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Senior Vice President

December 23, 2014

Federal Deposit Insurance Corporation  
550 17th Street NW,  
Washington, DC 20429  
Attn: Robert E. Feldman  
Executive Secretary  
FDIC: RIN 3064-AE27  
[comments@fdic.gov](mailto:comments@fdic.gov)

Farm Credit Administration  
1501 Farm Credit Drive  
McLean, VA 22102-5090  
Attn: Barry F. Mardock  
Deputy Director  
Office of Regulatory Policy  
FCA: RIN 3052-AC93  
[regcomm@fca.gov](mailto:regcomm@fca.gov)

National Credit Union Administration  
1775 Duke Street  
Alexandria, Virginia 22314-3428.  
Attn: Gerard Poliquin  
Secretary of the Board  
NCUA: RIN 3133-AE40  
[regcomments@ncua.gov](mailto:regcomments@ncua.gov)

Board of Governors of the  
Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue NW  
Washington, DC 20551  
Attn: Robert deV. Frierson  
Secretary  
Board: Regulation H, Docket No. R-1498,  
RIN 7100-AE22  
[regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)

Office of the Comptroller of the Currency  
Legislative & Regulatory Activities Division,  
400 7<sup>th</sup> Street SW  
Suite 3E-218  
Mail Stop 9W-11  
Washington, DC 20219  
OCC: Docket D OCC-2014-0016,  
RIN 1557-AD84  
[regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov)

**RE: Loans in Areas Having Special Flood Hazards**

Submitted via Electronic Delivery to: [www.regulations.gov](http://www.regulations.gov)

Dear Sir / Madam,

On October 30, 2014, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Company (FDIC), the Farm Credit Administration (FCA), and the National Credit Union Administration (NCUA) (collectively, the Agencies) published a joint notice of proposed rulemaking entitled "Loans in Areas Having Special Flood Hazards" in the Federal Register.<sup>1</sup> The Agencies are proposing to amend their respective regulations

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<sup>1</sup> 79 Federal Register at 64,518 (October 30, 2014).

regarding loans in areas having special flood hazards to implement certain provisions of the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA),<sup>2</sup> which amends some of the changes to the Flood Disaster Protection Act of 1973 (FDPA)<sup>3</sup> mandated by the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12).<sup>4</sup> The National Association of Home Builders (NAHB) appreciates the opportunity to provide these comments.

NAHB is a Washington, D.C.-based trade association representing over 140,000 builder and associate member firms organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. NAHB's members include those who design, construct, and supply single-family homes; build and manage multifamily, light commercial, and industrial structures; develop land; and remodel existing homes. Collectively, NAHB's members employ over 1.25 million people and will construct about 80% of the new housing units projected for 2014.

Since 1968, the Federal Emergency Management Agency's (FEMA) National Flood Insurance Program (NFIP) has played a critical role in directing the use and development of flood-prone areas and managing the risk of flooding for residential properties. NAHB's members depend upon the NFIP to be annually predictable, universally available, and fiscally viable. The availability and affordability of flood insurance helps ensure that the housing industry can continue to provide, safe, decent, and affordable housing to consumers.

The Agencies' joint notice of proposed rulemaking specifically would:

- Establish requirements with respect to the escrow of flood insurance payments consistent with changes established in HFIAA,<sup>5</sup> and
- Incorporate an exemption for certain detached structures from the mandatory flood insurance purchase requirement as set forth in HFIAA.<sup>6</sup>

In a separate rulemaking the Agencies plan to address other provisions of BW-12 over which they have jurisdiction and that have not been affected by HFIAA. These include provisions related to private flood insurance and force-placed flood insurance.

## Background

The National Flood Insurance Act of 1968 (NFIA)<sup>7</sup> and the Flood Disaster Protection Act of 1973 (FDPA)<sup>8</sup> are the Federal statutes governing the National Flood Insurance Program (NFIP).<sup>9</sup> The

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<sup>2</sup> Pub. L. 113-89, 128 Stat. 1020 (2014).

<sup>3</sup> Pub. L. 93-234, 87 Stat. 975 (1973).

<sup>4</sup> Pub. L. 112-141, 126 Stat. 916 (2012).

<sup>5</sup> 42 U.S.C. § 4012a(d)(1) (1973), amended by Pub. L. 113-89, 128 Stat. 1030 (2014).

<sup>6</sup> 42 U.S.C. § 4012a(c) (1973), amended by Pub. L. 113-89, 128 Stat. 1026 (2014).

<sup>7</sup> Pub. L. 90-448, 82 Stat. 572 (1968).

<sup>8</sup> Pub. L. 93-234, 87 Stat. 975 (1973).

<sup>9</sup> These statutes are codified at 42 U.S.C. 4001-4129. FEMA administers the NFIP and its regulations implementing the NFIP appear at 44 CFR parts 59-77.

NFIP is designed to mitigate future flood losses nationwide through community-enforced building and zoning requirements. It also provides affordable, federally-backed flood insurance protection for property owners. The NFIP is designed to provide an insurance alternative to disaster assistance to meet the rising cost of repairing damage to buildings and their contents caused by floods.

Participation in the NFIP is based on an agreement between local communities and FEMA that states that if a community adopts and enforces floodplain management ordinances to reduce future flood risks in special flood hazard areas (SFHAs),<sup>10</sup> the Federal government will make flood insurance available. Since its inception, the NFIP has played a critical role in directing the use of flood-prone areas and managing the risk of flooding for residential properties. Similarly, the NFIP plays an important role in determining where and how homes and communities are located and built.

As part of an effort to ensure the fiscal soundness of the NFIP, Congress passed the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) to mandate that all policyholders eventually pay the full actuarial risk rate for their properties.<sup>11</sup> To do so, BW-12 made significant changes to the NFIP, including raising the cap on flood insurance rate increases so that annual premiums may increase 20% per year for residences and 25% for businesses, requiring pre-FIRM<sup>12</sup> and grandfathered flood insurance premiums to immediately adjust to full actuarial rates on transfer (e.g., sale) of the insured property, and lowering the threshold for what is considered "substantial improvement" from 50% of the value of the structure to 30% cumulatively over the life of the structure.

Following passage of BW-12, NAHE heard from members across the country who voiced great concerns over the dramatic flood insurance premium increases their customers – including owners of grandfathered properties – would face beginning October 1, 2013. Concerns regarding the increased flood insurance premium rates and lowered substantial improvement threshold of BW-12 were also raised by property owners, realtors, and members of Congress. In 2013, over a dozen bills were introduced that sought to halt or delay several of the provisions of BW-12. In response, Congress enacted the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA) which was signed into law on March 21, 2014.<sup>13</sup> HFIAA lowers the BW-12 rate increases on some policies and implements a surcharge on all policyholders to offset subsidized policies and achieve the financial sustainability goals of BW-12.<sup>14</sup> HFIAA addresses premium grandfathering by repealing the BW-12 provision that required FEMA, upon the effective date of

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<sup>10</sup> A special flood hazard area (SFHA) is an area within a floodplain having a one percent or greater chance of flood occurrence in any given year. 44 C.F.R. § 59.1.

<sup>11</sup> Pub. L. 112-141, 126 Stat. 916 (2012).

<sup>12</sup> Pre-FIRM structures are those that were built before 1974 or before the first Flood Insurance Rate Maps (FIRMs) were established for a respective community.

<sup>13</sup> Pub. L. 113-89, 128 Stat. 1020 (2014).

<sup>14</sup> Pub. L. 113-89, 128 Stat. 1023, Section 8(a-c) (2014). (HFIAA imposes a \$25 surcharge on all primary residences and a \$250 surcharge on all other policies [e.g., businesses and non-primary residences] until all pre-FIRM subsidies are eliminated).

a new or updated flood insurance rate map (FIRM), to phase in premium increases by 20% per year to reflect actuarial rates. HFIAA also repeals certain rate increases that had already gone into effect following BW-12 and provides refunds to affected policyholders. Additionally, HFIAA requires FEMA to designate a Flood Insurance Advocate to advocate for the fair treatment of NFIP policy holders.<sup>15</sup>

HFIAA also introduces amendments related to flood insurance premium escrow requirements<sup>16</sup> and a new exclusion from the mandatory flood insurance purchase requirement for certain detached structures.<sup>17</sup> It is these changes that are the focus of NAHB's comments.

### Proposed Rule

The Agencies are issuing the proposed rule to implement the escrow and detached structure provisions from HFIAA. Since the adoption of the Flood Disaster Protection Act of 1973 (FDPA), the purchase of flood insurance has been mandatory for loans made by regulated lending institutions if the loans are secured by improved real estate or mobile homes, the property is located within a special flood hazard area (SFHA) and the property is within a community participating in the NFIP. The FDPA directs the Agencies to issue regulations governing the lending institutions they supervise. The regulations also require lenders to notify borrowers if the secured property is located in a SFHA and whether Federal disaster assistance is available to the property in the event of a flood.

In 2012, BW-12 significantly amended several of the NFIP requirements over which the Agencies have jurisdiction. Specifically, BW-12:

- Increased the maximum civil money penalty (CMP) that the Agencies can impose (per violation) on a regulated lending institution when the lender engages in a pattern or practice of flood insurance violations;
- Eliminated the annual limit on the total amount of penalties the Agencies can assess against a regulated lending institution;
- Required the Agencies to issue a rule to direct regulated lending institutions to escrow premiums and fees for flood insurance on residential improved real estate (unless the lender meets the BW-12 small institution exemption);
- Required the Agencies to issue a rule to direct regulated lenders to accept private flood insurance and notify borrowers of the availability of private insurance; and
- Amended the force-placed insurance requirement to clarify that regulated lenders may charge borrowers for costs of premiums and fees incurred if policies lapse or are insufficient.<sup>18</sup>

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<sup>15</sup> Pub. L. 113-89, 128 Stat. 1030, Section 24 (2014).

<sup>16</sup> Pub. L. 113-89, 128 Stat. 1030, Section 25 (2014). (Amends Section 102(d) of 42 U.S.C. 4012a(d)).

<sup>17</sup> Pub. L. 113-89, 128 Stat. 1026, Section 13 (2014). (Amends Section 102(c) of 42 U.S.C. 4012a(c)).

<sup>18</sup> Pub. L. 112-141, 126 Stat. 916 (2012).

In 2014, HFIAA further amended the changes set forth in BW-12. Among these changes are:

- Amendments that tie the escrow requirement to the origination, refinance, increase, extension, or renewal of a loan on or after January 1, 2016;
- A mandate that regulated lending institutions provide borrowers an option to escrow flood insurance premiums and fees for loans outstanding as of January 1, 2016; and
- Provision of a new exemption to mandatory flood insurance purchase requirements for any structure that is part of a residential property but is detached from the primary residential structure and does not serve as a residence (e.g. detached garage, detached shed).<sup>19</sup>

The CMP provisions and force-placed insurance requirements were effective upon the enactment of BW-12 on July 6, 2012, and the HFIAA provision excluding detached structures from mandatory flood insurance purchase requirements were effective upon enactment on March 21, 2014. BW-12 and HFIAA, however, require the Agencies to issue regulations to implement the escrow and private flood insurance provisions.

The Agencies thus propose to revise their flood insurance regulations to incorporate HFIAA's provisions exempting certain detached structures on residential property from the mandatory flood insurance purchase requirement and to implement the statutory provisions requiring the escrow of flood insurance premiums and fees.

## Specific Comments

### *Detached Structure Exemption*

Consistent with HFIAA, the Agencies propose a new exemption to the mandatory flood insurance requirement for detached structures that do not serve as a residence.<sup>20</sup> NAHB supports the Agencies' proposal to exempt detached structures from the mandatory flood insurance purchase requirement. Although a borrower may still wish to maintain flood insurance on detached structures or a lender may still require the borrower to do so to protect the collateral securing the mortgage, this exemption will keep certain loans from having to maintain flood insurance simply because a small storage shed, garage, or other outbuilding lies within a SFHA while the primary residence does not. This exemption will lead to greater housing affordability, which NAHB strongly supports.

The detached structure exemption in the proposed rule revises 12 CFR §§ 22.4, 208.25, 339.4, 614.4930, and 760.4 by exempting "any structure that is part of any residential property but is detached from the primary residential structure of such property and does not serve as a residence."<sup>21</sup> The Agencies have specifically solicited comment on whether this exemption

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<sup>19</sup> Pub. L. 113-89, 128 Stat. 1020 (2014).

<sup>20</sup> 79 Fed. Reg. at 64522.

<sup>21</sup> 79 Fed. Reg. at 64529, 64532, 64533, 64535, 64537.

should be clarified with respect to the definitions of “residence” and “residential property.” NAHB suggests that the Agencies can look toward definitions already codified in the CFR for guidance. For example “residence” is defined at 26 CFR § 1.163-1CT(p)(3)(ii):

**Definition of residence.** Whether property is a residence shall be determined based on all the facts and circumstances, including the good faith of the taxpayer. A residence generally includes a house, condominium, mobile home, boat, or house trailer, that contains sleeping space and toilet and cooking facilities. A residence does not include personal property, such as furniture or a television that, in accordance with the applicable local law, is not a fixture.

“Residential property” is defined at 24 CFR § 35.110:

**Residential Property** means a dwelling unit, common areas, building exterior surfaces, and any surrounding land, including outbuildings, fences and play equipment affixed to the land, belonging to an owner and available for use by residents, but not including land used for agricultural, commercial, industrial or other non-residential purposes, and not including paint on the pavement of parking lots, garages, or roadways.

“Residential structure” is defined in lead-based paint regulations at 48 CFR § 1436.570(a):

As used in this section, “**residential structure**” means any house, apartment, or structure intended for human habitation including any institutional structure where persons reside such as an orphanage, boarding school dormitory, day care center, or extended care facility.

NAHB suggests that if the Agencies are seeking to clarify the terms “residence” and “residential property” within the detached structure exemption, they can look to the existing CFR definitions above.

### ***Mandatory Escrow of New Loans***

The proposed rule would require regulated lending institutions to escrow flood insurance premiums and fees for any loans secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or before January 1, 2016.<sup>22</sup> The proposal also requires regulated lending institutions provide borrowers a written notice of these escrow requirements.<sup>23</sup>

In general, NAHB supports the Agencies’ proposal to escrow flood insurance payments for new loans. Escrowing will allow homeowners to pay flood insurance premiums and fees on a monthly basis along with their mortgage, rather than in one annual lump sum. The ability to

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<sup>22</sup> *Id.* at 64523.

<sup>23</sup> *Id.* at 64524.

distribute payment will make it easier for many homeowners to make flood insurance payments. Escrowing flood insurance payments will become increasingly attractive as rate increases begin to take effect following the flood insurance premium rate structure reform of BW-12 and HFIAA.

While NAHB supports the Agencies' proposal to escrow flood insurance payments for new loans, we highlight that it will be important for the Agencies to make sure that lenders do not unnecessarily add other costly burdens to the escrow requirement in the form of additional fees to establish or maintain flood insurance premium escrow accounts.

In order to ensure that borrowers are informed about the requirement to escrow premiums and fees for mandatory flood insurance, the Agencies propose that regulated lending institutions provide borrowers a written notice. To minimize the burden to regulated lenders and to ensure that borrowers receive the notice at a time when they are considering the purchase of flood insurance, the Agencies have proposed to require the lender to provide a notice of the escrow requirements with or in a notice the lender is already required to provide: The Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance. NAHB supports the Agencies' proposal to allow the escrow requirement notice to be distributed with the Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance, as it should save the lenders time and money. If this is done, however, care must be taken by the lenders to specifically point out the changes so that borrowers fully understand this requirement.

### ***Option to Escrow Existing Loans***

While BW-12 would have required all regulated lending institutions to escrow flood insurance payments for both new and existing loans, HFIAA requires that lenders provide borrowers with loans outstanding as of January 1, 2016, the *option* to escrow flood insurance payments.<sup>24</sup> Consistent with HFIAA, the proposed rule would codify the requirement that regulated lenders notify borrowers with existing loans that, should the borrower choose to do so, the lender will escrow flood insurance payments. Additionally, the Agencies are proposing that for regulated lending institutions that have a change in status and no longer qualify for the small lender exception (*see below*), the lender should be required to offer borrowers of existing loans the option to escrow flood insurance because the lender will now be in a position to escrow flood insurance payments for new borrowers.

In general, NAHB supports the Agencies' proposal to require lenders to provide those with outstanding loans the option to escrow flood insurance payments. This will provide borrowers flexibility on how they pay their flood insurance premiums and fees. As with the above concerns regarding the mandatory escrow of flood insurance payments for new loans, NAHB stresses that it will be important for the Agencies to make sure that lenders do not unnecessarily add

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<sup>24</sup> *Id.*

other costly burdens to the escrow requirement in the form of additional fees to establish or maintain flood insurance premium escrow accounts.

The Agencies propose to require that for outstanding loans, a lender mail or deliver, or provide electronically if the borrower agrees, a notice informing the borrower of the option to escrow by March 31 2016. This notice would not have to be provided in conjunction with any other disclosure. The Agencies propose to require a lender to begin escrowing flood insurance payments as soon as reasonably practical after the lender receives the borrower's request to escrow. NAHB believes the Agencies should develop further guidance on this proposed requirement to ensure lenders begin to escrow flood insurance premiums as quickly as possible after a borrower has made the request.

### ***Exemptions from Escrowing***

Consistent with BW-12, a regulated lending institution would not be required to escrow if it has total assets of less than \$1 billion and, as of the July 6, 2012 enactment of BW-12, was not otherwise required by federal or state law to escrow taxes or insurance for the term of the loan and did not have a policy to require escrow of taxes and insurance.<sup>25</sup> The Agencies propose transitional rules for regulated lending institutions that have a change in status and would no longer qualify for the escrow exception. Following HFIAA, the proposed rule would also implement the following exceptions from the escrow requirement:<sup>26</sup>

- Loans subordinate to a senior lien secured by the same property for which flood insurance is already held;
- Loans secured by residential improved real estate or a mobile home that is part of a condominium, cooperative, or project development (provided certain conditions are met);
- Loans that are extensions of credit for a business, commercial, or agricultural purpose;
- Home equity loans;
- Nonperforming loans (those over 90 days past due);
- Loans with terms of less than 1 year.

NAHB supports the proposed escrow exemptions for lenders with less than \$1 billion in total assets as the new requirements would result in administrative costs to establish and maintain escrow accounts that would be overly burdensome to small lenders. These costs, in turn, would likely be passed on to the borrower, resulting in decreased housing affordability.

Additionally, NAHB supports the inclusion of the HFIAA escrow exemptions because they would avoid unnecessary administrative costs and burdens of escrowing short term, past due, and

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<sup>25</sup> Pub. L. 112-141, 126 Stat. 920, Section 100209 (2012). (Amends 42 U.S.C. 4012a(d)).

<sup>26</sup> Pub. L. 113-89, 128 Stat. 1030, Section 25 (2014). (Amends 42 U.S.C. 4012a(d));

home equity loans. The exemption for subordinate loans will avoid duplicative escrowing requirements for loans secured for the same property.

### **Conclusion**

NAHB has a long history of supporting the NFIP and we are committed to ensuring that it remains a viable and affordable program for its policyholders while being mindful of the costs to the American taxpayer. NAHB is supportive of the proposal to exempt detached structures from the mandatory flood insurance purchase requirement. In general, NAHB supports the proposal to require regulated lending institutions to escrow new loans and provide the option for borrowers to escrow existing loans. However, NAHB urges the Agencies to ensure that borrowers do not encounter unnecessary fees related to escrow requirements.

Thank you for your consideration of our comments. Please do not hesitate to contact Owen McDonough, Environmental Policy Program Manager, at (202) 266-8662 if you have any questions or would like to discuss NAHB's comments further.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan Asmus".

Susan Asmus  
Senior Vice President  
Regulatory Affairs  
National Association of Home Builders