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May 17, 2021

Office of the Comptroller of the Currency
Chief Counsel's Office
Attn: Comments Processing
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Docket ID OCC-2020-0033

Kevin J. Kramp, Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
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Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW,
Washington, DC 20551
Docket No. R–1742

Melane Conyers-Ausbrooks, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
NCUA RIN 3133–AF31

James P. Sheesley
Assistant Executive Secretary
Attention: Comments-RIN 3064–ZA16/Legal ESS
Federal Deposit Insurance Corporation
550 17th St NW
Washington, DC 20429

Re: Comments on Proposed Interagency Questions and Answers Regarding Private Flood Insurance

Dear Ladies and Gentlemen:

The undersigned organizations respectfully submit these comments on the interagency questions and answers regarding private flood insurance (Q&A) proposed by the Office of Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), the Farm Credit Administration, and the National Credit Union Administration (NCUA) (Agencies).[1] We appreciate the Agencies' efforts to clarify the application of private flood insurance acceptance rules.

We recognize the Agencies' long-standing practice of addressing the practical and operational challenges of applying flood insurance rules by developing and disseminating detailed Q&As, through a process that gathers and considers input from a broad range of stakeholders. The Agencies' private flood insurance acceptance regulations (the "Regulations") apply across a complex commercial, residential, and multifamily financial system, and the Q&As can help provide clarity on discrepancies between regulatory intent and policy implementation. Often, rules that seem straightforward can become complicated when applied in the operational context of real estate finance. Rules designed for one situation can have an unintended consequence on another. For example, rules that work in single-family residential lending situations are often less clear in the world of multi-family or commercial transactions.

Consequently, we believe it is important for the Agencies to note on the face of the finalized Q&As that they are guidance only and should not serve as the basis for supervisory action. As recently noted in the final rule regarding the Role of Supervisory Guidance, the Agencies recognize a difference between supervisory guidance and formal regulations, and how agencies expect institutions and their management to react to supervisory guidance.[2] As a result, lenders/servicers should not be cited for failures to adhere to the Q&As themselves. A clear statement noting this important distinction would assist regulated institutions in understanding supervisory expectations with regards to the final Interagency Q&As.

We have developed our comments and responses to the proposed Q&As, gathering the collective input of a broad range of industry participants, including servicers, lenders, service providers, and insurance providers. Based on that input, we highlight areas of possible confusion and opportunities for clarity, as well as providing feedback as to the factual and operational scenarios

[1] 86 Fed. Reg. 14696 (March 19, 2020); available at https://www.federalregister.gov/documents/2021/03/18/2021-05314/loans-in-areas-having-special-flood-hazards-interagency-questions-and-answers-regarding-private

[2] See *Role of Supervisory Guidance* final rules at 86 Fed. Reg. 18173 (April 8, 2021) (Federal Reserve); 86 Fed. Reg. 12079) (FDIC); 86 Fed. Reg. 9253 (Feb. 21, 2021) (OCC); and 86 Fed. Reg. 7949 (Feb. 3, 2021) (NCUA).

our members experience. We hope that sharing practical operational perspectives will improve the functionality of the Q&As and make them more effective as tools for guidance.

Consistent with the Agencies' organization of the Q&As, our specific comments in many cases include the full text of the Q&As[3] and generally address the Q&As in the format set forth by the Agencies as follows:

- Mandatory Acceptance
- Discretionary Acceptance
- General Compliance

Due to the related issues raised by Mandatory 2 and Discretionary 4, which both address the scope and timing of private insurance policy review, and Private Flood Compliance 4 and 5, which both address the type and amount of information a lender/servicer should review, we discuss those topics collectively. We also include a general comment and proposed additional Private Flood Compliance Q&A regarding the acceptance of electronic records, which would apply across multiple Q&As. Finally, we address current regulatory requirements regarding Notice to the Administrator of FEMA, which does not appear to serve a purpose in the context of private flood insurance policies.

I. PRIVATE FLOOD INSURANCE – MANDATORY ACCEPTANCE

A number of the proposed Q&As refer to "reviews" of private flood insurance policies. As a general matter, it may be helpful to clarify that a private flood insurance policy will be subject to two different reviews.

First, as with any flood insurance policy, including NFIP policies, the lender/servicer must conduct the mandatory purchase requirement review in connection with a "MIRE" event (i.e., when a regulated lender makes, increases, renews, or extends any designated loan).[4] This review would include, among other things, determining whether the policy contains the appropriate coverage limits, deductible, term of coverage, and mortgagee clause.

Second, the lender/servicer must determine whether a private flood insurance policy satisfies the statutory definition of private flood insurance such that the policy must be accepted or could otherwise be accepted by a lender under the discretionary acceptance criteria. Clarification throughout the Q&As as to which review is the subject of the guidance would be helpful to the industry.

[3] For ease of review, we have omitted from the Q&As the footnotes citing specific regulatory provisions.

[4] See, e.g., 12 C.F.R. § 22.3(a).

A. Compliance aid assurance clause Q&As.

1. Mandatory 4

Mandatory 4: *Did the Agencies intend the compliance aid assurance clause to act as a conformity clause that would make a private policy conform to the definition of private flood insurance?*

> *No. The Agencies did not intend the compliance aid assurance clause to act as a conformity clause. Rather, the compliance aid assurance clause is intended to facilitate the ability of lenders, as well as consumers, to recognize policies that meet the definition of "private flood insurance" and promote the consistent acceptance of policies that meet this definition. The compliance aid provision is intended to leverage the expertise of insurers to assist lenders in satisfying the requirements of the Regulation.*

Comment

The interpretation of insurance contracts, including whether the compliance aid assurance clause acts as a conformity clause, is a matter of state law. Accordingly, this Q&A is outside of the scope of federal flood insurance statues or regulations, or federal agencies' authority to interpret and apply those federal statutes and regulations.

Therefore, while this may in fact be a frequently asked question, we recommend that the agencies address it by providing guidance that this is a matter of state insurance contract law, as follows:

> ~~*No. The Agencies did not intend the compliance aid assurance clause to act as a conformity clause. Rather, t*~~*The compliance aid assurance clause is intended to facilitate the ability of lenders, as well as consumers, to recognize policies that meet the definition of "private flood insurance" and promote the consistent acceptance of policies that meet this definition. The compliance aid provision is intended to leverage the expertise of insurers to assist lenders in satisfying the requirements of the Regulation.* *The question of whether the compliance aid assurance clause may be a conformity clause raises questions of state insurance contract law that fall outside of federal flood insurance statutes or regulations, or the scope of the Agencies' authority to interpret or apply federal flood insurance statutes or regulations.*

2. Mandatory 5

Mandatory 5: Is a lender required to accept a flood insurance policy issued by a private insurer that includes the compliance aid assurance clause? Conversely, may a lender reject a flood insurance policy issued by a private insurer solely because it does not contain the compliance aid assurance clause?

A lender is not required to accept a flood insurance policy issued by a private insurer solely because the policy contains the compliance aid assurance clause if the lender chooses to conduct its own review and determines the flood insurance policy actually does not meet the mandatory acceptance requirements.

If a flood insurance policy issued by a private insurer does not include the compliance aid assurance clause, the lender must still review the policy to determine if it meets the requirements for private flood insurance as set forth in the Regulation before the lender may choose to reject the policy.

Comment

Our members have commented that this Q&A is not clear as to whether the "required to accept" phrase in the Question applies only to an assessment of whether the policy meets the definition of "private flood insurance" or if a lender could be required to accept the policy even if the policy is otherwise insufficient, e.g. if for less than the required dollar amount of coverage. The Q&A should be clarified as to this issue.

Further, the second paragraph of the answer implies that lenders must always perform a specific review to ascertain whether a policy meets the definition of private flood insurance, however such review is not required, particularly if the lender has already determined the policy is unacceptable for other reasons such as insufficient coverage amount. Thus, we propose the following revision:

A lender may rely on the compliance aid assurance clause to conclude that a policy meets the definition of private flood insurance. However, lenders may choose to conduct their own policy reviews and reject policies that do not actually meet the definition of private flood insurance, or choose to accept such policies under the discretionary acceptance provisions.

Absence of a compliance aid assurance clause does not relieve lenders of the requirement to accept policies that meet the definition of "private flood insurance" and otherwise provide coverage in adequate amount.

3. Mandatory 7

Mandatory 7: *What additional reviews does a lender need to conduct if the flood insurance policy issued by a private insurer includes the compliance aid assurance clause?*

Although a lender may rely on the compliance aid assurance clause to determine that a flood insurance policy meets the definition of private flood insurance in the Regulation, the lender must also ensure that the coverage is 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. The lender should also ensure

that other key aspects of the policy are accurate, such as the borrower's name and property address. See also Q&A Mandatory 6.

Comment

Our members have expressed concern about the inclusion of the phrase "key aspects of the policy" because it is not clear what would be considered "key aspects of the policy." Since there are no statutory or regulatory requirements that a lender must ensure the accuracy of a borrower's name and address, including these examples could create confusion for regulated lenders. This is particularly true in the commercial context where the named borrower on a loan may not necessarily be the same as the named insured on a flood insurance policy.

To address the uncertainty resulting from an undefined reference to "key aspects of the policy," our members recommend deleting the sentence entirely. Alternatively, the Q&A could instruct the lender to review the policy as it would other insurance policies for safety and soundness considerations.

Consistent with the alternative recommendation above, we suggest that the Answer to Mandatory 7 be modified as follows:

~~Although a~~A lender may rely on the compliance aid assurance clause to determine that a flood insurance policy meets the definition of private flood insurance in the Regulation. The lender must also ensure that the coverage is 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. The lender should also review the private flood insurance policy as it would other insurance policies for the property ~~ensure that other key aspects of the policy are accurate, such as the borrower's name and property address~~ in accordance with safety and soundness principles. See also Q&A Mandatory 6.

4. Mandatory 9

Mandatory 9: *If the compliance aid assurance clause is on the declarations page, may a lender accept the policy without further review?*

If the compliance aid assurance clause is included on the declarations page, a lender may accept the policy without further review to determine whether the policy meets the definition of private flood insurance. However, a lender must also ensure compliance with the mandatory purchase requirement. See Q&A Mandatory 7.

Comment

For the same reasons described above in Mandatory 7, we recommend that Mandatory 9, which also addresses the relationship between policy review and the compliance aid assurance clause, be revised as shown below:

> *If the compliance aid assurance clause is included on the declarations page, a lender may ~~accept the policy without further review to~~ determine ~~whether~~ the policy meets the definition of private flood insurance without further review. However, a lender must also ensure compliance with the mandatory purchase requirement. See Q&A Mandatory 7.*

II. PRIVATE FLOOD INSURANCE – DISCRETIONARY ACCEPTANCE

A. Discretionary 3

Discretionary 3: *How can a lender evaluate the sufficiency of an insurer's solvency, strength, and ability to satisfy claims when determining whether a flood insurance policy provides sufficient protection of the loan, consistent with general safety and soundness principles?*

> *A lender may evaluate an insurer's solvency, strength, and ability to satisfy claims by obtaining information from the State insurance regulator's office of the State in which the property securing the loan is located, among other options. A lender can rely on the licensing or other processes used by the State insurance regulator for such an evaluation. See Q&A Coverage 1.*

Comment

Our members appreciate this Q&A, which will be helpful to many lenders, particularly small lenders, that may not otherwise be familiar with the process of determining the sufficiency of an insurer's solvency, strength, and ability to satisfy claims. To make it even more helpful, we suggest further expanding on the "among other options" that a lender could consult when making determinations about an insurer's solvency, strength, and ability to satisfy claims, as follows:

> *A lender may evaluate an insurer's solvency, strength, and ability to satisfy claims by obtaining information from the State insurance regulator's office of the State in which the property securing the loan is located among other options. A lender can rely on the licensing or other processes used by the State insurance regulator for such an evaluation. A lender also could rely on third-party sources of information relevant to an insurer's solvency, strength, and ability to satisfy claims, such as credit rating agencies including, but not necessarily limited to, AM Best, Moody's, Standard and Poor's, Demotech, Fitch Ratings, or Kroll Bond Rating Agency. See Q&A Coverage 1.*

III. GENERAL COMMENT REGARDING: REVIEW OUTSIDE A MIRE EVENT AND SUFFICIENCY OF INFORMATION TO CONDUCT REVIEW

A. Mandatory 2 and Discretionary 4

Mandatory 2 and Discretionary 4 both address the extent to which a private policy must be reviewed outside the context of loan origination. While we appreciate that the Agencies are addressing post-origination circumstances when a lender may review a private flood policy, the responses to these Q&As presume that lenders/servicers have a statutory or regulatory requirement to review a private flood policy at times other than initial acceptance of a private flood policy when the lender makes, increases, renews, or extends a designated loan (i.e., a MIRE event). There is no such requirement.

Mandatory 2: *Apart from loan origination, when must a lender review a flood policy issued by a private flood insurer?*

> *Once a flood insurance policy issued by a private insurer comes up for renewal or any time the borrower presents the lender with any new flood insurance policy issued by a private insurer, regardless of whether a triggering event occurred (making, increasing, extending or renewing a loan), the lender must review the policy to determine whether it meets the mandatory acceptance criteria. A lender may determine that the policy meets the mandatory acceptance criteria without further review if the policy or an endorsement to the policy includes the compliance aid assurance clause. If the policy does not meet the mandatory acceptance criteria, the lender may still accept the policy if it meets the discretionary acceptance criteria or, if applicable, the mutual aid plan criteria. If the policy does not meet the mandatory acceptance, discretionary acceptance, or mutual aid plan criteria, the lender must notify the borrower in accordance with the force placement provisions of the Regulation. If the borrower does not purchase flood insurance that complies with the Regulation, the lender must purchase insurance on the borrower's behalf.*
>
> *If the lender has previously reviewed the flood insurance policy under the discretionary acceptance provision to ensure that the policy meets the private flood insurance requirements of the Regulation, the lender may rely on its previous review, provided there are no changes to the terms of the policy. However, as required by the Regulation, the lender must document its conclusion regarding sufficiency of protection of the loan in writing. See Q&A Discretionary 4.*

Comment

These proposed Q&As conflict with the previously proposed Q&A Applicability 8, which states "[a]part from the requirements mandated when a loan is made, increased, extended, or renewed, a 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."

In that Q&A, the Agencies acknowledge that there is no lender/servicer obligation to review flood coverage aside from a MIRE event, and there is nothing in the Biggert-Waters Act that would indicate otherwise. Indeed, Congressional intent can be presumed to encourage, and in some cases mandate, lender acceptance of private flood policies; and requiring review of such policies at yearly renewals would clearly discourage acceptance.

In Mandatory 2, the Agencies should clarify that private flood policies *must* be reviewed at a MIRE event and otherwise *may* be reviewed periodically consistent with safety and soundness principles. The proposed Answer, however, improperly expands the instances in which a lender/servicer *must* review a private policy beyond a MIRE event. In addition, we suggest the Agencies refer throughout to acceptance "criteria," i.e., specifications or standards, rather than "requirements," unless referring to a specific required action. To ensure that the proposed Q&A does not unnecessarily expand the scope of private policy review beyond the statutory and regulatory requirement of such review at a MIRE event, and for additional clarity, we suggest the following revisions:

> ***Mandatory 2:*** *Apart from loan origination, when must a lender review a flood policy issued by a private flood insurer?*
>
> *A lender must review a private flood insurance policy at the making, increasing, extending, or renewing of a designated loan. Thereafter, ~~once~~ when a flood insurance policy issued by a private insurer comes up for renewal or any time the borrower presents the lender with ~~any new~~ a flood insurance policy issued by a private insurer~~, regardless of whether a triggering event occurred (making, increasing, extending or renewing a loan)~~, the lender must have "*effective internal controls in place through appropriate policies, procedures, training, and monitoring to ensure compliance with the requirements of the regulation."[5]*. For example, a ~~A~~ lender may determine that the policy meets the mandatory acceptance criteria without further review if the policy or an endorsement to the policy includes the compliance aid assurance clause. If the policy does not meet the mandatory acceptance criteria, the lender may still accept the policy if it meets the discretionary acceptance criteria or, if applicable, the mutual aid plan criteria. If the policy does not meet the mandatory acceptance, discretionary acceptance, or mutual aid plan criteria, the lender must notify the borrower in accordance with the force placement provisions of the Regulation. If the borrower does not purchase flood insurance that complies with the Regulation, the lender must purchase insurance on the borrower's behalf.*

[5] Interagency Examination Procedures, *Flood Disaster Protection Act,* FDCA 22 (2019); available at: https://www.federalreserve.gov/supervisionreg/caletters/CA%2019-10%20Letter%20Attachment%20Interagency%20Flood%20Disaster%20Protection%20Act%20Exam%20Procedures.pdf. .

If the lender has previously reviewed the flood insurance policy under the discretionary acceptance provision to ensure that the policy meets the private flood insurance acceptance criteria~~requirements~~ of the Regulation, the lender may rely on its previous review. However, as required by the Regulation, the lender must document its conclusion regarding sufficiency of protection of the loan in writing. See Q&A Discretionary 4.

***Discretionary 4**: If a flood insurance policy issued by a private insurer that was originally accepted in accordance with the discretionary acceptance requirements is renewed annually, is the lender required to review the policy upon renewal?*

If a lender had accepted a flood insurance policy issued by a private insurer in accordance with the discretionary acceptance requirements and the policy is renewed, the lender must review the policy upon renewal to ensure that it continues to meet the discretionary acceptance requirements. The lender must also document its conclusion regarding sufficiency of the protection of the loan in writing upon each renewal, to indicate that the policy continues to provide sufficient protection of the loan.

Comment

In addition to the comments directed specifically to Mandatory 2, we note that this question draws a distinction between origination and renewal, yet there is no statutory requirement to review policies at renewal. Private flood policies should be treated akin to NFIP policies, which carry no requirements for policy review at the time of renewal. Accordingly, we recommend revising Discretionary 4 as follows:

***Discretionary 4**: If a flood insurance policy issued by a private insurer that was originally accepted in accordance with the discretionary acceptance criteria ~~requirements~~ is renewed annually, is the lender required to review the policy upon renewal?*

If a lender had accepted a flood insurance policy issued by a private insurer in accordance with the discretionary acceptance ~~requirements~~ criteria and the policy is renewed, the lender ~~must~~ should have procedures ~~upon renewal~~ to ensure that the policy continues to meet the discretionary acceptance criteria ~~requirements~~. The lender must also have procedures to ensure that, ~~document its conclusion regarding sufficiency of the protection of the loan in writing~~ upon each renewal, ~~to indicate that~~ the policy continues to provide sufficient protection of the loan.

B. Private Flood Compliance 4 & 5

Related to the timing issue of when private policies should be reviewed, proposed Private Flood Compliance 4 and 5 discuss the types of information and how much information would be sufficient for a lender/servicer to determine whether a private flood insurance policy satisfies the statutory definition of private flood insurance. Private Flood Compliance 4 addresses the sufficiency of information in the context of origination, and Private Flood Compliance 5 considers whether a declarations page would provide sufficient information for a lender to

determine whether a private flood insurance policy satisfies the statutory definition of private flood insurance. Due to the regulatory treatment of the sufficiency of a declarations page as to the mandatory purchase requirement and the potential for the contradiction between Private Flood Compliance 4 and 5, we have addressed these proposed Q&As jointly.

Private Flood Compliance 4: *If the policy is not available prior to closing, what can the lender rely on to make sure the policy meets the requirements of the Regulation?*

> *The Act and Regulation do not specify the acceptable types of documentation for a lender to rely on when reviewing a flood insurance policy issued by a private insurer. Lenders should determine whether they have sufficient evidence to show the policy meets the requirements under the Regulation.*
>
> *Lenders can take steps to help mitigate against closing delays such as designating employees responsible for reviewing flood policies, training employees, and requesting additional information from insurers early in the process. If the lender does not have enough information to determine if the policy meets the private flood insurance requirements under the Regulation, then the lender should timely request additional information as necessary to complete its review.*

Private Flood Compliance 5: *Under existing force placement requirements, a declarations page is sufficient to evidence a borrower's purchase of a flood insurance policy. Does the declarations page have sufficient information for a lender to determine whether the policy complies with the Regulation?*

> *It depends. If the declarations page provides enough information for the lender to determine whether the policy meets the mandatory acceptance provision or discretionary acceptance provision of the Regulation or if the declarations pages contains the compliance aid assurance clause, then the lender may rely on the declarations pages. However, if the declarations page does not provide enough information for the lender to determine whether the policy satisfies the mandatory acceptance provision or discretionary acceptance provision of the Regulation, the lender should request additional information about the policy to aid in making its determination.*

Comment

Our members have expressed concern that Private Flood Compliance 4 does not adequately address a common dilemma lenders face when trying to get a copy of a private flood insurance policy during loan origination. In most cases, a copy of the insurance policy will not be available until after the loan closing. For example, insurance companies usually do not issue the policy until the borrower has an insurable interest in the property, which requires that the transaction close before the policy is issued.

Since it is sometimes necessary for a lender to review the policy itself to determine whether it meets the private flood insurance acceptance criteria, the current proposed answer to Private

Flood Compliance 4 does not provide practical guidance for lenders. Inevitably, there will be situations where it is not possible to obtain a copy of a private flood insurance policy until after the loan is closed. As a result, this proposed answer also introduces certain unintended consequences such as unnecessary force placement of flood insurance and situations where a force-placed policy and a private flood insurance policy are in place concurrently.

If a lender lacks sufficient information to conduct a complete review of a private policy, a lender must force place to avoid a lapse. Industry stakeholders go to great lengths to ensure coverage is placed on a loan only when a lender makes the determination that force-placement is absolutely necessary. Neither lenders nor insurers have incentive to place coverage when is it not needed, only to later to have to refund all premiums. The refund process creates a significant administrative burden for the lender or servicer and the borrower and may lead to damaging the customer's experience with the lender.

This practical issue was recognized in the context of Force Placement 11, which addresses documentation "sufficient to demonstrate evidence of flood insurance in connection with a lender's refund of premiums paid by a borrower for force-placed insurance during any period of overlap with borrower-purchased insurance." As noted in the answer to Force Placement 11 and as stated in the Regulation (which is recognized in the Answer to Proposed Private Flood Compliance 5), "a lender must accept from the borrower an insurance policy declarations page that includes the existing flood insurance policy number and the identity of, and contact information for, the insurance company or its agent."

In that circumstance, if the borrower presents a declarations page from a private insurance policy, a lender would be required to accept that policy for purposes of refunding premiums associated with a lender-placed policy. Importantly, the regulation allows the lender/servicer a 30-day window within which to terminate the force-placed insurance and refund any overlapping premiums and fees charged. By allowing lenders a 30-day window in which to review a policy, the Agencies have recognized that there is a difference between receipt of proof of some coverage and determination of whether that coverage is sufficient.

Moreover, Private Flood Compliance 5 does not distinguish between a declarations page that is received at the time of origination and a declarations page that is received at the time of renewal. The proposed Answer to Private Flood Compliance 4 suggests that a loan closing could be delayed pending receipt of the full private policy for review. Based on the plain language of the force-placement regulation, however, the lender/servicer would not have the same option as a possible means of determining whether a private flood insurance policy satisfies the statutory definition of private flood insurance and remain in compliance with the force-placement provisions.

For example, if a borrower has an existing NFIP policy that is expiring, and the borrower wants to replace that NFIP policy with a private flood policy, the lender/servicer would conduct a review of that private policy to determine whether the policy satisfies the statutory definition of

private flood insurance. Under the force placement regulation, however, the lender must accept the declarations page as proof of coverage.

If the lender is unable to make a determination of acceptability based on the declarations page alone, and the expiring policy is set to expire, should the lender allow coverage to lapse, or should the lender debit the borrower's escrow account to pay the premium for the private policy? For the former, we observe it would presumably be a violation of RESPA to allow for a lapse in coverage when it could be prevented by advancing funds. For the latter, the borrower's escrow account would be debited to pay a premium for a private policy that may ultimately be rejected for failure to satisfy the statutory definition of private flood insurance. Furthermore, the private flood insurance carrier would be unlikely to refund premium for the time period that carrier's policy was in force and liable for claim activity.

To ensure consistency across the regulations and to acknowledge the operational reality of obtaining full copies of private flood insurance policies, our members request that the Agencies recognize in the private flood insurance context – as has been recognized in the force placement context – that there is a difference between receipt of proof of some coverage (such as a declarations page or a binder) and a determination of whether that coverage is sufficient (full policy review). Providing this guidance will both solve the practical dilemma for lenders and further the Congressional intent of encouraging and accepting private flood insurance in the marketplace.

Specifically, we suggest that the following two new sentences be added to the last paragraph of the proposed answer to Private Flood Compliance 4:

> *If the information necessary to make this determination cannot be obtained until after loan closing, the lender may close the loan and review the policy after closing to determine whether it satisfies the definition of private flood insurance. If the lender determines after this review that the policy fails to satisfy the definition of private flood insurance and that failure creates a lapse in coverage, the lender should comply with the force-placed insurance requirements of the Act. See Force Placement 11.*

Similarly, we suggest that the following two new sentences be added to the end of the proposed answer to Private Flood Compliance 5:

> *If the information necessary to make this determination cannot be obtained until after the policy premium is paid, the lender may pay the premium and review the policy upon receipt to determine whether it satisfies the definition of private flood insurance. If the lender determines after this review that the policy fails to satisfy the definition of private flood insurance, and that failure creates a lapse in coverage, the lender should comply with the force-placed insurance requirements of the Act. See Force Placement 11.*

IV. PRIVATE FLOOD INSURANCE – PRIVATE FLOOD COMPLIANCE

A. Private Flood Compliance 1

Private Flood Compliance 1: *What is the maximum deductible a flood insurance policy issued by a private insurer can have for residential or commercial properties located in an SFHA?*

The maximum deductible for a flood insurance policy issued by a private insurer varies depending on whether the lender accepts the policy under the mandatory acceptance or the discretionary acceptance provision. For purposes of compliance with the mandatory acceptance provision, the Regulation provides that a policy must contain a deductible that is "at least as broad as" in a Standard Flood Insurance Policy (SFIP)—i.e., no higher than the specified maximum under an SFIP—for any total coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender. For a private policy with a coverage amount exceeding that available under the NFIP, the deductible may exceed the specific maximum deductible under an SFIP. However, for safety and soundness purposes, the lender should consider whether the deductible is reasonable based on the borrower's financial condition, among other factors. See Q&A Amount 9.

- *For example, if a private policy for a commercial building provided $1,000,000 of flood insurance coverage, which is in excess of the NFIP maximum coverage of $500,000 for a commercial building, then it would be acceptable for a million-dollar policy to have a deductible higher than the maximum deductible for a policy available under the NFIP. The lender should consider whether the deductible is reasonable based on the borrower's financial condition.*
- *Similarly, if a private policy for a residential building provided $1,000,000 of flood insurance coverage, which is in excess of the NFIP maximum coverage of $250,000 for a residential building, then it would be acceptable for a million-dollar policy to have a deductible higher than the maximum deductible for a policy available under the NFIP. The lender should consider whether the deductible is reasonable based on the borrower's financial condition.*

For purposes of compliance with the discretionary acceptance provision, the Regulation requires that the policy provide sufficient protection of the loan, consistent with general safety and soundness principles. Among the factors a lender could consider in determining whether a policy provides sufficient protection of a loan is whether the policy's deductible is reasonable based on the borrower's financial condition. Unlike the limitation on deductibles for policies accepted under the mandatory acceptance provision for any total coverage amount up to the maximum available under the NFIP, a lender can accept a flood insurance policy issued by a private insurer under the discretionary acceptance provision with a deductible higher than that for an SFIP for a similar type of

> *property, provided the lender has determined the policy provides sufficient protection of the loan, consistent with general safety and soundness principles.*
>
> *Whether the lender is evaluating the policy under the mandatory acceptance provision or the discretionary acceptance provision, 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. See Q&A Amount 9.*

This Q&A on private flood insurance provides an opportunity to clarify how the statement in Q&A Amount 9 referenced in the final paragraph of this Q&A applies differently to a private flood insurance policy where the covered "property" includes multiple individual buildings vs. an NFIP policy or private flood insurance policy where the "property" is limited to a single building.

Under an NFIP General Property Form, which provides that "[o]nly one building which you specifically described in the application, may be insured under this policy" the insurable value of the "property" covered by the policy is equal to the insurable value of the "building" covered by the policy. In that situation, the statement in Amount 9 prohibits the lender from allowing the borrower to use a deductible amount equal to the insurable value of that insured building (i.e., here, "property" equals "building"). This is also true for a private flood insurance policy that covers only a single building.

In contrast, for a private flood insurance policy where the "property" covered by the policy includes *multiple* buildings, the insurable value of the "property" covered by the policy is sum of the insurable value of all of the buildings and thus greater than any individual building covered by the policy. In this situation, the statement in Amount 9 would only prohibit the lender from allowing the borrower to use a deductible amount equal to the total insurable value of *all* property covered by the policy – regardless of the value of a single building covered by the policy. As a result, Amount 9 does not prohibit a lender from allowing a borrower to use a deductible that may be equal to the insurable value of an individual building covered by the policy, so long as the deductible does not exceed the total insurable value of all of the property covered by the policy.

For the reasons above, we recommend inserting an additional sentence to the final paragraph of Private Flood Compliance 1, as follows:

> *Whether the lender is evaluating the policy under the mandatory acceptance provision or the discretionary acceptance provision, 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. However, where the "property" covered by the policy includes multiple buildings, a lender may allow the borrower to use a deductible amount equal to the insurable value of an individual building, so long as the deductible does not exceed the total insurable value of all of buildings included in the property covered by the policy. See Q&A Amount 9.*

For clarity and consistency, we recommend that the agencies also add the additional sentence to Amount 9 as part of the current round of updates to the general flood insurance Q&As.

As an additional comment in connection with Private Flood Compliance 1, industry appreciates the inclusion of this Q&A because the role a deductible plays, or does not play, in determining the amount of coverage required for flood insurance compliance as opposed to the role of the deductible in safety-and-soundness considerations has been a source of confusion. To that end, we note that comments in response to the agencies' recent proposal to update the existing flood insurance Q&As have included a recommendation to add a new, foundational Q&A that describes the function of a deductible more generally and distinguishes between the role of a deductible in a safety-and-soundness consideration and the role of the deductible in determining the adequacy of coverage in satisfaction of the mandatory purchase requirement.[6]

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[6] See MBA *Comments on Proposed Interagency Questions and Answers Regarding Flood Insurance*, pp. 4-5 (Oct. 27, 2020) recommending a new Q&A, as follows:

> **Coverage [NEW]. For purposes of the mandatory coverage requirements, is the amount of coverage provided by a flood insurance policy reduced by the amount of the deductible under that policy?**
>
> No. A deductible in a flood insurance policy does not reduce the amount of coverage provided by the policy. Rather, an insurance policy deductible is "a fixed amount of an insured loss that is the responsibility of the insured and that is incurred before any amounts are paid for the insured loss under the insurance policy." [Footnote citing FEMA as source.] As a result, when determining whether a policy provides the necessary coverage, the lender should consider the coverage limits provided in the flood insurance policy separately from consideration of the deductible contained within that policy.
>
> For example, a property with an estimated insurable value of $100,000 securing a loan with an unpaid principal balance of $50,000 is required to have flood insurance with a $50,000 coverage limit and is permitted to have a $10,000 deductible. The deductible reduces the insured loss payable amount and does not reduce the coverage amount. Thus, in the event of a claim where the loss amount is $50,000, the policy would pay the amount of the loss up to the coverage limit ($50,000) in excess of the deductible ($10,000) or $40,000 ($50,000 - $10,000). In the event of a claim where the loss amount is $15,000, the policy would pay the amount of the loss up to the coverage limit in excess of the deductible, or $5,000 ($15,000 - $10,000). If the property were to sustain a $60,000 loss (of the estimated insurable value of $100,000), the policy would pay the amount of loss up to the coverage limit in excess of the deductible or $50,000 ($60,000 - $10,000). In all events, if the loss payable amount is less than the deductible, no payment would be made by the insurance carrier. Rather, the insured would be solely responsible for that loss.
>
> While a policy deductible is not relevant to a determination of whether a policy provides the necessary coverage limits, lenders should consider the possible safety and soundness impact of the policy deductible. For example, in Coverage 1, a policy's deductible may be a factor a lender considers in determining whether a private policy "provides sufficient protection of a loan." Similarly, as provided in Amount 9, it may not be a sound business practice to always allow the maximum deductible.

We agree that such a foundational Q&A could clarify that a deductible in a flood insurance policy does not reduce the amount of coverage provided by the policy and that, rather, an insurance policy deductible is a fixed amount of an insured loss that is the responsibility of the insured and that is incurred before any amounts are paid for the insured loss under the insurance policy. Such a foundational Q&A would clarify that when determining whether a policy provides the necessary coverage, the lender should consider the coverage limits provided in the flood insurance policy separately from consideration of the deductible contained within that policy.

V. GENERAL COMMENTS AND PROPOSED NEW Q&AS

A. *Acceptance Of Electronic Records*

A number of the proposed private flood Q&As discuss the documentation necessary to comply with certain statutory and regulatory obligations. *See* Q&A Mandatory 8, Q&A Discretionary 2, and Q&A Discretionary 4. For consistency, we recommend a new Private Flood Compliance Q&A that would explain that a lender or servicer's documentation requirement could be satisfied through an electronic record system, such as the following:

> ***Private Flood Compliance [NEW]:*** *May a lender rely on electronic record systems for "documentation" of lender actions and conclusions "in writing," and may a lender rely on electronic records containing information regarding a private flood insurance policy to determine sufficiency of coverage or other purposes?*
>
> *The Agencies recognize that lenders may use electronic record systems to document lending and servicing processes, including managing compliance with the National Flood Insurance Act (NFIA), and implementing regulations, including the private flood insurance acceptance regulations.[1] For example, when assessing the deductible on an insurance policy, a servicer will likely receive an electronic record, digest that information in a servicing system, perform a systematic edit comparing the deductible to a percent of the total coverage as well as fixed dollar thresholds and limits, and then either accept the deductible or produce an exception report indicating the deductible fails to meet allowable criteria. The decisioning occurs within the system and the acceptance of the deductible is witnessed by the fact that it did not appear on an exception report.*
>
> *Accordingly, a lender may use electronic record systems to "document" "in writing" the lender's conclusion as to sufficiency of coverage (see Discretionary Flood Compliance 2 and 4), or other processes employed to comply with the NFIA and implementing regulations, so long as that system provides supervisory staff with prompt and sufficient access to reliable information to permit adequate examination of compliance with the NFIA and implementing regulations.*
>
> *Similarly, a lender may rely on electronic records containing information regarding a private flood insurance policy, for example, to review sufficiency of coverage or other*

[1] See, e.g., OCC Advisory Letter, AL 2004-9, *Electronic Record Keeping* (June 21, 2004); available at: https://www.occ.gov/news-issuances/advisory-letters/2004/advisory-letter-2004-9.pdf

purposes, so long as that record includes the information relevant to that review or process, without regard to the pagination or format of that information (See Private Flood Insurance Compliance 4 and 5).

B. *Notice to Administrator of FEMA*

Our members have also identified a regulatory requirement and related Servicing Q&A that would not apply in the context of private flood insurance. Specifically, 12 CFR § 22.10 (and other agency corollary rules) requires notice of the identity of a servicer to the Administrator of FEMA at the time of a MIRE event, sale, or transfer of the designated loan as well as when there is a change in servicer. This regulation also provides that the WYO insurer will serve as Administrator's designee. Proposed Servicing 2 (Current Q&A 45) provides further guidance on this issue.

> **Servicing 2. When a lender makes a designated loan and will be servicing that loan, what are the requirements for notifying the Administrator of FEMA or the Administrator's designee, i.e. the insurance provider?**
>
> *The Regulation states that the Administrator's designee is the insurance company issuing the flood insurance policy. The borrower's purchase of an NFIP policy (or the lender's force placement of an NFIP policy) will constitute notice to FEMA when the lender is servicing that loan.*
>
> *In the event the servicing is subsequently transferred to a new servicer, the 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.*

This requirement under the Regulation and this Q&A serve a purpose only in cases where the property is insured through an NFIP policy. In contrast, where a property is insured through a private flood insurance policy, the Administrator of FEMA should not need to be notified of the identity of a servicer or of a servicing transfer. Further, private flood insurers who are not issuing NFIP policies through the WYO program would not seem to qualify as a designee of the administrator. Thus, Notice to Administrator of FEMA would not serve any purpose in the case of a property that has private flood insurance.

This situation could be remedied by a technical change to the Regulation. In the interim, our members request that the agencies acknowledge that there is no purpose served by this reporting requirement through the addition of a sentence to Servicing 2 or through a new Private Flood Compliance Q&A. For example, the following could be added as the final sentence to Servicing 2: "Notwithstanding procedural requirements under the Regulation, such notice to the Administrator of FEMA regarding identity of servicer or servicing transfer is not required where the property is insured by a private flood policy rather than an NFIP policy." Alternatively, the Agencies could include the following new Q&A:

> ***Private Flood Compliance [NEW]:*** *When a lender makes, increases, renews, extends, sells, or transfers a designated loan, must the lender provide notice of the identity of the servicer to the Administrator of FEMA or the Administrator's*

designee? Similarly, must notice be provided to the Administrator or the Administrator's designee when there is a change in servicer?

No. Where the real property securing a designated loan is covered by a private flood insurance policy, it is not necessary for the lender/servicer to notify the Administrator of FEMA or the Administrator's designee of the identity of the loan servicer or when there is a change in servicer.

* * *

The undersigned organizations support the Agencies' commitment to provide clear and actionable guidance as it relates to implementation of the Private Flood Insurance rules, and we appreciate the opportunity to participate in this process. We hope the Agencies find these comments to be helpful.

Our organizations would be pleased to provide any additional information the Agencies might find helpful or to respond to questions about any of these comments.

Respectfully submitted,

Mortgage Bankers Association

American Bankers Association

American Property Casualty Insurance Association

Consumer Credit Industry Association

Independent Community Bankers of America

National Association of REALTORS®

National Association of Mutual Insurance Companies

National Flood Association

Reinsurance Association of America

The Council of Insurance Agents & Brokers

Wholesale & Specialty Insurance Association