

December 1, 2011

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Re: Loans in Areas having Special Flood Hazards: Interagency Questions and Answers
Regarding Flood Insurance; OCC Docket ID OCC-2011-0024; FRB Docket No. OP-1431;
FDIC RIN 3064-ZA00; FCA RIN 3052-AC46; NCUA RIN 3133-AD41

By Electronic Delivery

Dear Ladies and Gentlemen:

On behalf of the Board of Directors and members of the American Bankers Insurance Association (ABIA)¹, thank you for the opportunity to comment. We want to focus our comments on forced-placed insurance, specifically addressed in proposed Q&A 57, and 60-62.

¹ The ABIA is a subsidiary of the American Bankers Association. The ABIA is dedicated to furthering the policy and business objectives of banks in insurance. ABIA's members include banks, insurance companies, and firms that provide insurance-related services.

Force Placement is not an issue in Contract but in Statute

While we appreciate that the Agencies expressly recognize a bank or servicer's right to force place flood insurance – and charge the borrower for the premium– within the 45-day notice period, we are surprised that the Agencies continue to think that this right is a matter of discretion instead of compulsory. For example, Question and Answer 62 wrongly assumes that the ability of a lender or servicer to charge a borrower for the cost of forced-placed insurance relies on the borrower's affirmative consent to be charged:

A lender or its servicer may charge a borrower for insurance coverage for any part of the 45-day notice period in which no adequate borrower-purchased flood insurance is in effect, *if the borrower has given the lender or its servicer the express authority to charge the borrower for such coverage as a contractual condition of the loan being made.*²

In fact, lenders and servicers do not enjoy a right to charge a borrower for forced-placed coverage but have a statutory duty to charge for it, irrespective of a contractual relationship.

Congress amended the Flood Disaster Protection Act of 1973, following widespread flood claims in 1993, to strengthen compliance with the mandatory purchase requirement contained in the Act. Congress added section 524 to ensure that borrowers maintain continuous coverage for the life of the loan. Therefore, Section 524 is not a contractual provision, granting a bank or servicer discretion to charge a borrower for the cost of purchasing forced-placed insurance but a statutory requirement that obligates the bank, lender or servicer to secure this coverage and charge for it.³

Expanding the compliance burden on lenders beyond statutory requirements

Misinterpreting the statute by including the reference to a contractual component has other service and compliance risks as well. Although current contract covenants in both the Fannie Mae and Freddie Mac uniform first mortgage security interests may satisfy this requirement, contractual provisions in commercial loan security instruments and older mortgage security instruments may not.

Thus, prior to force placement, a bank or servicer would be required to retrieve and review the loan documentation to determine whether the contract authorizes the lender to charge the borrower, an analysis likely to result in litigation over whether a particular contractual provision satisfies the standard of “express authority to charge the borrower.”

ABIA urges the Agencies to delete the statement in Question and Answer 62 that ties the ability to charge a borrower for the cost of forced-placed insurance to the existence of a contractual

² See 76 Fed. Reg. *supra* at 64180 (emphasis added).

³ 42 U.S.C. §4012a(e).

right to do so and instead affirm that the ability to charge a borrower for costs associated with forced-placed insurance is a statutory duty.

Creating non-statutory servicing standards

The proposed Questions and Answers reference “encouragement” and “best practices” statements throughout the draft and, by doing so, establish *de facto* regulatory practice requirements the statute doesn’t authorize.

For example, in proposed Question 57, the Agencies note the circumstances that mandate a force placement notice and the required content of the notice. However, the Agencies also suggest that it is an industry “best practice” to send the Flood Determination Notice with the force placement notice. The Act and its implementing regulations establish four “triggers” for the Flood Determination Notice – the making, increasing, extending, or renewing a loan – none of which have anything to do with force placement of flood insurance. Creating a requirement that the Flood Determination Notice be sent with the force placement notice may confuse customers. More to the point, there is no consensus among lenders and servicers that this is a “best practice.”

Similarly, the Agencies suggest inclusion of statements that require explanation of a bank’s policy on charging for forced-placed coverage during the 45-day notice period, the timing of that charge, the fact that forced-placed coverage may be more expensive than a borrower’s own policy, and notice to the borrower concerning when flood insurance on the collateral is about to expire. ABIA members feel that such statements are enforced in the field like regulatory requirements, limiting institutional discretion on the timing and content of customer communications.

Questions and Answers 57: Force Placement of Flood Insurance

Proposed Question and Answer 57 contains statements that will add to the existing confusion regarding the extent of force placement duties of home equity lenders and servicers, potentially leading to the over-insurance of properties secured by multiple liens.

Most home equity servicing systems do not have escrow capabilities. We suggest that the Agencies directly address the force placement obligations for home equity loans and home equity lines of credit secured by junior liens on properties located in a Special Flood Hazard Area. This can be accomplished within Question and Answer 57 or as a separate question and answer, as suggested below. We also believe that it would be useful to provide an example.

Proposed Question and Answer 57(a). What is the appropriate amount of flood insurance coverage that the lender or servicer of a home equity loan or line of credit secured by a junior lien can force place?

Answer: If the lender or servicer of a home equity loan or line of credit secured by a junior lien has given the required notice and the borrower fails to provide evidence that flood insurance is in place in an amount equal to the amount required by the Act and implementing regulations for the remainder of the term of the home equity loan or line of credit, the Act only requires force placement of insurance for the minimum coverage amount.

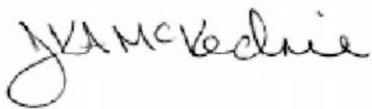
Since there can only be one NFIP flood insurance policy for a secured property, if the borrower provides evidence within the notice period that it has obtained private insurance or that the first-lien mortgage lender or its servicer has force placed flood insurance in an amount equal to the minimum amount of flood insurance required by the Act and regulation, the home equity lender or servicer has satisfied its statutory obligation. The Act does not require the lender or servicer to force place any additional flood insurance coverage. If the borrower fails to provide the above evidence of coverage within the notice period, the Act only requires that the home equity lender or servicer force place a flood insurance policy for the minimum coverage required.

Example: Lender A holds a first mortgage with an unpaid principal balance of \$250,000. Lender B holds a home equity loan with an unpaid balance of \$100,000. Adequate flood insurance was in place when the home equity obligation was closed naming both lenders as loss payees. The flood insurance policy lapses and Lender B provides notice to the borrower that flood insurance does not exist. Within the 45 day period, the borrower provides evidence to Lender B that Lender A force placed a flood insurance policy naming Lender A as the loss payee with a coverage limit of \$250,000. Lender B has no obligation to obtain a second force placed flood insurance policy. If Lender B subsequently determines that the unpaid balance of Lender A's loan is less than \$250,000 and the insurable value of the secured property is at least \$250,000, Lender B can require the borrower to obtain additional flood insurance coverage to protect its interest.

Conclusion

ABIA supports the Agencies' efforts to clarify the statutory requirements as they pertain to flood insurance. We hope our suggestions are helpful.

Sincerely,



J. Kevin A. McKechnie
Executive Director