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From: John Frobose, President
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Date: September 18, 2009

Re: Loans in areas having special flood hazards; Interagency questions and answers regarding flood insurance; **OCC Docket** OCC-2009-0014; **FRB Docket No.** R-1311; **FDIC RIN No.** 3064-ZA00; **OTS Docket** OTS-2009-0005; **FCA RIN No.** 3052-AC46; **NCUA RIN No.** 3133-AD41

I. Introduction

American Security Insurance Company ("ASIC") is pleased to have the opportunity to respond to, and comment on, specific question(s) raised in the interagency questions and answers regarding flood insurance ("Q&As"). ASIC partners with clients who are leaders in mortgage lending industry, providing them with lender-placed flood insurance products and services. ASIC is an affiliate company of Assurant, Inc., which is a premier provider of specialized insurance products and related services in North America

and selected other international markets. Assurant is a Fortune 500 company and a member of the S&P 500, with more than $24 billion in assets and $8 billion in annual revenue, and approximately 15,000 employees worldwide.

This comment (hereinafter "Comment") is intended to address the Q&As related to the National Flood Insurance Program ("NFIP"), and the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as revised by the National Flood Insurance Reform Act of 1994 (collectively the "Act") published in Vol. 74, No. 138 of the Federal Register. In particular, the supplemental explanation following the Answer to Question 61, available on page 35934, states: "Regardless of whether the flood insurance coverage is obtained through FEMA or by private means, under the Act and Regulation, lenders may not impose the cost of coverage for that 45 day period at any time." The supplemental explanation goes on to state that "[t]he Agencies are proposing new question and answer 62 to address this comment."

It is ASIC's opinion that the aforementioned supplemental explanation is in conflict with the plain text of the Act, which states that, although lenders and servicers may not charge borrowers until the expiration of the 45-day notice period, once the 45-day period is over a lender or servicer may charge borrowers for the cost of the flood insurance required by the Act, which necessarily includes coverage for the 45-day notice period. The Act defines required flood insurance as having both an amount requirement and a continuity requirement. It is the continuity requirement that mandates that the flood insurance policy obtained by the lender or servicer is effective as of the date the previous acceptable coverage lapsed. Because the Act allows the lender or servicer to pass on the cost of the policy to the borrower, it must necessarily allow the lender or servicer to pass on the full cost of coverage to the borrower, including for the 45-day notice period, albeit after said notice period has expired.

II. The Opinion Set Forth in the Q&As

In the Answer to Question 62, the Q&As specifically state that "The ability to impose the costs of force placed flood insurance on a borrower commences 45 days after notification . . . [t]herefore, lenders may not charge borrowers for coverage during the 45-day notice period." However, this Comment is not intended to address the timing under which the lender or servicer may charge the borrower, but instead simply the ability of the lender or servicer to charge the borrower for the coverage the lender or servicer has obtained; which includes the coverage for the 45-day notice period. It appears the entirety of the analysis in the Q&As on this specific topic is found in the supplemental explanation to Question 61:

> "Regardless of whether the flood insurance coverage is obtained through FEMA or by private means, under the Act and Regulation, lenders may not impose the cost of coverage for that 45 day period at any time."

Based on this statement, it appears the Q&As take the position that there is no authority under the Act to allow the lender or servicer to charge the borrower for the cost of the coverage the lender or servicer is required to obtain if the borrower fails to obtain an acceptable policy during the 45-day notice period. However, this position seems to be in direct conflict with the plain text of the Act, which specifically authorizes a lender or servicer to charge the borrower for the cost of such coverage.

III. The Statutory Directive

"[A] regulated lending institution may not make, increase, extend, or renew any loan secured by improved real estate or a mobile home located . . . in a [special flood hazard] area . . . unless the building or mobile home . . . is covered for the *term of the loan* by flood insurance in an amount at least equal to the outstanding principal balance of the loan or the maximum limit of coverage made available under the Act with respect to the particular type of property, whichever is less." (Emphasis Added) 42 U.S.C. § 4012a(b)(1). Thus, through oversight of lending institutions, the Act requires flood insurance for a particular amount (the outstanding principal balance or maximum limit of coverage, whichever is less);

and which is continuous (for the term of the loan). For the duration of this Comment, flood insurance meeting both the amount and continuity requirements shall be referred to as "Acceptable Flood Insurance."

Of particular note to this Comment, by requiring coverage for the "term of the loan," the drafters of the Act have mandated that there be no gap in coverage while the loan exists. By mandating continuous coverage, the Act ensures that properties located in Special Flood Hazard Areas will never be exposed to the risk of damage to or destruction of the real property improvements without remuneration for the loss during the course of the loan.

This is consistent with other governmental entities involved in the mortgage industry, such as Fannie Mae and Freddie Mac, which both require in their Servicer Guides that loans have continuous flood insurance coverage. In further support of the continuous coverage requirement is the renewal provision of the FEMA NFIP Dwelling Policy, which allows borrowers to renew the policy for a period of time after expiration, effective back to the date the policy expired, not the date when the borrower remits premium and /or the date the policy is issued. In Article H.2. the FEMA NFIP Dwelling Policy states that the borrower may remit premium within 30 days of the expiration date of the policy. The effect of this provision is that the borrower has a 30-day period after expiration to decide whether to renew the policy. If the borrower chooses to renew the policy, coverage is reinstated to the lapse date, not the date premium is received. Therefore, the FEMA NFIP Dwelling Policy also provides for continuous coverage, for 30 days, as opposed to a gap period where a property could be otherwise exposed.

IV. The Placement Process

The Act states that: "[i]f at the time of origination or at any time during the term of a loan . . . the lender or servicer for the loan determines that the building . . . securing the loan is not covered by flood insurance or is covered by such insurance in an amount less than the amount required . . . the lender or servicer shall notify the borrower under the loan that the borrower should obtain, at the borrower's expense, an amount of flood insurance for the building . . . that is not less than the amount under section (b)(1) of this section, *for the term of the loan*." (Emphasis Added) 42 U.S.C. § 4012a(e)(1). Thus, again the Act states that flood insurance must meet a continuity requirement.

"If a borrower fails to purchase [the Acceptable] [F]lood [I]nsurance . . . the lender or servicer for the loan shall purchase the [Acceptable Flood] [I]nsurance on behalf of the borrower. . . ." 42 U.S.C. § 4012a(e)(2). The sentence then goes on to state that the lender or servicer "may charge the borrower for the cost of premiums and fees incurred by the lender or servicer for the loan in purchasing the [Acceptable Flood] [I]nsurance. 42 U.S.C. § 4012a(e)(2).

Because of the continuity requirement, the policy obtained by the lender or servicer must be effective the date that previous coverage lapsed. Although the Act provides a borrower a 45-day period after their previous policy has expired to obtain Acceptable Flood Insurance, if the borrower fails to obtain such a policy, the lender or servicer must then obtain a policy that provides coverage for the term of the loan, i.e. effective the date the previous policy lapsed.

Once the lender or servicer determines that it must obtain Acceptable Flood Insurance, it will seek a lender-placed policy. The lender-placed policy provided by ASIC is a dual interest flood policy modeled after the NFIP guidelines, and as such, is based on the last known coverage amount and effective from the date the previous policy lapsed. Thus, the lender or servicer has obtained Acceptable Flood Insurance which benefits both the lender or servicer and the borrower.

As mentioned above, the lender-placed Acceptable Flood Insurance policy would be effective from the date the previous policy lapsed, not the date premium is paid and the policy is actually issued, which would be at least 45 days after the previous policy lapsed. In charging premium for the policy, an insurer must charge for the entire period of the policy, including the first 45 days because state law

prohibits insurers from providing free insurance. See e.g., N.Y. General Counsel Opinion, Aug. 6, 1999; FL Memorandum 2003-7 (April 23, 2003). Thus, the required premium must be paid on the initial 45 days of the insurance policy, even if the issue date of the policy is after the coverage is effective.

V. The Statutory Intent

Preventing lenders or servicers from charging borrowers the full cost of the coverage, including for the 45-day notice period, is inconsistent intent of the Act. Specifically, the Act is not intended to protect borrowers or to provide borrowers with gratuitous benefits, but instead simply to ensure adequate flood coverage is continuously maintained on properties located in Special Flood Hazard Areas. See, Custer v. Homeside Lending, Inc., 858 So. 2d 233, 245 (Ala. 2003) (stating the Act was not enacted for the special benefit of borrower); see also, Wentwood Woodside I LP v. GMAC Commer. Mortg. Corp., 419 F3d 310, 323 (5th Cir. 2005) (stating 42 U.S.C. § 4012a is not intended to protect individual mortgagors). Thus, reading any specific benefit to borrowers into the Act, including not having to pay for 45 days of coverage is inconsistent with purpose of the Act, which is only concerned that Acceptable Flood Insurance is continuously maintained.

VI. Summary

The Act requires that lenders and servicers monitor borrowers to ensure that borrowers have continuous flood insurance coverage, in an amount meeting the outstanding principal balance or maximum limit of coverage, whichever is less. If the lender or servicer discovers that the borrower has failed to obtain such coverage, the lender or servicer is required to notify the borrower of the coverage deficiency. If after 45 days, the borrower still has not obtained an Acceptable Flood Insurance policy, the lender or servicer is required to obtain flood insurance meeting both the amount and continuity requirements, on behalf of the borrower, and may charge the borrower for the costs associated with the obtaining such insurance. There does not appear to be any support for reading into the Act any implied benefits which would provide a borrower with free coverage for 45 days.

Conversely, the text of the Act specifically allows lenders and servicers to charge borrowers for insurance that covers the 45-day period immediately after the 45-day period has ended and the lender or servicer has obtained Acceptable Flood Insurance. As such, the Q&As should be revised to explicitly reflect this statutorily permitted action by lenders.

ASIC is appreciative of the opportunity to respond to the Q&As, and is hopeful this Comment will be useful in assisting the Agencies' formulation of an enduring answer to the question(s) posed in the Q&As. If you have any questions regarding the above, please feel free to contact ASIC at the address set forth above.

Sincerely,

John Frobose, President
American Security Insurance Company