Consumer Mortgage Coalition

December 10, 2013

Legislative and Regulatory Activities Division
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Washington, D.C. 20219
Docket ID OCC-2013-0015
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Docket No. R-1462
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Re: **Loans in Areas Having Special Flood Hazards**

Dear Sir or Madam:

The Consumer Mortgage Coalition ("CMC"), a trade association of national mortgage lenders, servicers, and service providers, appreciates the opportunity to submit comments on this interagency proposed regulation to implement the Biggert-Waters Flood Insurance Reform Act of 2012 (the "Biggert-Waters Act").

We support the agencies' efforts to promulgate these regulations jointly. Overall, the proposed regulations are carefully based on the Biggert-Waters statutory language. We

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suggest in this letter a few areas where the proposal would create practical difficulties, and how the agencies might resolve them.

Two Loans With Separate Servicers on One Property

Proposed § 22.5(a)(1)(ii)[1] would require a servicer to escrow flood insurance premiums, but not if the consumer "has obtained" the required coverage "and is currently paying premiums and fees through an escrow account established by another lender[.]"

The servicer of a junior loan does not normally know whether the consumer is current with escrow payments to the servicer of the senior loan. Even if the servicer were to somehow find out that the consumer had not made escrow payments on the senior loan, the servicer of the senior loan would have ensured that coverage is in place, such as by force-placing coverage. In this event, the proposed regulation would still require the servicer of the second loan to escrow for insurance, meaning the borrower would have to pay twice. We do not believe this was the intent.

The language seems to exempt the junior loan from the escrow account only if the consumer, rather than the servicer, "has obtained" the coverage. If the servicer of the senior loan has force-placed coverage, the servicer of the junior loan should not also require payment for flood insurance. Again, if there is coverage through the senior loan, the junior loan should not also require payment for coverage.

The servicer of the senior loan must make sure sufficient coverage is in place at all times. If the regulation works as intended, the coverage in connection with the senior loan would suffice. Requiring the servicer of the junior loan to charge for duplicate coverage would often mean the borrower would pay twice, surely not the intended result. There cannot be two overlapping policies on the same property, so it is not clear what the servicer of the junior loan would do with the collected funds.

The servicer of the junior loan is aware if the insurance policy is cancelled. Should the servicer of the senior loan be in bankruptcy and unable to function, the servicer of the junior loan may need to step in and ensure coverage, but that is a very unusual circumstance. In the vast majority of cases, relying on the servicer of the senior loan is sufficient, and prevents requiring the junior loan to require payment for duplicative coverage that is unavailable.

The Need for Exemptions From the Escrow Requirement

The proposed regulation would require escrow accounts broadly. However, this will be impracticable in many cases, and will have a number of unintended consequences.

[1] Citations are to the Comptroller's version of the proposed regulation for simplicity.

Consumers May Not be Willing or Able to Fund Escrows on Preexisting Loans

The proposed rule would require servicers to create escrows for designated loans that are outstanding on July 6, 2014, and for preexisting loans that become designated loans after that date. The proposed rule does not address the possibility that borrowers may not agree to flood insurance escrows in these circumstances, or that they may not be able to fund them as the servicer would require. The borrower may have irregular income, or may have a temporary financial burden at the time. Especially for borrowers who have already prepaid for a year of flood insurance coverage before their loan became a designated loan, the need to also make escrow payments will appear to be an unnecessary and very unfair expense.

If the borrower is unwilling to agree to an escrow and the servicer has no legal ability to require an escrow, the servicer should not be deemed in violation of any regulation.

We recognize that this proposed requirement is based on the language in § 100209(b) of the Biggert-Waters Act. However, it is not reasonable to believe that Congress intended to potentially increase the default risk for these homeowners. For this reason, we believe that escrows should not be required on pre-existing loans. Instead, we recommend that for preexisting loans, the servicer be required to offer an escrow (unless the servicer is exempt), but that the borrower have the ability to refuse an escrow. In a few years, due to market turnover, there would be few loans in this circumstance. This would be a reasonable accommodation to borrowers who are unwilling or unable to make escrow payments, and would be consistent with lowering default risk on mortgage loans.

Escrows Are Inappropriate For Certain Loan Products

Congress appears to have assumed that servicers can readily establish escrow accounts for any loan product. This is not the case. Open-end credit, reverse loans, and loans secured by mobile homes with a chattel mortgage, are very different loan products than closed-end, first lien loans. For this reason, they often are serviced by separate servicing systems from first-lien, closed-end loans, and these separate systems do not necessarily have escrow administration capacity. The Dodd-Frank Act recognized this fact and, therefore, did not require escrow accounts for open-end credit or reverse mortgage loans.[2] The systems changes required to establish escrow capacity for open-end credit and reverse mortgage loans would be disproportionate to the benefit to consumers of having an escrow account. This is especially the case because servicers will need to pass the compliance costs through to consumers.

Escrow requirements should be limited to closed-end, first lien loans, as under the Dodd-Frank Act escrow requirement.

[2] Dodd-Frank Act § 1461(a), codified at 15 U.S.C. § 129D(a).

Open-End Credit and Reverse Loans Should Be Exempt From the Escrow Requirement

The amount of required flood insurance coverage is based in part on the outstanding loan balance. Open-end credit account balances can and do change frequently. The amount of flood insurance coverage can change from time to time, such as annually. In this situation, requiring an escrow account would not serve its usual purpose because the servicer will not know in the current year how much insurance coverage would be required for the following year. Any escrow payment amounts would be arbitrary. For this reason, escrow accounts should not be required for open-end credit.

Additionally, some of the borrowers in these loans paid a premium to avoid having an escrow account. To require an escrow and reverse their agreement would be inherently unfair.

Servicers may not have the legal ability to require escrows on existing open-end credit or reverse loans, and may be prohibited under consumer lending laws from unilaterally amending the loan agreement. If a servicer cannot legally require an escrow, the servicer should not be required by the agencies' final flood insurance rule to establish an escrow.

We urge the agencies to exempt open-end credit and reverse loans from the escrow requirement.

Short-Term Loans Should Not Require Escrows

Construction and temporary loans should not require escrows for flood insurance. These loans may not require periodic principal payments. For these loans, the cost of administering the escrow would be unreasonable in relation to any short-term benefit. We recommend that any loan with a term of two years or less be exempt from the escrow requirement.

Escrows Should Not Be Required for Nonperforming Loans

There would be no point in requiring an escrow for a loan that is accelerated or for a loan that has been referred to foreclosure, discharged in bankruptcy, or charged off. In these cases, the consumer is not making loan payments, and, therefore, will not make escrow payments.

Private Insurance

The proposed regulation would require lenders and servicers to accept private flood insurance that meets the applicable coverage requirements. It would provide a safe harbor if a state insurance regulator determines that the policy meets the proposed definition of private flood insurance. When the safe harbor is unavailable, lenders and servicers would be required to accept private insurance that provides flood coverage "at least as broad as" under a standard flood insurance policy under the National Flood Insurance Program ("NFIP").

We support the availability of private flood insurance. We also appreciate the safe harbor. However, the safe harbor will not always be available, and in this case it would fall to lenders and servicers to determine whether private insurance meets the "at least as broad as" standard, thus requiring lenders and servicers to review each potential private policy, in detail.

Lenders and servicers would need to reject any private insurance for which there are any coverage differences. Even minor wording differences in the defined terms under the two types of insurance could require lenders and servicers to reject private coverage. This is excessive. Moreover, each change in the NFIP coverage would require reexamining every private insurance policy then in effect, and replacing the policies, perhaps over even minor amendments. This would be unnecessarily disruptive, and would discourage consumers from accepting private policies.

We suggest a more effective approach would be for the agencies to involve private insurers. If a private insurer determines that its flood insurance is sufficient under the regulation in a particular state, it should be acceptable under the federal regulation. The insurers are in the best position to know how similar their policies are to NFIP policies. They are also regulated by the states, who would oversee such determinations.

Timing of Escrow Requirement for Existing Loans

If the final regulation does apply to preexisting loans, a timing adjustment will be necessary. For designated loans outstanding on July 6, 2014, the proposed regulation would require escrowed premiums to begin with the first loan payment after renewal after that date. For loans that become designated loans after July 6, 2014, the proposed regulation would require escrowed premiums to begin with the first loan payment after an insurance policy is established. Notices to consumers will be required before the escrow payments begin.

Servicers need to flag loans as having an escrow for flood insurance to generate the notices of escrow requirements. Once a loan is flagged as escrowed, the systems will recognize the policy renewal date and disburse a payment. If the renewal date falls immediately after July 6, 2014, it would cause an escrow shortage, and likely consumer confusion. We recommend that notices to consumers of the new escrow requirement be required beginning on July 6, 2014.

For loans that become designated after July 6, 2014, the proposed regulation assumes the consumer had no coverage before that date, but that will not always be so. In this case, notice of the new escrow requirement should begin after the loan becomes designated.

Technical Comments

There Cannot be Coverage for the Life of the Loan at Origination

Section 22.3(a) would require flood insurance for the term of a mortgage loan. However, it prohibits a bank from making a designated loan unless the property "is covered by flood insurance for the term of the loan." The loan term is likely 15 to 30 years, while flood insurance contracts may be for only one year, so it would usually not be possible to have an insurance policy in place at origination that extends for the term of the loan. It might be clearer to require the insurance on the loan, and also require it to be renewed, otherwise kept in force, or replaced, so that there is no gap in coverage, throughout the life of the loan.

Consumer May Obtain Insufficient Coverage

Proposed § 22.7(a) provides that, after notice to a consumer, "[i]f the borrower fails to obtain flood insurance within 45 days[,]" the servicer shall obtain coverage. It might be clearer to revise this to read that if the borrower fails to obtain *sufficient* flood insurance coverage, the servicer shall obtain coverage.

Conclusion

We appreciate your consideration of the recommendations made in our comment letter.

Sincerely,

Anne C. Canfield
Executive Director