homeowners the option of purchasing additional coverage to receive compensation in the event they are displaced from their insured property due to flood while their home is undergoing repair or in the event of an evacuation.
- (4) *Basement Coverage Endorsement*: FEMA proposes creating an endorsement that would allow limited simplified coverage for basements. This endorsement would allow FEMA to insure up to the selected Coverage A sublimit against direct physical loss by or from flooding to the basement for an additional premium. The endorsement would also provide coverage up to the selected Coverage C limit against direct physical loss by or from flood to personal property in a basement; and in an enclosure, the policy would only cover appliances installed in their functioning locations and, if necessary for operation, connected to a power source.

¹³ *Id.* at 8288.

- (5) *Builder's Risk Endorsement*: FEMA proposes creating an endorsement that would cover buildings under construction. Under the endorsement, FEMA would provide coverage for the dwelling under construction at the described location, and if the building is not walled or roofed yet, then the coverage would apply (1) only while construction is in progress, or (2) if construction is halted only for a period of 90 consecutive days to clarify that the endorsement would not cover an incomplete building that has been sitting for several months. The endorsement would name the builder as an additional insurance party and provide business rules within the endorsement to avoid automatic renewal billing of the policy for the builder. The endorsement would also add language regarding mortgagees to clarify that a holder of a construction loan upon which draws have been paid shall be considered the "mortgagee" under the policy.

FEMA must work with the prudential regulators to address lenders' compliance with the mandatory purchase requirement as it relates to the use of these endorsements for designated loans. The guidance should also clarify whether lenders will be obligated to escrow the extra premiums linked with these new endorsements.

For example, FEMA should work with the prudential regulators to provide guidance on the use of the ACV endorsement. Specifically, our members have questions about whether a borrower's selection of this endorsement could mean that the loan does not comply with statutory mandates due to the resultant decrease in coverage levels. Although FEMA posits that the majority of policyholders would opt for RCV as the standard method for loss settlement, a significant number might prefer ACV, particularly those facing higher premiums under Risk Rating 2.0.¹⁴ To maintain adherence to flood insurance regulations and ensure uniform practices among all lending institutions, prudential regulators must determine whether regulated lenders are obligated to prohibit policyholders from selecting this endorsement.

In addition, regulators must provide guidance on the use of the Builder's Risk Endorsement. As indicated in Section I of this letter, the new Form, excluding any endorsements, would not cover buildings under construction. To extend coverage to these buildings, the Builder's Risk Endorsement must be added to the policy. Therefore, it is imperative that the prudential regulators specify whether this endorsement will be required for designated loans covering buildings in the course of construction. Should the endorsement be mandated, further instructions will be needed on the timing for lenders to enforce this requirement.¹⁵

Moreover, considering the regulatory stipulation for lenders to escrow flood insurance premiums and associated fees upon the purchase of insurance for buildings under construction,¹⁶ there is a need for supplementary guidance on the impact of this endorsement on escrow obligations. This includes when escrow should commence and the methodology for calculating escrow amounts. For example, if lenders incorporate the one-year Builder's Risk Endorsement during the construction phase, guidance is needed on recalculating the escrow following the conclusion of the endorsement period.

¹⁴ According to the Government Accountability Office, about 66% of NFIP policyholders will see an increase in their premiums under Risk Rating 2.0. See U.S. Gov't Accountability Office, GAO-23-105977, *Flood Insurance: FEMA's New-Rate Setting Methodology Improves Actuarial Soundness but Highlights Need for Broader Program Reform*, at 2 (July 31, 2023), <https://www.gao.gov/assets/gao-23-105977.pdf>.

¹⁵ Similar to how the Q&As currently address when a lender must purchase flood insurance for construction loans. See 87 Fed. Reg. 32880 (Construction 4).

¹⁶ See 87 Fed. Reg. at 32881 (Construction 6).

VI. Conclusion

The Associations appreciate the opportunity to comment on FEMA's proposed changes to the SFIP form. As highlighted in the preceding comments, numerous concerns require resolution by FEMA and the prudential regulators before the new Form is finalized. To guarantee that these matters are comprehensively addressed before the new Form and its endorsements are adopted and implemented, it is crucial for FEMA to engage in a collaborative process with the prudential regulators. This partnership will ensure that the finalized policy accurately reflects the needs and addresses the challenges faced by all stakeholders.

Sincerely,

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