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Re: Loans in Areas Having Special Flood Hazards; RIN 1557-AD67; RIN 7100AE-00; RIN 3064-AE03; RIN 3052-AC93; RIN 3133-AE18

Ladies and Gentlemen:

The American Bankers Association,[1] its insurance subsidiary, the American Bankers Insurance Association,[2] and the Consumer Bankers Association[3] (the Associations) appreciate the

[1] ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $185 million in assets.
[2] The American Bankers Insurance Association (ABIA) is the leading trade association for banks selling insurance products and services.
[3] The Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking – banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

opportunity to comment on the proposal by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the National Credit Union Administration (the Agencies) to amend their respective regulations regarding loans in areas having special flood hazards to implement provisions of the Biggert-Waters Flood Insurance Reform Act.[4]

I. Summary of Comment

The enactment of the Biggert-Waters Flood Insurance Reform Act of 2012 (the Act) on July 6, 2012, set in motion unprecedented change to the National Flood Insurance Program (NFIP).[5] The law is ushering in sweeping reform of the flood insurance premium rate structure, flood hazard mapping, and floodplain management and mitigation. At the same time, the law made significant changes to lender flood insurance compliance requirements. Congress' motivation for reforming the NFIP was clear and compelling: it sought to restore the financial solvency and stability of the federal flood insurance program. The statutory changes, however, affect all major components of the program and will have profound effects on consumers who own property located in a flood zone, on real estate markets, and on lenders charged with ensuring that borrowers purchase and maintain flood insurance over the life of the loan. Unfortunately, the full impact of these changes is only beginning to emerge as regulators are in the early stages of implementing the statute.[6]

Although well intentioned, the legislation generates a number of interpretive issues that require careful regulatory implementation. The Agencies have addressed a number of these issues by expressly excluding commercial purpose loans and most subordinate lien loans from the escrow requirements. Nevertheless, there are additional problems that the proposal presents that warrant correction to ensure that the program goals Congress sought to advance are met. These include making additional exclusions to the escrow requirement; providing further clarity regarding force placement; and creating an additional path to safe harbor to promote the acceptance of private insurance policies. Finally, the rule must provide the industry with a realistic period of time to implement the required changes.

In addition, we call on the Agencies to work with the Federal Emergency Management Agency (FEMA) to publish an updated edition of the *Mandatory Purchase of Flood Insurance Guidelines* (the Guidelines) that reflects Biggert-Waters Act reforms. Our members report that compliance with the mandatory purchase requirement is among the most challenging compliance obligations they face, and Biggert-Waters Act implementation is adding significantly to these

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[4] 78 Fed. Reg. 65108 (October 30, 2013).
[5] Public Law 112-141, 126 Stat. 916 (2012).
[6] Representative Waters, a co-author of the legislation, has expressed her own concern about the extent of the impact of the implementation of the program changes enacted and is supporting a bi-partisan, bicameral legislative effort to delay implementation of several provisions of the Act. *See public statement of Representative Waters:* "Waters leads Coalition of 95 Members of Congress in Introducing Legislation to Address Flood Insurance Rate Increases" (October 29, 2013) *available at* http://waters.house.gov/news/documentsingle.aspx?DocumentID=359958.

challenges. We urge the Agencies to work with FEMA to consider the impact of NFIP program changes on bank customers and bank compliance obligations and to provide the kind of clear, comprehensive, and understandable guidance that lenders need to comply – an updated edition of the Guidelines.

II. Background

Between September 2008 and December 2011, the NFIP was extended on a short-term basis sixteen times; over that period, the program also lapsed four times. By 2012 it was clear that the program had to be reauthorized for an extended period of time and that reauthorization needed to be tied to significant reforms intended to restore the flood insurance program's financial solvency and sustainability. At the time, the NFIP was estimated to be almost $18 billion dollars in debt to the Department of the Treasury as a result of flood-related losses from Hurricane Katrina and a flood insurance premium structure that did not reflect the true risks and costs of flooding. All major components of the NFIP, including its flood insurance premium rate structure, flood hazard mapping, and floodplain management programs, needed reform and were addressed in the Flood Insurance Reform and Modernization bill, S. 1940, that was under consideration but had not yet been passed.[7]

In late June, 2012, with another reauthorization period set to expire on July 31, 2012, the opportunity was presented to attach the bill to a larger piece of legislation, H.R. 4348, the "Moving Ahead for Progress in the 21st Century Act,'' or ''MAP-21,'' which included federal transportation and student loan bills and was scheduled for a vote on June 29, 2012. On June 20, Senators Shelby and Johnson filed a substitute amendment to S. 1940, adding the mandatory escrow provision, section 100209, and the definition of "private flood insurance" in section 100239. On June 28, a conference report was filed for H.R. 4348,[8] which included the flood insurance reform content of S. 1940; it was passed by both the Senate and the House the next day.[9] As a result, there is little Congressional history to shed light on the intended purpose for either addition, and there was no opportunity for public input about potential unintended consequences for borrowers or the banking industry. President Obama signed the Act into law on July 6, 2012.

This scarcity of legislative history underscores the need for thoughtful and deliberate implementation. Care must be exercised to promulgate rules that will achieve Congressional intent of the legislative text, which was passed hurriedly and with little opportunity for consideration of how or even whether the statutory provisions would achieve their intended result.

[7] *See* All Actions, Including Floor Amendments, S. 1940 — 112th Congress (2011-2012).
[8] *See* CR H4432-4601.
[9] *See* All Actions, Including Floor Amendments, H.R. 4348 — 112th Congress (2011-2012).

III. Recommendations for Implementation of the Act's Private Flood Insurance Provision

One of the goals of the Act was to encourage greater private sector participation by requiring lenders to accept private flood insurance – flood insurance coverage that is not backed by the NFIP. Unfortunately, the definition of "private flood insurance" included in the Act, unless carefully applied, will make meeting this goal difficult and present significant compliance challenges for lenders. The Act requires that lenders accept private policies that meet certain specific standards, including coverage at least as broad as coverage provided by a standard flood insurance policy (SFIP) under the NFIP. Few lenders have the capacity to determine whether policies meet the required standards, and others report that the private policies they receive today do not precisely meet one or more of these rigid criteria. The Agencies have proposed one potential solution to this problem, a safe harbor provision. The Agencies also have invited comment on an alternative solution, which would give lenders discretion to accept private policies that do not meet the required standards. As discussed further below, the Associations support both solutions, subject to certain modifications.

1. The Associations urge the Agencies to create an additional path to a safe harbor.

The Agencies have proposed a safe harbor for private flood insurance policies. Under the proposed safe harbor, a private policy would be deemed to meet the statutory definition of private flood insurance if a state insurance regulator makes a determination, in writing, that the policy meets the definition.

We support the inclusion of this proposed safe harbor. It would permit a lender to rely upon the expertise of state insurance authorities to make the determination that the terms of a particular policy are consistent with the statutory definition of private flood insurance. As a practical matter, however, no such mechanism exists today for state insurance authorities to make such a determination, and it could be some time before such a mechanism is implemented. Moreover, even if such a mechanism is developed, it may not be implemented in the same manner in each state since each state retains independent authority over the business of insurance conducted within its borders. In addition, we anticipate that surplus lines insurers, subject to limited oversight from state insurance regulators, will be potential providers of private flood insurance coverage. Therefore, we recommend that the Agencies modify the proposed safe harbor by creating an additional, or alternative, path to a safe harbor based upon a certification issued by the insurer issuing the private policy.

Specifically, we propose that the safe harbor provision be modified as follows:

> [ ] <u>Safe harbor</u>. A flood insurance policy shall be deemed to meet the definition of private flood insurance in [ ] for purposes of paragraph [ ] of this section if –
>
> (i) a state insurance regulator makes a determination in writing that the policy meets the definition of private flood insurance in [ ]; <u>or</u>

(ii) the insurer issuing the policy certifies, in a written endorsement to the policy or on company letterhead accompanying the policy or other evidence of insurance, that the policy is certified to conform to the minimum requirements for private flood insurance in [ ] **using language in Appendix D**."

Proposed subparagraph (ii) would give lenders an additional means to ensure that a policy meets the Act's standards, and policyholders would be similarly assured. Insurers issuing private policies would be confident that their policy forms would be accepted as compliant flood insurance coverage by regulated lenders. The certification could take one of several forms. It could be a formal written endorsement to the policy. It also could be printed directly on the policy or policy jacket, or it could take the form of a statement in a letter from the insurer that accompanies the policy or other evidence of insurance.

The use of such endorsements is an accepted practice within the insurance industry. For example, New York State's statutory form fire insurance policy is considered an industry standard for certifying minimum mandatory fire insurance coverage exists within a broader homeowners insurance policy.[10] It is routine for insurers issuing a homeowners insurance policy in New York to affirm in the policy or by endorsement that the policy is certified to conform to the minimum requirements of the standard form fire insurance policy. In fact, some insurers are already issuing endorsements to their flood insurance policies certifying that the policy meets the Act's minimum standards.

Under our proposed safe harbor, an insurer might certify that a policy meets the definition of private flood insurance in the statute by providing a letter to a lender in conjunction with the delivery of the policy or other valid evidence of insurance. The decision to issue an endorsement or a letter would depend upon the scope of the original policy. In those cases in which the original policy was designed to meet the Act's definition of "private flood insurance," the certification would not constitute any change in the fundamental character of the policy and should not require any review or approval by a state insurance authority. Thus, an insurer could make the certification via a letter. This approach would work for both admitted and non-admitted insurers.

On the other hand, if the original policy was not designed specifically to meet the Act's standards, an admitted insurer may be required to seek formal approval of a state to make the certification, and such approval may best be accomplished by a state-approved endorsement to the policy. The selection of an endorsement or letter certification would be left to the discretion of the policy issuer.

Regardless of whether an insurer uses an endorsement or letter to certify the policy, any such certification would be a legally binding agreement on the part of the insurer. Thus, an insured policyholder and a lender could rely upon the certification and could bring legal action against

[10] *See* NY CLS Ins § 3404.

the insurer should the insurer not adhere to the terms of the certification, just as with any other policy term or condition. Moreover, state insurance authorities have the power to investigate and have enforcement authority to punish insurers that fail to adhere to policy terms and conditions.

To facilitate further the use of our proposed alternative safe harbor, subparagraph (ii) refers to a model form, which we recommend the Agencies include as an appendix to the regulation. Insurers could use the model form to provide the safe harbor certification. We propose the following model language:

> **Appendix D to Part [ ] Model For Safe Harbor Insurer Certification:**
> **NFIP Compliance Certification**
> This policy is hereby certified to meet the definition of private flood insurance contained in 42 U.S.C. § 4012a(b), in all respects; therefore, to the extent that any provision within this policy fails to meet the definition of private flood insurance contained therein, such provision herein is hereby amended to conform to the minimum requirements of such definition.
>
> As an alternative to this policy, flood insurance is available under the National Flood Insurance Program ("NFIP") through an insurance agency who will obtain a policy either directly through the NFIP or through an insurance company that participates in the NFIP.

The publication of this model language will help to ensure consistency to the certification. In addition, the last sentence in the proposed model language provides notification to the insured policyholder about the availability of coverage from the NFIP. Thus, it provides the insurer and lender with a means to meet one of the specific features of the new definition of private flood insurance.

2. *The Associations believe that the regulation should permit a lender to exercise discretion to accept a private flood insurance policy that does not meet the definition of private flood insurance.*

The Agencies have asked for comment on whether lenders should be able to accept a flood insurance policy issued by a private insurer that does not meet the statutory definition of private flood insurance and would be outside the safe harbor. The Associations believe that the regulation should permit a lender to accept a private flood insurance policy that does not meet the definition of private flood insurance, but which, in the opinion of the lender, would meet the mandatory purchase obligation of the FDPA. The option to use lender discretion should be in addition to any safe harbor. In other words, lenders should have the flexibility either to rely upon a regulatory safe harbor, or to have the discretion to accept a private flood policy that does not fit within either safe harbor. Such an approach is consistent with the statute and Congressional intent, and it would provide a very practical alternative to the safe harbor.

While the statute mandates the acceptance of private flood insurance by a lender, it is silent on whether or not a lender may accept a policy that does not meet the statutory definition. It is not easy to infer congressional intent from silence. "As one court has aptly put it, '[n]ot every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. In still other instances, silence may reflect the fact that Congress has not considered an issue at all. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[11]

In this case, however, the development of a private market for flood insurance was one of the stated goals of the Act. The House Committee Report accompanying the bill states that the legislation is intended, among other things, to "increase the role of private markets in the management of flood insurance risk."[12] That report also describes the development of competing NFIP-backed and non-NFIP backed products:

> To encourage greater private sector participation, this section further requires lenders to accept non-NFIP backed flood insurance coverage provided by a private entity if that coverage meets all the same requirements as NFIP-backed flood insurance. This section also clarifies that private sector flood insurance products are acceptable where they meet the requirements of the NFIP. Like other property-casualty insurance products, private-sector flood products and the companies that offer them would be subject to state regulation. This section does not create preferences either for government or private-sector flood products; it does confirm, however, that private sector flood insurance products could replace Federal government products.[13]

Thus, the Agencies reasonably may read the statute to permit lenders to accept policies that do not satisfy the definition of private flood insurance in the Act.

Giving lenders the discretion to accept policies that are outside the safe harbor also will help to address the realities facing lenders and borrowers—many private policies available today and for the foreseeable future do not meet all of the requirements of the definition of "private flood insurance." The development and implementation of any safe harbor, even the modified safe harbor that we propose, will take some time. In the interim, many lenders already have accepted private flood insurance policies, and lenders and borrowers will need to continue to accept private flood policies to meet the statutory mandate until insurers can elect to incorporate (or not) the model language in their policies. Permitting a lender to exercise discretion solves a material problem that, if left unaddressed, will cause disruption in the market place and frustrate achieving the goals of the Act.

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[11] *Burns v. United States*, 501 U.S. 129, 136 (1991) (quoting *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)).
[12] H. Rep. No 112-102, at 1 (2011)
[13] *Id*. at 39

The Agencies have asked if the regulations should require non-NFIP policies to meet certain criteria. We believe that it would be appropriate for the Agencies to adopt some minimum policy standards. Specifically, we recommend that non-NFIP policies that are outside the safe harbor should: (1) provide flood insurance coverage in an amount that is compliant with the statutory requirement; (2) be clearly identified as policies that include coverage for the peril of flood; (3) cover improved real property that is collateral for designated loans in all flood zones; and (4) require the insurer to notify the policyholder and the lender if the policy is cancelled using industry standard mortgage clause language. We do not support incorporating an "as least as broad as" clause as an SFIP policy standard. Such an inflexible standard would result in a high private policy denial rate and frustrate the potential value of lender discretion in serving borrowers and in meeting the goals of the Act. In contrast, the four criteria described above would provide meaningful regulatory guidance and foster the acceptability of private policies as envisioned by the Act.

IV. Recommendations for Implementation of the Act's Mandatory Escrow Provision

Section 100209 of the Act amends section 102(d) of FDPA[14] to require insured depository institutions, or servicers acting on their behalf (collectively, lenders), to escrow all flood insurance premiums and fees required for residential improved real estate or a mobile home securing any mortgage loan. Escrow will be required for any loan that is "outstanding or entered into" on or after July 6, 2014, unless the lender qualifies for the statutory exception for small institutions. That exemption applies to institutions with less than $1 billion in assets if: (1) at the time of enactment of the Act, the institution was not otherwise required by state or federal law to escrow taxes, insurance premiums or fees, and (2) it did not have a policy of requiring the escrow of taxes, insurance premiums, or fees.[15]

1. *The Associations support the proposal to exclude from the escrow requirement loans for business, commercial, or agricultural purposes secured by residential property located in a flood zone.*

As initially enacted, the escrow provision failed to specify that escrow would only be required for residential improved real estate. However, on January 14, 2013, Congress passed an ABA-supported technical correction to clarify that the flood insurance escrow requirement applies only to loans secured by "residential improved real estate."[16]

Extending this clear expression of Congressional intent, the Agencies propose to exclude from the escrow requirement any loan that is an extension of credit primarily for business, commercial, or agricultural purposes, even if it is secured by residential property located in a flood zone. The Associations strongly support that exclusion. There is no reason to believe that Congress intended to extend the mandatory escrow requirement to commercial or agricultural

[14] 42 U.S.C. 4012a(d).
[15] *See* Section 100209 amending section 102(d) of the Flood Disaster Protection Act, 42 U.S.C. 4012a(d).
[16] *See* Pub.L.112-281,125 Stat.2485 (Jan. 14, 2013).

purpose loans secured by residential improved real estate, and imposing such a requirement would present significant operational and practical challenges for commercial and agricultural borrowers which are typically small businesses or small agricultural operations.[17]

First, requiring escrow would mean that capital that should be used to grow the small business or farm will be tied up in an escrow account. This impact will become increasingly acute as other sections of the Biggert-Waters Act are implemented, including those sections that permit flood insurance premiums to increase by 25% annually and eliminate existing subsidies and grandfathered status.

Second, flexibility in payment and loan structure would be limited by escrow collection requirements. In order to meet the unique needs of businesses and farms, lenders allow flexible payment and loan structure options that will not accommodate regular escrow payments. Examples include:

- Loans to farmers in which annual payments are tied to crop harvest times.
- Lines of credit made to homebuilders to fund varying phases of construction within a development in which repayment is tied to completion of a particular phase.
- Loans with multiple payment streams – a small business may have one credit facility, but within that facility there may be sub-loans each with its own repayment terms.

Third, requiring escrow may result in misplaced responsibility for the payment of flood insurance premiums. Commercial purpose loans may have residential collateral pledged to a transaction, but only one of the business owners/borrowers may own the residence being pledged. In this situation, collection of escrow payments during the monthly billing cycle would make the business (i.e., all of the owners) responsible for paying the escrow, transferring flood insurance liability from the owner of the home to the entire business. Similarly, paying out collected but not yet due flood insurance premiums at loan payoff could benefit business owners who are not owners of the pledged collateral.[18]

Finally, there is no evidence that Congress intended to impose an escrow requirement into commercial or agricultural purpose lending. Therefore, the Associations strongly support the proposed exclusion as an appropriate exercise of interpretive discretion.

2. *The regulations should exclude all loans that are subordinate liens at origination from the escrow requirement for the life of the loan.*

Similarly, we support the proposed exclusion for subordinate liens when a lender has determined at origination of the subordinate lien that a borrower has obtained flood insurance that satisfies the mandatory purchase requirement and is currently paying flood insurance premiums and fees into an escrow account that has been established by the first lienholder.

[17] Often these are the so-called "abundance of caution" liens required by Small Business Administration and Farm Credit Administration program requirements, and the lien on the home may be just one piece of the collateral securing the loan.
[18] To avoid these results, businesses would have to develop costly internal accounting and tracking processes to adjust for the escrow liability.

That decision is consistent with the requirements of the mandatory purchase obligation and existing interagency guidance describing supervisory expectations for coordination between the first and subordinate lienholders.[19]

Currently, because there can only be one NFIP flood insurance policy insuring a building, when a lender makes, increases, extends, or renews a subordinate lien loan secured by a building located in a special flood hazard area, that lender is required to work with the borrower and the senior lienholder to ensure compliance with the mandatory purchase obligation. Together they are to ensure (1) that adequate flood insurance is in place by taking into consideration the outstanding principal balances of both loans, the maximum amount available under the NFIP, and the insurable value of the property securing the loans, and (2) that the subordinate lienholder's name is added to the existing flood insurance policy as a mortgagee/loss payee.[20] It is, however, the responsibility of the senior lienholder to receive and pay the flood insurance, as it would not be practical for both lenders to be involved in escrowing, receiving invoices, and paying premiums. Indeed, in most instances doing so would result in double escrow payments—an unfair financial burden to the borrower and one that will be increasingly difficult for borrowers as flood insurance premiums rise to reflect actuarial rates.

The Associations support the Agencies' decision not to impose an escrow requirement on the subordinate lienholder if the borrower is currently paying premiums and fees through an escrow account established by the first lienholder. However, we urge the Agencies to reconsider their statement,

> [I]f the first lienholder is not required to or otherwise does not escrow flood insurance premiums and fees for adequate insurance coverage … the proposed rule would require the regulated lending institution in the second lienholder position to escrow required flood insurance premiums and fees, unless such regulated lending institution qualifies for an exception from the escrowing provisions.[21]

That statement would impose monitoring obligations beyond those required by the FDPA. The mandatory purchase obligation requires action by a lender only at specific statutory "triggers," when a loan is originated, increased, extended or renewed. Without clear direction by Congress, the Agencies should not seek to expand this obligation by imposing on a subordinate lienholder an ongoing duty to monitor whether (1) the first lienholder is collecting escrow payments from the borrower, (2) the first lien has been paid off, or (3) the first lienholder is exempt from the escrow requirement. Imposing such an obligation would increase origination and servicing costs significantly – costs that will ultimately be borne by consumers – without advancing the Congressional goal of ensuring that borrowers maintain flood insurance over the life of their loan.

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[19] *See* Interagency Questions and Answers Regarding Flood Insurance, 74 Fed. Reg. 35914 (July 21, 2009) (Q& A 36.).
[20] *Id. at* 35940.
[21] 78 Fed. Reg., *supra* at 65115.

Unless the statement quoted above is retracted and the Agencies propose a rule that exempts all subordinate lien loans from escrow, first and subordinate lien lenders would be required to implement policies and procedures for the monthly exchange of information about escrow payments and lien status. Moreover, some lenders may be uncooperative and unwilling to confirm that the borrower is making escrow payments every month. In that case, the subordinate lienholder would have no means to require the first lienholder to provide the information, and the only option available would be for the subordinate lienholder to begin collecting escrow payments, perhaps forcing the borrower to make duplicative escrow payments.

Significantly, little, if any, consumer protections would be gained by the ongoing monitoring. Current industry practices, developed in compliance with existing rules and guidance, ensure that if a borrower stops making payments into escrow and due to an oversight or other failure by the first lienholder the policy is allowed to lapse, the subordinate lien lender – who is listed as a mortgagee on the policy – will be notified of the lapse. And after giving notice to the borrower, that institution would be obligated under the statute to force place a policy. Thus, existing rules and industry practices ensure that a property subject to a lien held by a regulated lending institution is insured throughout the life of a loan.

Therefore, the compliance exercise that would be set in motion by a rule requiring a subordinate lien lender to be prepared to escrow due to the *possibility* that certain events might occur would do nothing to advance Congress' goal of ensuring that borrowers maintain flood insurance over the life of their loan. However, it would require lenders to add escrow capabilities into the origination and servicing systems for *all* their home equity loans and lines of credit – none of which have escrow capabilities today – requiring extensive expenditures of time and resources, which will ultimately be borne by borrowers in the form of increased credit costs.[22] The Associations strongly urge the Agencies to promulgate a rule that unequivocally excludes all subordinate lien loans from the escrow requirement.

3. *The regulations should clarify there is no duty to monitor the continued existence and adequacy of a master flood policy held by a condominium association.*

The proposed rule would also exclude from the mandatory escrow requirement "Flood insurance coverage for the residential improved real estate or mobile home provided by a policy that is purchased by a common interest community instead of the borrower, such as an NFIP Residential Condominium Association Policy (RCBAP) that meets the requirements of [the mandatory purchase obligation]."[23] The Associations also support this exclusion. If a lender is making a loan secured by an individual condominium where the common interest community has purchased a master flood policy (that is sufficient to meet the mandatory purchase requirement) and charges the unit owner for his *pro rata* share of the premium, it is not

[22] See pages 17-18, infra for a discussion of the implementation challenges presented by adding escrow capabilities.
[23] 78 Fed. Reg. *supra at* 65132.

necessary or feasible for the lender to escrow premiums for the individual borrower's share of the master policy premium. To do so could result in the borrower being forced to pay twice.

However, the Associations urge the Agencies to clarify that there is no duty to monitor the continued sufficiency of the master flood policy held by the common interest community. As discussed above, the FDPA requires a lender to evaluate the sufficiency of a master policy only on a trigger event, and if the lender determines that the policy does not satisfy the mandatory purchase obligation, to require the borrower to obtain a dwelling policy for supplemental coverage. We agree that under those circumstances, the lender (assuming it is not exempt) would be required to escrow the flood insurance premiums and fees for the dwelling policy. However, we urge the Agencies to confirm that there is no obligation to review the sufficiency of the master flood policy at other than the occurrence of a statutory trigger. As described in the section above, requiring ongoing monitoring would impose a burdensome compliance exercise that does not further the goal of ensuring that flood insurance policies are in place over the life of a loan.

4. *The proposed rules should not require a lender to begin collecting escrow payments for existing mortgage loans unless a statutory trigger occurs.*

Paragraph (5) of section 100209 establishes the effective date of the mandatory escrow provision. It states, "The amendment made by subsection (a) shall apply to any mortgage *outstanding or entered into* on or after the expiration of the 2-year period beginning on the date of enactment of this Act," or July 6, 2014. To implement the escrow requirement for existing loans, the proposal suggests a staggered implementation process based on the renewal date of a flood insurance policy. Accordingly, it requires lenders to begin escrowing with first loan payment after the first renewal date of the borrower's flood insurance policy that occurs on or after July 6, 2014.[24] The Agencies assert that the proposed implementation rule will "alleviate the potential burden to lenders and borrowers of establishing an escrow account for an outstanding loan for which a borrower was not previously escrowing premiums and fees."[25] A staggered implementation timeline, however, fails to address significant contractual, enforcement, and customer relation issues presented by the requirement to extend escrow to existing loans.

Lenders typically give borrowers with sufficient equity in their home the option of paying their own taxes and fees, including their flood insurance premiums. Our membership estimates that between 15-30% of their existing portfolio of first lien loans secured by a home located in a special flood hazard area elected at origination not to escrow flood insurance premiums and fees. Although Fannie Mae and Freddie Mac uniform mortgage instruments include contractual language that assumes the escrow of taxes, insurance, and fees, if the lender and borrower

[24] The proposed rule provides the following example: if a borrower's current flood insurance policy will renew on March 15, 2015, and the borrower's loan payments are due the first of each month, the institution would begin escrowing with the loan payment due on April 1, 2015, and the borrower would be responsible for paying the premium to renew the policy on March 15, 2015.

[25] 78 Fed. Reg. *supra at* 65115.

agree to waive escrow the borrower executes a separate document memorializing that agreement at closing. It is not clear that a new federal requirement abrogates these contracts. Moreover, many of these borrowers agreed to pay a higher interest rate (typically a 25 basis point increase) over the life of the loan as a condition for the escrow waiver. Our members anticipate angry customers, requests for refund of the extra interest paid over the life of the loan, and the threat of class action litigation. The proposal, however, mentions none of these challenges.

Instead, the Agencies suggest that their proposal will benefit borrowers because tying the establishment of escrow to the renewal of a flood policy gives the borrower the maximum amount of time to escrow for the next policy renewal. While this is true, it discounts the immediate, and quite substantial, financial outlays required of borrowers. Under the proposed timing rule, a borrower who has just paid a full year's renewal premium will be expected to begin escrow on the first of the next month. Thus, the borrower will be required to pay a full renewal premium plus 1/12 of the next year's premium, *and* may also be asked to pay an additional one to two escrow payments to establish the reserve or cushion permitted by RESPA and state law.[26] Many customers will struggle to meet this obligation, particularly as flood insurance premiums rise.

In addition, our members anticipate that a significant number of existing borrowers will resist escrow, presenting questions about how lenders will enforce the obligation. To comply with the law, will lenders be expected to force place a policy and establish escrow for that force placed policy? If so, will the lender be expected to advance the necessary funds into an escrow account and charge the customer? Receipt of an insufficient monthly payment from a customer unwilling to escrow would constitute a default, but should lenders proceed with foreclosure for the sole purpose of complying with the rule?[27] Obviously, each of these scenarios would negatively affect borrowers, particularly those who have continued to maintain their own flood insurance, but have just resisted lender efforts to begin escrowing. Nevertheless, the proposal fails even to mention these enforcement issues or the potential for borrower harm.

We strongly urge the Agencies to reconsider the costs and benefits presented by the proposed rule. While we understand that the Act states that escrow shall apply to any mortgage "outstanding or entered into" two years after the date of enactment, we urge the Agencies to exercise discretion to promulgate a rule that extends escrow to existing loans in a manner that mitigates the potential for borrower harm and does not engender negative relationships between lenders and borrowers.

The Associations recommend adoption of a rule that ties the obligation to establish an escrow account for an existing loan to a statutory tripwire – making, increasing, renewing, or extending

[26] RESPA permits a bank to collect a reserve to be prepared for unexpected expenses. Because of anticipated increases in flood insurance premium rates, banks may feel it is prudent to establish the reserve permitted by RESPA and state law so that there is not a deficiency when the following year's renewal premium must be paid.

[27] Further, there is an unanswered question about a bank's legal ability to enforce escrow under an existing security instrument if that agreement does not require the borrower to escrow.

a loan. Such a rule would effectuate the Congressional directive to require escrow for existing mortgage loans, but it would do so in a manner that is consistent with the underlying framework of the FDPA and that will minimize contractual, enforcement, and customer relation challenges. Because the borrower will be contacting the lender to request a loan modification, the lender will have an opportunity to explain the change in the law and how it will affect the borrower's monthly mortgage payment. At that point, the customer may decide whether to proceed with the transaction. If the customer chooses to go forward, any necessary contract amendments may be made at the closing. Thus, the lender will not be put in the untenable position of abrogating an existing customer's contractual right not to escrow and force placing a policy for those who refuse.

5. *Tying the escrow requirement to a statutory tripwire protects borrowers affected by loan ownership changes or sales of servicing rights.*

The Agencies have also proposed to apply their timing rule to loan ownership changes – i.e., situations in which a lender required to escrow acquires designated loans that were originated by a lender that falls within the exemption for small institutions, or when an exempt lender is acquired by or merges with a lender subject to escrow. In those instances, the proposed rule would require the acquiring lender to begin escrow "with the first loan payment on or after the first renewal date of the borrower's flood insurance policy that is six months from the transfer date of the loan."

Our members anticipate that after the Act is implemented, lenders that fit within the small lender exemption may in some cases use their exemption to gain a competitive advantage. Borrowers who do not want to be forced to escrow flood insurance premiums may seek an exempt lender as their mortgage originator. Having made a conscious effort to avoid escrow, they will be particularly upset if as a result of the sale of their loan or a merger with a non-exempt lender they are forced to escrow. For the reasons described in section 4 above, we believe that whether escrow is required should be tied to the lender who originated the loan for the life of the loan. A change of ownership does not change the borrower's reliance interest on the bargain he arranged; therefore, unless a statutory trigger occurs, the borrower should not be required to escrow.

We also urge the Agencies to apply this rule to the sale of servicing rights, a situation not addressed at all in the proposal. It will not be uncommon for a small exempt lender to retain ownership of a group of mortgage loans, but to sell servicing rights to a servicer required to escrow. We recommend that ownership of the loan should control, and the sale of servicing rights should not trigger an obligation to establish escrow.

6. *The regulations should exclude from the escrow requirement five other categories of loans.*

The proposed rules do not address five other types of loans that lenders may be servicing, including: (1) non-performing mortgage loans, (2) loans with maturities of less than one year,

(3) lines of credit and reverse mortgage loans, (4) manufactured (mobile) home loans with chattel mortgages, and (5) loans with force placed insurance. The Associations urge the Agencies to address each of these categories of loans in the escrow rule so that lenders (and examiners) have a clear understanding of supervisory expectations.

We recommend that the escrow rule exclude from the escrow requirement "non-performing residential mortgage assets," a category that would include mortgage loans that have been charged-off, are in bankruptcy, or are in foreclosure. It is important to underscore the fact that these are non-performing loans; although the lender has retained a lien (that is protected by a voluntary or force placed flood insurance policy as required by the FDPA), the lender is no longer billing the customer. Typically, these non-performing assets have been moved from servicing systems to a recovery management accounting system that lacks escrow capabilities. Thus, the Associations urge the Agencies to exclude non-performing residential mortgage assets from the escrow requirement. It would be a wasteful expenditure of resources to require lenders to add escrow capabilities to recovery management accounting systems when there is little or no prospect of receiving any payments.

The Associations also believe that the escrow rule should expressly exclude from the escrow requirement a loan secured by residential improved property with a maturity of less than one year. Such loans are often originated for bridge financing or a construction loan on a new home. Because the loan will mature before the flood insurance policy is due for renewal, the funds that would have been paid into escrow each month are unlikely to be disbursed to renew a flood insurance policy. Instead they will be returned to the customer, defeating the purpose of escrow.

The Associations also believe that the escrow rule should expressly exclude from the escrow requirement lines of credit and reverse mortgage loans. In the case of lines of credit and reverse mortgage loans, borrowers can make draws against the established line of credit. Repayments can be made against the line of credit. On either product, the outstanding balance can be zero. Flood insurance is only required on these accounts prior to a draw, and then only for the amount of the outstanding balance. The amount of flood insurance required, and consequently the corresponding flood insurance premium, can vary year-to-year making the flood escrow difficult to calculate, unless the lender requires coverage for the full line regardless of its utilization. Doing so, however, penalizes the borrower who could be required to maintain unnecessary flood insurance coverage. Finally, lines of credit and reverse mortgage loan documents do not require an escrow for hazard insurance, taxes, or flood insurance, and loan servicing systems for these products do not support escrow accounts.

The Associations also believe the escrow rule should expressly exclude from the escrow requirement loans secured by manufactured (mobile) homes. Such homes are subject to the mandatory purchase requirement and are eligible for coverage under the NFIP; however, often they are serviced by lenders on consumer loan servicing systems that do not have escrow capabilities. In addition, the loan documents do not require an escrow for hazard insurance or flood insurance, and typically there are no real estate taxes on such collateral. Finally, insurance

coverage on manufactured homes is commonly provided on a "comprehensive" policy form that includes flood and hazard coverage on the structure, personal property, and additional living expense, which is underwritten by private insurance providers who may not have escrow billing capability. Requiring escrow on such properties could force borrowers to purchase an NFIP or private flood policy at considerably increased cost.

Finally, the Agencies have requested comment on whether the escrow requirement should only require escrow for borrower-purchased flood insurance, and expressly exclude instances in which a force placed policy is established. As a general rule, escrow is intended to assist borrowers with cash flow planning by forcing them to save over the course of a year to pay taxes and insurance. In the case of force placed insurance, the *lender* is frequently paying the flood insurance premium, and the forced saving is superfluous. However, some lenders do collect monthly flood insurance premiums and fees for force placed flood insurance, and we urge the Agencies to leave it to the discretion of the lender whether to escrow for a force placed flood policy.

7. *The Associations urge the Agencies to provide an implementation period of 12 to 18 months after the final rule has been published to facilitate orderly compliance.*

The escrow provision is the only statutory section for which Congress assigned an effective date; subparagraph 5 provides, "The amendment made by subsection (a) shall apply to any mortgage outstanding or entered into on or after the expiration of the 2-year period beginning on the date of enactment of this Act."[28] At the same time, Congress expressly assigned responsibility to the Agencies for drafting implementing regulations.[29] Thus, Congress recognized that developing effective rules would be crucial to achieving its objectives for imposing mandatory escrow, and it is reasonable to conclude that the mandatory escrow obligation cannot arise until the Agencies issue final regulations and provide the industry with adequate time to comply.[30]

Moreover, when members of Congress assigned an effective date, they would not have anticipated that the Agencies charged with writing rules to implement the new requirement would require fifteen months just to *propose* a rule. Because the Agencies must consider the public comments submitted on December 10 and make appropriate changes to the escrow rule, it is unlikely that a final rule will be published until well into the first quarter of 2014, leaving the industry perhaps only four or five months to implement major changes across almost all existing systems – application, origination, funding, accounting, and servicing – and to hire and train the additional employees that will be needed.

[28] 42 U.S.C. 4012a(d)(5).
[29] 42 U.S.C. 4022a(d)(1)(a).
[30] *See* April 11, 2011 letter of the CFPB on Section 1071 of the Dodd-Frank Act, *available at* http://files.consumerfinance.gov/f/2011/04/GC-letter-re-1071.pdf (Explaining that although section 1071 of the Dodd-Frank Act was effective on the transfer date of the Act, regulatory obligations arising under that section do not arise until the Bureau issues implementing regulations and those regulations take effect.)

As the Agencies are aware, the industry's concern about having adequate time to complete the necessary work was one of the reasons that ABA and member banks began immediately after enactment of the Act to identify issues that would need to be addressed in the rule-writing process and to communicate them to Agency staff. We hoped that doing so in the early months following enactment would inform and accelerate the rule-writing process, ensuring that the industry has adequate time for implementation.[31]

Our members were aware of the work that would be required to comply with the escrow requirement but also recognized that the rule writing process could significantly alter its scope. At a time when lenders are being challenged to implement the new mortgage rules, it was not meaningfully possible to undertake anything more than preliminary investigation of what will be required to add escrow capabilities to various origination and servicing systems. Moreover, many institutions have not been able to begin even preliminary scoping, and some have not had the resources to consider the impact of Biggert-Waters Act in any significant way.

Those institutions who have undertaken the preliminary scoping have advised us that they will require at least 12 months following publication of a final rule to complete the necessary work, assuming that the final rule excludes all subordinate lien loans from the escrow requirement. The changes to be implemented are vast; they require changes to origination, servicing, booking, and accounting policies, procedures and software to ensure that the lender does not release escrow for flood insurance over the life of the loan. In addition, escrow capabilities will have to be added to servicing systems to accommodate the 15 to 30 percent of existing borrowers who do not currently escrow. In an attempt to reduce their contractual exposure, some lenders may attempt to obtain amended and re-executed escrow loan documents and security agreements to authorize escrow payments; notices and RESPA disclosures will have to be created and sent to customers. The loans will have to be converted to escrow and an escrow analysis must be run. Additional employees will need to be hired and trained to do this work and to handle the daily disbursements from escrow. In addition, in anticipation of an increased number of borrower inquiries and complaints – both at the initiation of escrow and annually as borrowers have questions about their escrow analysis statements – additional customer service employees will need to be hired and trained.

However, if escrow capabilities must be added to origination and servicing systems for subordinate lien loans, our members estimate that it will take a minimum of 18 months following publication of a final rule. Today, the origination and servicing processes and systems for subordinate lien loans lack escrow capabilities, so lenders will have to build entire new systems and processes to support it. Origination systems will have to calculate initial escrow deposit requirements and collect and store multiple new fields. Disclosures, credit agreements, and security instruments for subordinate lien loans will need to be revised. Process for booking these loans will have to be modified to accommodate escrow, and there will be required additions to accounting processes to collect monthly escrow payments and move them to

[31] For example, ABA and member banks met with Agency staff on November 6, 2012, and February 11, 2013, to discuss industry concerns about the escrow, private policy and force placement provisions. In each of these meetings, we stated that the industry would need at least 12 to 18 months to implement the escrow provision.

appropriate general ledger accounts (which also must be established). Finally, as described above, additional employees will need to be hired and trained to run escrow analysis, to handle disbursements, and respond to consumer inquiries and complaints.

These summary descriptions do not adequately describe the full and detailed nature of the work to be accomplished, but they should underscore the fact that the work that needs to be done cannot be completed by July 6, 2014. Thus, the Associations urge the Agencies to establish a compliance date 12 months after the publication of a final rule if the escrow rule excludes all subordinate lien loans and if not, to establish a compliance date 18 months after final rules are published.

V. Recommendations for Implementation of the Act's Force Placement Amendments.

In section 100244 of the Act, Congress sought to clarify its expectations for the force placement of flood insurance, specifically to establish rules governing when a borrower may be charged and rules for the termination of a force placed policy. Section 100244 was effective upon enactment; however, the Agencies have proposed amendments to their regulations to clarify (1) when a lender may begin to charge the borrower for force placed insurance, (2) the circumstances under which a lender must terminate force placed insurance and refund borrower payments, and (3) what documents are sufficient to demonstrate that a borrower has flood insurance.

The Associations generally support the proposed amendments, but considering the consumer protection and reputational risks presented by force placement, we urge the Agencies to address and clarify additional issues regarding the force placement of flood insurance.

1. *We support the proposed amendment clarifying when a borrower may be charged for a force placed policy and request further clarification.*

Section 100244 of the Act amends section 102(e) of the FDPA to permit a lender to charge the borrower for "premiums or fees incurred for coverage beginning on the date on which flood insurance coverage lapsed or did not provide a sufficient coverage amount."[32]

The Associations support the proposal to amend Agency regulations to conform to this clear statutory directive. The proposed amendment mirrors the statutory text and permits a lender to charge the borrower for the cost of premiums and fees incurred beginning on the date on which the flood insurance lapsed or did not provide a sufficient coverage amount. Further, we support the proposed clarification that the term "date of the lapse" is the expiration date provided in the policy. Permitting lenders to charge back to the expiration date of the lapsed policy is consistent with Congressional intent and longstanding industry practice adopted to ensure continuous coverage as required by the FDPA.

[32] 42 U.S.C. 4012(a)(e).

However, we ask the Agencies to address how to reconcile the proposed definition of lapse with the fact that an NFIP flood insurance policy provides mortgagee protection for an additional 30 days (the Extension Period) after the NFIP policy expires. If a lender force places a policy and charges the borrower from the date the policy lapsed – defined as the expiration date – and the borrower subsequently provides confirmation of a policy effective within the 30 day Extension Period, but with a "gap" in the coverage dates, is the lender to refund the full force-placed premium or only the unearned premium from the effective date of the borrower's policy?

In a related vein, our members urge the Agencies to define the date a lender should charge back to when a lender discovers that flood insurance coverage "did not provide a sufficient coverage amount." For example, assume a lender discovers that a policy has insufficient coverage (perhaps due to re-mapping and a zone change) on February 2, 2014, but in fact the zone change was effective on December 31, 2013. If the lender provides the 45-day notice to the borrower on February 1 and due to the borrower's failure to purchase a policy, the lender force places a policy 46 days later, on March 18, 2014, what is the date that the lender should charge back to: February 1, 2014, December 31, 2013, or March 18, 2014? Many lenders only charge back to the expiration of the 45-day notice period, or March 18, 2014, but we encourage the Agencies to define clearly the date to which the lender may charge back.

2. *The Associations urge the Agencies to clarify what constitutes a "sufficient demonstration" for purposes of confirming a borrower's existing flood insurance coverage.*

Section 100244 also amends section 102(e)(3) of the FDPA to address the termination of force placed insurance. It requires a lender:

- Within 30 days of receiving confirmation of a borrower's existing flood insurance coverage, to terminate any force placed insurance and refund to the borrower all force placed insurance premiums and any related fees paid for by the borrower during any period of overlap between the borrower's policy and the force placed policy; and

- To accept as confirmation of a borrower's existing flood insurance policy a declarations page that includes the existing flood insurance policy number and the identity and contact information for the insurance company or agent.

We support the proposed clarification that recognizes that although the lender can request that the policy be cancelled, it is the insurer that actually cancels the policy. Therefore, the proposed rule requires the lender only to notify the insurer to terminate the force placed policy and to refund to the borrower the premiums and fees during any period of overlap within the 30-day period required by the statute.

In addition, the Agencies have proposed to amend their rules to conform to section 100244(a)(4), which defines the documents deemed sufficient to demonstrate that a borrower

has flood insurance. The proposed rule mirrors section 100244 and requires a lender to 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 agent."

The banking industry cautions that a declarations page and contact information for the insurance carrier or agent will not always provide enough information to permit the lender to assess the sufficiency of the borrower's policy. For example, if a borrower provides the lender with the declarations page of a private flood insurance policy, the lender may not have enough information to determine whether that policy satisfies the mandatory purchase obligation. In addition, our members note that it is not uncommon for the declarations page of an NFIP policy to lack necessary information for a lender to confirm its sufficiency. Under those circumstances, it would be unreasonable to require the lender to cancel the force placed policy and refund the borrower. Doing so could result in situations in which a lender subsequently determines that the borrower's policy does *not* meet the requirements of the FDPA and would be required to force place another policy.

In addition, a declarations page may not be the only documentary evidence demonstrating that the borrower has compliant coverage. Assuming that Congress' intent was to ensure that borrowers could reasonably establish compliant coverage, we encourage the Agencies to adopt a rule that permits the lender to accept other documents (that evidence compliant coverage) and to recognize expressly the right of the lender to ascertain that the borrower's policy satisfies the mandatory purchase obligation before the lender is required to cancel the force placed policy and refund the borrower.

Accordingly, we urge the Agencies to amend their rule as follows (the textual additions are underlined):

> Sufficiency of demonstration. For purposes of confirming a borrower's existing flood insurance coverage under paragraph (b) of this section, a lender or its servicer shall accept from the borrower an insurance policy declarations page <u>or any other reasonable form of written confirmation, such as an insurance certificate or insurance binder that evidences compliant coverage under the FDPA</u> and that includes the existing flood insurance policy number and the identity of, and contact information for, the insurance company or agent. <u>A lender or its servicer may reject evidence of flood insurance coverage submitted by the borrower if neither the evidence of insurance provided nor the borrower's insurance provider or agent provide confirmation that the</u>

policy satisfies the mandatory purchase of flood insurance obligation as defined by 42 U.S.C. 4012a. [33]

3. *The Associations urge the Agencies to provide additional guidance on supervisory expectations for force placement.*

As stated previously, considering the consumer protection and reputational risks presented by force placement, we urge the Agencies provide additional clarity about supervisory expectations for the force placement of flood insurance.

We encourage the Agencies to address borrower notification requirements when a designated loan is insured by a force placed flood insurance policy that is due to expire. Are lenders to send the initial notice that the force placed policy is approaching the end of its one-year term 45 days prior to the expiration of the force placed policy so that the lender is prepared to renew on the date it expires (assuming the borrower does not purchase a policy)? Or should the lender wait until the force-placed policy expires and then send the notice?

The banking industry recommends that the Agencies issue guidance that would authorize a lender to follow a notification process similar to that outlined for renewal of a force placed policy issued through FEMA's Mortgage Portfolio Protection Program.[34] Thus, lenders would be permitted to send the first renewal/expiration letter to the borrower 45 days prior to expiration of the policy so that if the borrower does not purchase a policy, the lender is able to renew the policy—thereby, advancing the FDPA's goal of continuous coverage.

In addition, we urge the Agencies to address whether a lender can refinance or modify a designated loan that is insured by a force placed flood insurance policy. Technical application of the mandatory purchase obligation, which requires borrower-purchased flood insurance to be in place at the closing, undermines industry efforts to help borrowers experiencing financial hardship keep their homes. Our members urge the Agencies to clarify that to assist at-risk homeowners – both those who are in default and those who are at imminent risk of default as defined by the Home Affordable Modification Program (HAMP) – lenders may modify a loan with lender-placed flood insurance.

[33] The suggested amendment is consistent with the Consumer Financial Protection Bureau's servicing rule that provides: "Evidence demonstrating insurance. As evidence of continuous hazard insurance coverage that complies with the loan contract's requirements, a servicer may require a copy of the borrower's hazard insurance policy, or other similar forms of written confirmation. A servicer may reject evidence of hazard insurance coverage submitted by the borrower if neither the borrower's insurance provider nor insurance agent provides confirmation of the insurance information submitted by the borrower, or if the terms and conditions of the borrower's hazard insurance policy do not comply with the borrower's loan contract requirements."

[34] *See Mandatory Purchase of Flood Insurance Guidelines,* Appendix 7. MPPP Guidelines (p. 7-11).

VI. The Associations Call on the Agencies and FEMA to Work Together to Update and Maintain the *Mandatory Purchase of Flood Insurance Guidelines.*

Finally, the Associations urge the Agencies to recognize the magnitude of the changes coming to the NFIP. In the sixteen months since the Act became law, FEMA has been actively working to implement the statute and to communicate the changes to stakeholders. While our members appreciate this effort, FEMA has published an almost overwhelming amount of material, and there is a growing concern, particularly among community banks, that it is becoming exceeding difficult to keep up with the changes.[35]

While it is true that many of these changes involve matters that should be the responsibility of an insurance agent to communicate to a customer, the truth is that lenders are often the ones who must explain the program changes and new requirements to their customers. Many insurance agents sell only a few flood insurance policies each year and therefore lack adequate knowledge about the NFIP and the mandatory purchase obligation. As a result, customers typically look to their lender for information and guidance about flood insurance, and lenders need to understand the NFIP program changes. The failure to do so may result in inadvertent policy lapses, regulatory violations, and consumer harm.

In March 2013, ABA wrote to the Agencies regarding FEMA's announcement that it rescinded the *Mandatory Purchase of Flood Insurance Guidelines* (the Guidelines) and urged the Agencies to assume responsibility for updating and maintaining the Guidelines to reflect Biggert-Waters Act changes.[36] Then as now, we underscored the need for clear and comprehensive guidance about how NFIP program changes impact a lender's flood insurance compliance obligations. An August 22, 2013, reply from the Agencies expressed agreement with the need for clear guidance but stated that the Agencies would not assume responsibility for updating the Guidelines because, "FEMA administers the NFIP, and as such, much of the Guidelines pertained to flood insurance matters outside of the Agencies' authority."

We agree that much of the Guidelines provide information and guidance about the NFIP which is outside of the Agencies' authority. As explained above, however, to comply with the mandatory purchase obligation and assist customers, our members must understand the NFIP. They cannot dismiss insurance, mapping, and other NFIP-related matters as outside the purview of a lender's obligation under the FDPA. In addition, lenders must also understand the role of private flood insurance as an alternative to satisfy the mandatory purchase requirement.

Thus, the Associations strongly urge the Agencies to work with FEMA to provide clear and comprehensive guidance to the industry. In the short-run, we suggest that the Agencies review

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[35] *See, e.g.,* FEMA Website on the Flood Insurance Reform Act of 2012, *available at* http://www.fema.gov/flood-insurance-reform-act-2012 ; NFIP Guide to the October 2013 Flood Insurance Manual, *available at* http://www.h2opartnersusa.com/manual-changes/index.html; WYO Program Bulletins *available at* http://nfipiservice.com/bulletin_2013.html (In 2013 alone FEMA has published 69 bulletins to notify insurance agents of NFIP program changes.)

[36] *See* ABA letter dated March 28, 2013, *available at* http://www.aba.com/Advocacy/commentletters/Documents/clFEMARescissionFloodInsuranceGuidelines2013March.pdf.

FEMA's implementation announcements and bulletins, identify those that will affect lender compliance obligations, and ensure that lenders are informed of the changes. As a longer-term project, we believe that the Agencies and FEMA should work together to update and maintain the Guidelines.

VII. Conclusion

The Associations appreciate the opportunity to comment on the proposed amendments to the regulations regarding loans in areas having special flood hazards. If you have any questions about these comments or would like to discuss anything further, please contact Virginia O'Neill at 202-663-5073 or voneill@aba.com.

Respectfully submitted,

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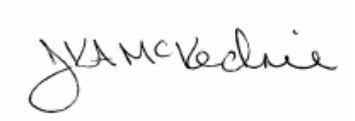

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