

Flood Disaster Protection

Introduction

The National Flood Insurance Program (NFIP) is administered primarily under the National Flood Insurance Act of 1968 (1968 Act) and the Flood Disaster Protection Act of 1973 (FDPA).¹ The 1968 Act made federally subsidized flood insurance available to owners of improved real estate or mobile homes located in special flood hazard areas (SFHA) if their community participates in the NFIP. The NFIP, administered by a department of the Federal Emergency Management Agency (FEMA) known as the Federal Insurance and Mitigation Administration (FIMA), makes federally backed flood insurance available to consumers through NFIP Direct Program agents who deal directly with FEMA or through the Write Your Own Program (WYO), which allows consumers to purchase federal flood insurance from private insurance carriers. The NFIP aims to reduce the impact of flooding by providing affordable insurance to property owners and by encouraging communities to adopt and enforce floodplain management regulations. The FDPA requires federal financial regulatory agencies to adopt regulations prohibiting their regulated lending institutions from making, increasing, extending or renewing a loan secured by improved real estate or a mobile home located or to be located in an SFHA in a community participating in the NFIP unless the property securing the loan is covered by flood insurance. Flood insurance may be provided through the NFIP or through a private insurance carrier.

Title V of the Riegle Community Development and Regulatory Improvement Act of 1994² which is called the National Flood Insurance Reform Act of 1994 (1994 Act), comprehensively revised the Federal flood insurance statutes. The purpose of the 1994 Act was to increase compliance with flood insurance requirements and participation in the NFIP in order to provide additional income to the National Flood Insurance Fund and to decrease the financial burden of flooding on the Federal government, taxpayers, and flood victims.³ The 1994 Act required the federal financial regulatory agencies, the Board of Governors of the Federal Reserve System (FRB); the Federal Deposit Insurance Corporation (FDIC); the National Credit Union Administration (NCUA); and the Office of the Comptroller of the Currency (OCC) to revise their current flood insurance regulations and brought lenders regulated by the Farm Credit Administration (FCA) under the coverage of the Federal flood insurance statutes. The federal financial regulatory agencies and the FCA (collectively, the Agencies) jointly issued regulations on August 29, 1996 (61 FR 45684).⁴

The 1994 Act also made the flood insurance requirements directly applicable to the loans purchased by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) and to agencies that provide government insurance or guarantees such as the Small Business Administration (SBA), Federal Housing Administration (FHA), and the Department of Veterans Affairs (VA).

The mandatory flood insurance purchase requirements of the FDPA were again significantly amended with the passage of the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters Act) and the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA). These statutes made changes to the provisions pertaining to force placement of flood insurance; escrowing of flood insurance premiums and fees; exemptions to the mandatory flood insurance purchase requirement; and civil money penalties. Moreover, a new provision mandating the acceptance of a private flood insurance policy meeting certain criteria as satisfaction of the mandatory purchase requirement was added to the FDPA. The Agencies jointly issued rules addressing force placement, escrow, and the exemption to the mandatory purchase requirement for detached structures on July 21, 2015 (80 FR 43215).

Objectives of the FDPA:

- Provide flood insurance to owners of improved real estate located in SFHAs of communities participating in the NFIP.
- Require communities to enact measures designed to reduce or avoid future flood losses as a condition for making federally subsidized flood insurance available.
- Require federal financial regulatory agencies to adopt regulations prohibiting their regulated lending institutions from making, increasing, extending, or renewing a loan secured by improved real estate or a mobile home located or to be located in an SFHA of a community participating in the NFIP, unless the property securing the loan is covered by flood insurance.

¹ These statutes are codified at 42 USC §4001-4129. FEMA administers the NFIP; its regulations implementing the NFIP appear at 44 CFR Parts 59-80.

² Pub. L.103-325, Title V, 108 Stat. 2160, 2255-87 (September 23, 1994).

³ H.R. Conf. Rep. No. 652, 103d Cong. 2d Sess. 195 (1994). (Conference Report).

⁴ Agency regulations are codified at 12 CFR 22 (OCC); 12 CFR 208 (FRB); 12 CFR 339 (FDIC); 12 CFR 614 (FCA); 12 CFR 760 (NCUA).

- Require federal agencies, such as the FHA, SBA and the VA not to subsidize, insure, or guarantee any loan if the property securing the loan is in an SFHA of a community not participating in the NFIP.

Structures Eligible for Flood Insurance Under the NFIP

The NFIP covers improved real property or mobile homes located or to be located in an area identified by FEMA as having special flood hazards. Generally, each insurable structure requires a separate insurance policy. The following types of structures are eligible for coverage:

- Residential, industrial, commercial, and agricultural buildings that are walled and roofed structures that are principally above ground.
- Buildings under construction where a development loan is made to construct insurable improvements on the land. Insurance can be purchased to keep pace with the new construction.
- Mobile homes that are affixed to a permanent site, including mobile homes that are part of a dealer’s inventory and affixed to permanent foundations.
- Condominiums.
- Co-operative buildings.
- Flood insurance coverage is also available for personal property and other insurable contents contained in real property or mobile homes located in SFHAs. The property must be insured in order for the contents to be eligible.

Structures Not Eligible for Flood Insurance Under the NFIP

- Unimproved land, bridges, dams, and roads.
- Mobile homes not affixed to a permanent site.
- Travel trailers and campers.
- Converted buses or vans.
- Buildings entirely in, on, or over water into which boats are floated.
- Buildings newly constructed or substantially improved on or after October 1, 1983, in an area designated as an undeveloped coastal barrier with the Coastal Barrier Resource System established by the Coastal Barrier Resources Act (Public Law 97-348).

Flood Insurance Requirements for Lending Institutions

Basic Requirement

Flood insurance, either issued through the NFIP or from a private insurance provider, is required for the term of the loan on buildings or mobile homes when an institution makes, increases, extends or renews a designated loan, meaning all three of the following factors are present:

- The loan (commercial or consumer) is secured by improved real estate or a mobile home that is affixed to a permanent foundation (security property);
- The property securing the loan is located or will be located in an SFHA as identified by FEMA; and
- The community in which the property is located participates in the NFIP.

In the case of mobile homes, an institution does not have to obtain a security interest in the underlying real estate in order for a loan secured by a mobile home to be covered by the regulations.

The FDPA provides that a regulated lending institution may not make, increase, extend, or renew any loan secured by improved real

property that is located in an SFHA unless the improved real property is covered by the minimum amount of flood insurance required by statute. This includes situations where a security interest in improved real property is taken only “out of an abundance of caution.”

Nonparticipating Communities

Although a lender may make, increase, extend, or renew a loan in a nonparticipating community, a lender is still required to determine whether the security property is located in an SFHA and if so, to notify the borrower. The lender must also notify the borrower that flood insurance coverage under the NFIP is not available because the community does not participate in the NFIP. If the nonparticipating community has been identified for at least one year as containing an SFHA, properties located in the community will not be eligible for federal disaster relief assistance in the event of a federally declared disaster.

Because of the lack of NFIP flood insurance coverage and limited federal disaster assistance available, a lender should carefully evaluate the risk involved in making such a loan. A lender making a loan in a nonparticipating community may want to require the purchase of private flood insurance, if available. Also, a lender with significant lending in nonparticipating communities should establish procedures to ensure that such loans do not constitute an unacceptably large portion of the financial institution’s loan portfolio.

Federal agency lenders such as the FHA, the SBA and the VA will not subsidize, insure or guarantee any loan if the property securing the loan is in a SFHA of a community not participating in the NFIP. In addition, Freddie Mac and Fannie Mae will not purchase mortgages secured by improved properties located in SFHAs in nonparticipating communities.

Special Situation—Table Funded Loans

In the typical table funding situation, the party providing the funding reviews and approves the credit standing of the borrower and issues a commitment to the broker or dealer to purchase the loan at the time the loan is originated. Frequently, all loan documentation and other statutorily mandated notices are supplied by the party providing the funding, rather than the broker or dealer. The funding party provides the original funding “at the table” when the broker or dealer and the borrower close the loan. Concurrent with the loan closing, the funding party acquires the loan from the broker or dealer.

For flood hazard determination purposes, the substance of the table funded transaction should control and the typical table funded transaction should be considered a loan made, rather than purchased, by the entity that actually supplies the funds. Regulated institutions that provide table funding to close loans originated by a mortgage broker or mobile home dealer will be considered to be “making” a loan for purposes of the flood insurance requirements.

Treating table funded loans as loans made by the funding entity need not result in duplication of flood hazard determinations and borrower notices. The funding entity may delegate to the broker or dealer originating the transaction the responsibility for fulfilling the flood insurance requirements or may otherwise divide the responsibilities with the broker or dealer.

Exemptions to the Purchase Requirement

The flood insurance purchase requirement does not apply to the following three loan situations:

- Loans on state-owned property covered under an adequate policy of self-insurance satisfactory to the Administrator of FEMA. The Administrator will periodically publish a list of state property falling within this exemption.
- Loans with an original principal balance of \$5,000 or less, and having an original repayment term of one year or less.
- Any structure that is a part of any residential property but is detached from the primary residential structure of such property and does not serve as a residence.
 - A structure that is part of a residential property is a structure used primarily for personal, family, or household purposes, and not used primarily for agricultural, commercial, industrial, or other business purposes. It is detached from the primary residential

structure if it is not joined by any structural connection to that structure.

- Whether a structure serves as a residence is based on the institution's good faith determination that the structure is intended for residential use or actually used as a residence, which generally includes sleeping, bathroom, or kitchen facilities, but not necessarily all three.

Amount of Flood Insurance Required

The minimum amount of flood insurance required must be at least equal to the lesser of the outstanding principal balance of the loan, the maximum amount available under the NFIP for the type of structure, or the insurable value of the property. Flood insurance coverage under the NFIP is limited to the building or mobile home and any personal property that secures the loan and not the land itself.

The limits of coverage for flood policies are:

- \$250,000 for residential property structures and \$100,000 for personal contents.
- \$500,000 for non-residential structures and \$500,000 for contents.
- \$500,000 for non-condominium residential buildings of five units or greater and \$100,000 for personal contents.⁵

Waiting Period

NFIP flood insurance policies that are not issued in conjunction with the making, increasing, extending or renewing of a loan have a 30-day waiting period. The congressional intent behind this requirement was to prevent the purchase of flood insurance (and any direct loss to the U.S. government) in times of imminent loss. However, if the initial purchase of flood insurance is made during the 13-month period following revision or update of a Flood Insurance Rate Map for the community, there is a one-day waiting period.

There is no waiting period when an additional amount of NFIP insurance is required in connection with the making, increasing, extending or renewing of a loan, such as a second mortgage, home equity loan, or refinancing.

Special Situations—Second Mortgages/Home Equity Loans

Both second mortgages and home equity loans are transactions that may be subject to the mandatory purchase requirements of the FDPA. Because only one NFIP flood insurance policy can be issued on a building, an institution should not request a new NFIP flood insurance policy if one already exists. Instead, the institution should have the borrower contact the insurance agent:

- To inform the agent of the intention to obtain a loan involving a subordinate lien
- To obtain verification of the existence of a flood insurance policy, and
- To check whether the amount of insurance covers all loan amounts.

After obtaining this information, the insurance agent should increase the amount of NFIP coverage if necessary and issue an endorsement that will reflect the institution as a lien holder.

As an alternative, the borrower may also consider obtaining a private flood insurance policy in the proper amount.

For loans with approved lines of credit to be used in the future, it may be difficult to calculate the amount of insurance for the loan since the borrower will be drawing down differing amounts on the line at different times. If there is no policy on the collateral, the borrower must, at a minimum, obtain a policy as a requirement for drawing on the line. As a matter of administrative convenience to ensure compliance with the requirements, an institution may take the following alternative approaches:

- As part of its procedures, an institution should review its records periodically so that as draws are made against the line or repayments made to the account, the appropriate amount of insurance coverage can be maintained; or

⁵ This amount was increased from \$250,000 to \$500,000 as of June 1, 2014.

- Upon origination, require the purchase of flood insurance for the total amount of the line, the value of the improved property or the maximum amount of flood insurance coverage available, whichever is less.

Special Situations—Condominium Policies

FEMA’s condominium master policy is called a Residential Condominium Building Association Policy (RCBAP). The RCBAP covers both the common and individually owned building elements within the units, improvements within the units, and contents owned in common if contents coverage is purchased. The maximum amount of building flood insurance coverage that can be purchased under an RCBAP is either 100 percent of the replacement cost value of the building, or the total number of units in the condominium building times \$250,000, whichever is less.

An institution must ensure that the minimum amount of flood insurance covering the condominium unit is the lesser of:

- the outstanding principal balance of the loan, or
- the maximum amount of insurance available under the NFIP which is the lesser of:
 - the maximum limit available for the residential condominium unit, or
 - the insurable value allocated to the residential condominium unit which is the replacement cost value of the condominium building divided by the number of units.

Therefore, an institution must require a borrower whose loan is secured by a residential condominium unit to either:

- Ensure the condominium owners association has purchased an RCBAP, or other flood insurance policy, covering either 100 percent of the replacement cost value of the building, or the total number of units in the condominium building times \$250,000, whichever is less; or
- Obtain a Dwelling Policy if the condominium owners association has not purchased flood insurance as described above or if that coverage is less than either 100 percent of the replacement cost value of the building or the total number of units in the condominium building times \$250,000, whichever is less. The amount of coverage under a Dwelling Policy required to be purchased by the individual unit owner would be the difference between the condominium policy’s coverage allocated to that unit and the mandatory flood insurance purchase requirements discussed above.

For instance, the maximum amount of coverage on a 50-unit condominium building would be \$12,500,000 (\$250,000 x 50). If the replacement cost value of the building was \$10,000,000, the condominium association could purchase a policy of \$10,000,000. This amount of insurance would meet the requirements of the regulations for any individual unit insurance requirement in the condominium.

Non-residential condominium buildings are not eligible for coverage under the RCBAP. The NFIP offers a maximum amount of building coverage up to \$500,000 for these buildings and \$500,000 for commonly owned contents. Under the NFIP, the owner of a non-residential condominium unit within a non-residential condominium building may purchase only contents coverage for that unit. Building coverage may not be purchased in the name of the unit owner. The maximum allowable contents coverage for non-residential owners is \$500,000.

Other Special Situations

- *Multiple Structures*— Multiple structures that secure a loan located in an SFHA must each be covered by flood insurance, even though the value of one structure may be sufficient to cover the loan amount. Under the NFIP, FEMA generally requires one policy per building, but also permits borrowers to insure non-residential buildings using one policy with a schedule separately listing each building. This coverage alternative may be especially useful for loans secured by agricultural properties and improvements.
- *Other Real Estate Owned*— An institution with other real estate owned (OREO) in SFHAs should, as a prudent practice, purchase flood insurance policies on its OREO property, although it is not required to do so by the regulations.

Escrow Requirements

The regulations require the escrowing of flood insurance premiums and fees for designated loans secured by residential improved real estate or a mobile home made, increased, renewed, or extended on or after January 1, 2016. In addition, institutions must offer and

make available the option to escrow for flood insurance premiums and fees to borrowers with designated loans secured by residential improved real estate or a mobile home outstanding as of January 1, 2016. The escrow provisions are designed to improve compliance with flood insurance requirements by ensuring that borrowers with designated loans secured by residential improved real estate or a mobile home set aside funds to maintain flood insurance for the life of the loan.

While the escrow requirement pertains generally to any designated loan secured by residential improved real estate or a mobile home, there are two types of exceptions: a small lender exception and a loan-type exception. The regulation provides that an institution is not required to escrow if it has total assets of less than \$1 billion as of December 31 of either of the two prior calendar years and, as of July 6, 2012:

- The institution was not required by Federal or State law to escrow taxes, insurance premiums, fees, or any other charges for the term of the loan; and
- The institution did not have a policy of uniformly and consistently escrowing the same.

If an excepted institution no longer qualifies for the exception because its assets exceeded the threshold for two consecutive calendar year ends, it must begin escrowing for any designated loan secured by residential improved real estate or a mobile home made, increased, extended, or renewed on or after July 1 of the first calendar year of changed status. If a financial institution provides escrow accounts only upon requests from borrowers, this does not constitute a uniform or consistent policy of requiring escrows.

In addition, the escrow requirement does not apply to the following types of loans:

- Extensions of credit primarily for business, commercial, or agricultural purposes even if secured by residential real estate;
- Loans in a subordinate position to a senior lien secured by the same property upon which the borrower has obtained sufficient flood insurance;
- Loans secured by a property that is covered by a flood insurance policy with sufficient flood insurance coverage, which is provided by a condominium, cooperative, or homeowners association;
- Home equity lines of credit;
- Nonperforming loans; or
- Loans with a term of no longer than 12 months.

A nonperforming loan in this instance is a loan that is 90 or more days past due and remains nonperforming until it is permanently modified or until the entire amount past due, including principal, accrued interest, and penalty interest incurred as the result of the past due status, is collected or otherwise discharged in full.

A loan that has a term exceeding 12 months does not qualify for the 12 month exception, even if one phase of the loan is for 12 months or less.

If the institution determines that a loan no longer qualifies for one of these loan-type exceptions, the institution must begin escrowing as soon as reasonably practicable.

Option to escrow: An institution (or its servicer) must offer and make available to borrowers the option to escrow flood insurance premiums and fees for designated loans secured by residential improved real estate or a mobile home that are outstanding as of January 1, 2016. In addition, an institution must provide the option to escrow notice to borrowers by June 30, 2016. A model clause for the notice on the option to escrow is provided in Appendix B of the regulations.

An institution that no longer qualifies for the small lender exception must provide a notice of the option to escrow flood insurance premiums and fees for loans outstanding on July 1 of the first calendar year in which it has a change in status by September 30 of that year. Further, the financial institution must begin escrowing as soon as reasonably practicable after receiving a borrower's request to escrow. The notice regarding the option to escrow does not have to be provided in conjunction with any other disclosure or be

segregated from other information provided to the borrower. An institution may choose whether to provide a separate notice or add it to any other disclosure the lender provides the borrower, such as a periodic statement.

Standard Flood Hazard Determination Form

When an institution makes, increases, extends, or renews any loan secured by improved real estate or by a mobile home, it *must* use the standard flood hazard determination form (SFHDF) developed by FEMA⁶ to determine whether the building or mobile home offered as security property is or will be located in an SFHA in which flood insurance is available under the Federal flood insurance statutes.

An institution can use a printed, computerized, or electronic form. It must retain a copy of the completed form, in either hard copy or electronic format, for the period of time it owns the loan. FEMA has stated that if an electronic format is used, the format and exact layout of the SFHDF is not required, but the fields and elements listed on the form are required. Accordingly, any electronic format used by an institution must contain all mandatory fields indicated on the SFHDF.

The SFHDF is available on the FEMA Website at: <http://www.fema.gov/media-library/assets/documents/225>

Decisions as to the applicability of flood insurance may not be based on an institution's unilateral determination of elevations at which floods may occur. Official elevation determinations and, therefore, map revisions or amendments, Letter of Map Revision (LOMR) or Letter of Map Amendment (LOMA), respectively, may be performed only by FEMA.

Letter of Map Amendment (LOMA)

- A flood map will occasionally show a property as being in an SFHA, even though the building on the property is actually above the base flood elevation. In practice, flood insurance maps do not reflect every rise in terrain, and there may be instances of high ground inadvertently included in the SFHAs. Nevertheless, lenders are bound by the information shown on the FEMA maps until the map is changed by FEMA.
- To resolve such a situation, a property owner can submit elevation materials with a request to FEMA for a LOMA to remove the property from the SFHA. The request must be submitted on the appropriate FEMA application form available at: <https://www.fema.gov/flood-mapping-related-forms>.
- Upon receiving a complete application package, FEMA will normally complete its review and issue its determination within 4-6 weeks.
- After obtaining a LOMA, a borrower must submit it to the lender for the flood insurance requirement to be waived. The lender has the discretion to continue to require flood insurance if the lender determines it is prudent to do so.

Letter of Map Revision (LOMR)

- A LOMR is appropriate when physical changes are necessary to raise the land above the base flood elevation 100-year flood level. For example, a LOMR request is appropriate when a property, located within a SFHA, is graded and filled to raise the level of the land above the base flood elevation 100-year flood level. The request for a LOMR must be initiated and approved by the community since changes in land level may affect other property owners. Community approval also confirms that the change in the land has been reviewed and is compatible with the community's planning.
- A LOMR request must be submitted to FEMA on the appropriate form, available at: <https://www.fema.gov/flood-mapping-related-forms>.
- After obtaining a LOMR, the borrower must submit it to the lender before the flood insurance requirement is waived. The lender has the discretion to continue to require flood insurance if the lender determines that it is prudent to do so.

Flood maps, Standard Flood Hazard Determination forms, and Community Status Books may be obtained from FEMA by:

⁶ See 63 FR 27857 (May 21, 1998) (codified at 44 CFR § 65.16).

Calling: **1-800-358-9616** or **1-800-611-6125**, or

Ordering online: www.msc.fema.gov

To obtain information on a community's participation status, contact a FEMA representative at 1-800-358-9616 to request a community status book. Information on community status is also available on the Internet at www.fema.gov/national-flood-insurance-program/national-flood-insurance-program-community-status-book.

Reliance on prior determination

An institution may rely on a prior flood determination, whether or not the security property is located in an SFHA, and it is exempt from liability for errors in the previous determination if:

- The previous determination is not more than seven years old, and
- The basis for the previous determination was recorded on the SFHDF.

There are, however some circumstances in which an institution may not rely on a previous determination, such as:

- If FEMA's map revisions or updates show that the security property has been remapped into an SFHA, or
- If the lender contacts FEMA and discovers that map revisions or updates affecting the security property have been made after the date of the previous determination.

An institution may also rely on a previous determination, which is not more than seven years old and is set forth on an SFHDF, when it increases, extends, renews, or purchases a loan. The making of a loan is not listed as a permissible event that permits an institution to rely on a previous determination. However, when the loan involves a refinancing or assumption by the same lender who obtained the original flood determination on the same property, the institution may rely on the previous determination, but only if the original determination was made not more than seven years before the date of the transaction, the basis for the determination was set forth on the SFHDF, and there were no map revisions affecting the property since the original determination was made. The same is true for multiple loans made by the same lender to the same borrower secured by the same property. A new determination is required when a loan refinancing or assumption is made by a lender different from the one who obtained the original determination because this constitutes a new loan.

Force Placement Requirements

An institution is not required to monitor for map changes, and flood determinations are not required to be made at any time other than when a loan is made, increased, extended, or renewed. If, however, at any time during the life of the loan the institution or its servicer determines that required flood insurance is deficient, the Agencies' regulations require initiation of force placement procedures.

An institution or a servicer acting on its behalf is required to purchase or "force place" flood insurance for the borrower if the institution or the servicer determines that coverage is inadequate. An institution, or servicer acting on its behalf, upon discovering that the security property is not covered by an adequate amount of flood insurance, must provide notice to the borrower that the borrower should obtain flood insurance. If the borrower fails to purchase flood insurance in the appropriate amount within 45 days, the lender must purchase insurance on the borrower's behalf. If there is a brief delay in force placing coverage, the Agencies expect the lender to be able to provide a reasonable explanation, for example, because the lender uses batch processing when purchasing force-placed flood insurance policies.

An institution or its servicer continues to be responsible for ensuring that if flood insurance was required at origination, the borrower renews the flood insurance policy and continues to renew it for as long as flood insurance is required for the security property. If a borrower allows a policy to lapse when insurance is required, the institution or its servicer is required to commence force placement procedures.

Under the Biggert-Waters Act, an institution may force place and charge for insurance beginning on the date on which flood insurance coverage lapsed or did not provide a sufficient coverage amount. The Biggert-Waters Act also provides that

an institution must terminate force-placed insurance within 30 days of receipt of confirmation of a borrower's existing flood insurance coverage. Additionally, an institution must refund to the borrower all premiums and fees for force-placed insurance paid by the borrower during any period of overlap between the borrower's policy and the force-placed policy. Because an insurer is the entity that actually cancels the policy, an institution need only notify the insurer to terminate the force-placed policy in order to comply with the termination requirement.

Force placement authority is designed to be used if, over the term of the loan, the institution or its servicer determines that flood insurance coverage on the security property is deficient; that is, whenever the amount of coverage in place is not equal to the lesser of the outstanding principal balance of the loan or the maximum coverage available under the NFIP. If a borrower fails to obtain the required amount of flood insurance coverage upon notification by an institution or its servicer, the amount that must be force placed is equal to the difference between the present amount of coverage, if any, and the lesser of the outstanding principal balance or the maximum coverage limit.

There is no required form of notice to borrowers for use in connection with the force placement procedures. An institution or its servicer may choose to send the notice directly or may use the insurance company that issues the force placement policy to send the notice. Force-placed flood insurance policies are available through private insurers or through the NFIP. FEMA has developed the Mortgage Portfolio Protection Program (MPPP) to assist lenders in connection with force placement procedures. For information concerning the MPPP, lenders and others should consult FEMA's Website.⁷

Determination Fees

The regulations permit an institution or its servicer to charge a reasonable fee to the borrower for the costs of making a flood hazard determination under the following circumstances:

- The borrower initiates a transaction (making, increasing, extending, or renewing a loan) that triggers a flood hazard determination;
- There is a revision or updating of floodplain areas or risk zones by FEMA;
- The determination is due to FEMA's publication of a notice that affects the area in which the loan is located; or
- The determination results in the purchase of flood insurance under the force placement provision.

The loan agreement or other contractual documents between the parties may also permit the imposition of fees.

The authority to charge a borrower a reasonable fee for a flood hazard determination extends to a fee for life-of-loan monitoring by either the institution, its servicer, or by a third party, such as a flood hazard determination company.

Truth in Lending Act Issues

The Commentary to Regulation Z states that a fee for services that will be performed periodically during the loan term is a finance charge, regardless of whether the fee is imposed at closing, or when the service is performed. This would include the fee for life-of-loan monitoring. The fee for the original flood determination (i.e., whether a security property is in an SFHA) is excluded from the finance charge. The Commentary further indicates that any portion of a fee that does not relate to the initial decision to grant credit must be included in the finance charge.⁸ If creditors are uncertain about what portion of a fee is related to the initial decision to grant credit, the entire fee may be treated as a finance charge.

Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

When an institution makes, increases, extends or renews a loan secured by property that is or will be located in a SFHA, the institution must provide a written notice of special flood hazards to the borrower and the servicer, if there is one. This notice of special flood hazards must be provided regardless of whether the security property is located in a participating or non-participating community. The written notice must contain the following information:

⁷ http://www.fema.gov/media-library-data/1444065610669-6de95573a833329e4a889e95569d5d9b/11_mppp_508_nov2015.pdf

⁸ See 12 CFR part 1026, supplement 1, comment 4(c)(7)-3.

- A warning that the building or mobile home is or will be located in a SFHA.
- A description of the flood purchase requirements contained in section 102(b) of the FDPA, as amended.
- A statement, if applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers.
- A statement that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP.
- A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company.
- A statement that the borrower is encouraged to compare flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies, and that the borrower should inquire about the availability, cost, and comparisons of flood insurance coverage to an insurance agent.
- A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home, caused by flooding in a Federally declared disaster.

For any loan for which an institution is required to escrow under the regulations, the institution must provide a written notice with the notice of special flood hazards informing the borrower that the institution is required to escrow all premiums and fees for flood insurance required under the regulations. The language in the notice about escrow should be substantially similar to the model clauses provided in Appendix A of the regulations, under the section titled “Escrow Requirements for Residential Loans.” The escrow notice may be provided in the notice of special flood hazards or separately.

An institution may use the sample form contained in Appendix A to the regulations to comply with the notice requirements. The sample form is an example of an acceptable form the notice may take and contains additional information not required under the regulations. Lenders may also personalize, change the format of, and add information to the sample form if they wish to do so. However, to ensure compliance with the notice requirements, a lender-revised notice form must provide the borrower, at a minimum, with the information required by the regulations.

The regulations permit an institution to rely on assurances from a seller or lessor that the seller or lessor has provided the requisite notice to the purchaser or lessee. As an example, this alternate form of notice might arise in a situation in which the lender is providing financing through a developer for the purchase of condominium units by multiple borrowers. The lender may not deal directly with the individual condominium unit purchaser and need not provide notice to each purchaser but may instead rely on the developer/seller’s assurances that the developer/seller has given the required notice.

Delivery of the notice of special flood hazards must take place within a “reasonable time” before the completion of the transaction. What constitutes “reasonable” notice will necessarily vary according to the circumstances of particular transactions. An institution should bear in mind, however, that a borrower should receive notice timely enough to ensure that:

- The borrower has the opportunity to become aware of the borrower’s responsibilities under the NFIP; and
- Where applicable, the borrower can purchase flood insurance before completion of the loan transaction.

The Agencies generally regard ten days as a “reasonable” time interval.

Notice to Servicer

Loan servicers must also be notified of special flood hazards. In many cases, the servicer’s identity will not be known until well after the loan closing; consequently, notification to the servicer in advance of the loan closing would not be possible or would serve no purpose. Notice to the servicer is required as promptly as practicable after the institution provides notice to the borrower, and must be given no later than at the time the lender transmits to the servicer other loan data concerning hazard insurance and taxes. Delivery to the servicer of a copy of the borrower’s notice suffices as notice to the servicer.

Notice to the Administrator of FEMA

An institution must notify the Administrator of FEMA, or the Administrator’s designee, of the identity of the loan servicer and of any change in the servicer. FEMA has designated the insurance carrier as its designee to receive notice of the servicer’s identity and of any

change thereof, and at FEMA's request this designation is stated in the regulations. Notice of the identity of the servicer will enable FEMA's designee to provide notice to the servicer of a loan 45 days before the expiration of a flood insurance contract. Notice is required to be sent within 60 days of the effective date of the transfer of servicing. No standard form of notice is required to be used; however, the information should be sufficient for the Administrator, or the Administrator's designee, to identify the security property and the loan, as well as the new servicer and its address.

Notice of Option to Escrow

When an institution must offer and make available to a borrower the option to escrow flood insurance premiums and fees, the institution is required to mail or deliver to the borrower a written notice of the option to escrow for required flood insurance. The language in this notice must be similar to the language in the model clause of Appendix B of the regulations. The notice must also include the method(s) by which the borrower may request the escrow. Institutions must mail or deliver the notice no later than June 30, 2016 for any loan covered by flood insurance and outstanding on January 1, 2016.

Institutions that no longer qualify for the small lender exception must mail or deliver, for any loan covered by flood insurance and outstanding on July 1 of the first calendar year in which the institution had a change in status, the notice by September 30 of that year.

Recordkeeping Requirements

The record keeping requirements of the regulations include retention of:

- Copies of completed SFHDFs in either hard copy or electronic form, for as long as the institution owns the loan; and
- Records of the receipt of the notice of special flood hazards to the borrower and the servicer for as long as the institution owns the loan.

There is no particular form required for the record of receipt; however, it should contain a statement from the borrower indicating that the borrower has received the notification. Examples of records of receipt may include:

- A borrower's signed acknowledgment on a copy of the notice,
- A borrower-initialed list of documents and disclosures that the lender provided the borrower, or
- A scanned electronic image of a receipt or other document signed by the borrower.

An institution may keep the record of receipt provided by the borrower and the servicer in the form that best suits the institution's business. Institutions that retain these records electronically must be able to retrieve them within a reasonable time.

Penalties and Liabilities

The FDPA provides penalties for violations of:

- Mandatory flood purchase requirement;
- Escrow requirements;
- Notice requirements; and
- Force placement requirements.

If an institution is found to have a pattern or practice of committing any of these violations, the Agencies are required to assess civil money penalties in an amount not to exceed \$2,000 per violation. Any penalty assessed will be paid into the FEMA National Flood Mitigation Fund. Liability for violations cannot be transferred to a subsequent purchaser of a loan. No penalty may be imposed after the expiration of four years beginning on the date of the occurrence of the violation.

Examination Objectives

1. To determine whether an institution performs required flood determinations for loans secured by improved real estate or a mobile home affixed to a permanent foundation in accordance with the regulations.
2. To determine if the institution requires flood insurance in the correct amount when it makes, increases, extends, or renews a loan secured by improved real estate or a mobile home located or to be located in a SFHA in a participating community.
3. To determine if the institution provides the required notices to the borrower and servicer when the property is located in a SFHA, and to the Administrator of FEMA whenever flood insurance is required as a condition of the loan.
4. To determine if the institution requires flood insurance premiums to be escrowed when required by law.
5. To determine if the institution complies with the force placement provisions if, at any time during the term of a loan, it determines that flood insurance on the loan is not sufficient to meet the requirements of the regulation.
6. To initiate corrective action when policies or internal controls are deficient, or when violations of law are identified.

Examination Procedures⁹

The following procedures should be performed, as appropriate:

- By reviewing previous examinations and supervisory correspondence;
- By obtaining and reviewing the institution's policies, procedures, and other pertinent information;
- By reviewing the institution's system of internal controls;
- By discussing procedures with management; and
- By reviewing a sample of loan files.

Coverage and Internal Control

1. Determine the method(s) used by the institution to ascertain whether improved real estate or mobile homes are or will be located in an SFHA.
2. Verify that the process used accurately identifies special flood hazard areas.
3. For those special flood hazard areas identified, determine if the communities in which they are located participate in the NFIP.
4. If the detached structure is not covered by flood insurance, review the institution's documented conclusion and verify that the structure meets the exemption.
5. If the institution provides "table funding" to close loans originated by mortgage brokers or dealers, verify that it complies with regulatory requirements.
6. If the institution purchases servicing rights, review the contractual obligations placed on the institution as servicer by the owner of the loans to ascertain if flood insurance requirements are identified and compliance responsibilities are adequately addressed.
7. If the institution utilizes a third party to service loans, review the contractual obligations between the parties to ascertain that flood insurance requirements are identified and compliance responsibilities are adequately addressed.

Property Determination Requirements

1. Verify that flood zone determinations are accurately recorded on the SFHDF. (Note: An institution is required to prepare a flood hazard determination for all detached structures, including those that may not be in a SFHA or require flood insurance coverage. Because a flood hazard determination is often needed to identify the number and types of structures on the property, conducting a flood hazard determination remains necessary to ensure compliance with the flood insurance requirements.)

⁹ These reflect the interagency examination procedures in their entirety.

2. Verify that the institution relies on a previous determination only if it is not more than seven years old; the determination was recorded on the SFHDF; and the determination is not on a property located in a community that has been remapped.
3. If the institution utilizes a third party to prepare flood zone determinations, review the contractual obligations between the parties to ascertain that flood insurance requirements are identified and compliance responsibilities are adequately covered, including the extent of the third party's guarantee of work and the procedures in place to resolve disputes relating to determinations.
4. Verify that the institution retains a copy of the completed SFHDF, in either hard copy or electronic form, for as long as it owns the loan.

Purchase Requirements

1. For loans that require flood insurance, determine that sufficient insurance was obtained prior to loan closing and is maintained for the life of the loan.
2. In connection with a residential property, if flood insurance was not required for a detached structure, determine whether the institution followed its internal policies and procedures and verify that the institution documented its decision in writing not to require insurance for such structure at the time of loan origination.
3. If the institution makes loans insured or guaranteed by a government agency (SBA, VA, or FHA) determine how it complies with the prohibition against making these loans if the security property is in an SFHA within a non-participating community.

Determination Fee Requirements

1. Determine that any fees charged to the borrower by the institution for flood zone determinations (absent some other authority such as contract language) are charged only when a loan:
 - Is made, increased, renewed, or extended;
 - Is made in response to a remapping by FEMA; or
 - Results in the purchase of flood insurance under the force placement provisions.
2. If other authority permits the institution to charge fees for determinations in situations other than the ones listed above, determine if the institution is consistent in this practice.
3. Determine the reasonableness of any fees charged to a borrower for flood determinations by evaluating the method used by the institution to determine the amount of the charge. Consider, for example, the relationship of the fees charged to the cost of services provided.

Notice Requirements

Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

1. Ascertain that when an institution makes, increases, extends or renews a loan secured by property located in an SFHA, written notice is mailed or delivered to the borrower within a reasonable time prior to completion of the transaction.
2. Verify that the notice contains:
 - A warning that the property securing the loan is or will be located in an SFHA;
 - A description of the flood insurance purchase requirements;
 - A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers, if applicable;
 - A statement that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP;
 - A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company;
 - A statement that the borrower is encouraged to compare flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies, and that the borrower should inquire about the availability, cost, and comparisons of flood insurance coverage to an insurance agent;
 - A statement whether Federal disaster relief assistance may be available in the event of damage to the property caused by flooding in a federally declared disaster, if applicable.

3. If an institution is required to escrow under the regulations, verify that the institution provided a written notice with the notice of special flood hazards informing the borrower that the institution is required to escrow all premiums and fees for flood insurance, similar to the model clause in Appendix A of the regulations.
4. If the seller or lessor provided the notice to the purchaser or lessee, verify that the institution obtained satisfactory written assurance that the notice was provided within a reasonable time before the completion of the sale or lease transaction.
5. Verify that the institution retains a record of receipt of the notice provided to the borrower for as long as it owns the loan.
6. If applicable, verify that the institution provided written notice to the servicer of the loan within the prescribed time frames and that the institution retains a record of receipt of the notice for as long as it owns the loan.

Notice of the Option to Escrow

1. If the institution is required to send a notice of option to escrow flood insurance premiums and fees, ascertain that written notice is mailed or delivered to the borrower: 1) by June 30, 2016 for any loan covered by flood insurance and outstanding on January 1, 2016; or, if applicable, 2) by September 30 of the first calendar year in which the institution has had a change in status and no longer qualifies for the small lender exception for any loan covered by flood insurance and outstanding as of July 1 of that calendar year.
2. Verify that the notice contains:
 - A statement that the borrower has an option to escrow required flood insurance premiums and fees.
 - A statement about the methods the borrower may use to request the escrow.

Notice of Servicer's Identity

1. If the institution transfers servicing of loans to another servicer, ascertain whether it provides notice of the new servicer's identity to the flood insurance carrier (the Administrator of FEMA's designee) within prescribed time frames.

Escrow Requirements

1. Verify that the institution escrows for flood insurance premiums and fees for designated loans made, increased, renewed, or extended on or after January 1, 2016 unless the loan qualifies for one of the exceptions or the institution qualifies for the small lender exception.
2. If a designated loan no longer qualifies for a loan-related exception, verify that the institution established an escrow account as soon as reasonably practicable.
3. If the institution no longer qualifies for the small lender exception, verify that the institution started requiring escrow on designated loans made, increased, extended or renewed on or after July 1 of the first calendar year of changed status.
4. Verify that an institution (or its servicer) offered and made available to borrowers the option to escrow flood insurance premiums and fees for loans secured by residential improved real estate or a mobile home that are outstanding as of January 1, 2016. In addition, verify that an institution started escrowing as soon as reasonably practicable after receiving the borrower's request to escrow.
5. Verify that, for institutions that no longer qualify for the small lender exception, the institution mailed or delivered, for any loan covered by flood insurance and outstanding on July 1 of the first calendar year in which the institution no longer qualifies for the small lender exception, the notice of the option to escrow by September 30 of that year. In addition, verify that the institution started escrowing as soon as reasonably practicable after receiving a borrower's request to escrow.
6. Verify that the institution's escrow procedures comply with section 10 of RESPA.

Force Placement Requirements

1. If the institution determines that flood insurance coverage is less than the amount required by the FDPA, ascertain that it has appropriate policies and procedures in place to exercise its force placement authority.

2. If the institution is required to force place insurance, verify:
 - That it provides written notice to the borrower that flood insurance is required, and
 - That if the required insurance is not purchased by the borrower within 45 days from the time that the institution provides the written notice, that the institution purchases the required insurance on the borrower's behalf.
3. If the institution purchases required flood insurance on the borrower's behalf and charges the borrower for premiums and fees incurred for coverage, verify that within 30 days of receiving confirmation of a borrower's existing flood insurance coverage, the institution:
 - Notifies the insurance provider to terminate the existing force-placed insurance, and
 - Refunds to the borrower all force-placed insurance premiums and any fees paid for by the borrower during any period of overlap between the borrower's policy and the force-placed policy.

FDPA Examination Checklist

The following questions are designed to be used in conjunction with the Examination Procedures to guide the examiner in a comprehensive review of the requirements of the regulation as it is applied to depository institutions:

Coverage

1. Does the institution offer or extend credit (consumer or commercial) that is secured by improved real estate or mobile homes as defined in the regulations? If yes, complete the remainder of this checklist.
2. If the institution provides "table funding" to close loans originated by mortgage brokers or dealers, does it have procedures to ensure that the requirements of the regulations are followed?
3. If the institution purchases servicing rights to loans covered by the regulation, do the documents between the parties specify the contractual obligations on the institution with respect to flood insurance compliance?
4. If the institution utilizes third parties to service loans covered by the regulation, do the contractual documents between the parties require the servicer to meet the requirements of the regulations?

Property Determination

1. If the institution utilizes a third-party to prepare flood zone determinations, do the contractual documents between the parties:
 - Provide for the third-party's guarantee of work?
 - Contain provisions to resolve disputes relating to determinations, to allocate responsibility for compliance, and to address which party will be responsible for penalties incurred for noncompliance?
2. Are the determinations prepared on the SFHDF developed and authorized by FEMA?
 - If the form is maintained in an electronic format does it contain the elements required by FEMA?
3. Does the institution maintain a record of the SFHDF either in hard copy or electronic form for as long as it owns the loan?
4. When increasing, extending, renewing, or purchasing a loan (not making a loan), does the institution rely on a prior determination only if it is made on the SFHDF, is no more than seven years old, and the community has not been remapped?

Determination Fees

1. Absent some other authority (such as contract language) does the institution charge a fee to the borrower for a flood determination only when:
 - It is made when a loan is made, increased, renewed or extended, or
 - It is made in response to a remapping by FEMA, or
 - It results in the purchase of flood insurance under the force placement provisions?
2. If the institution has other authority to charge fees for determinations in situations other than those noted above, is the practice followed consistently?
3. For those loans subject to TILA, if the institution requires the borrower to obtain life-of-loan monitoring and passes that charge along to the borrower, does it either:
 - Break out the original determination charge from the charge for life-of-loan monitoring or
 - Include the full amount of the charge as a finance charge?
4. Are the fees charged by the institution for making a flood determination reasonable?

Notice Requirements

Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

1. Are borrowers whose security property is located in an SFHA provided written notice of special flood hazards within a reasonable time prior to loan closing?
2. Does the notice contain the following required information?
 - A warning that the building or mobile home is located in a SFHA;
 - A description of the flood insurance requirements;
 - A statement that flood insurance is available under the NFIP and is also available from private insurers;
 - A statement that flood insurance coverage is available from private insurance companies that issue standard flood insurance policies on behalf of the NFIP or directly from the NFIP;
 - A statement that flood insurance that provides the same level of coverage as a standard flood insurance policy under the NFIP may also be available from a private insurance company that issues policies on behalf of the company;
 - A statement that the borrower is encouraged to compare flood insurance policies issued on behalf of the NFIP and policies issued on behalf of private insurance companies, and that the borrower should inquire about the availability, cost, and comparisons of flood insurance coverage to an insurance agent;
 - A statement whether Federal disaster relief assistance may be available in the event of damage to the property caused by flooding in a federally declared disaster, if applicable.
3. If an institution is required to escrow under the regulations, verify that the institution provided a written notice with the notice of special flood hazards informing the borrower that the institution is required to escrow all premiums and fees for flood insurance, similar to the model clause in Appendix A of the regulations.
4. If the institution uses the alternate notice procedures in certain instances as permitted by the regulation, does it obtain the required satisfactory written assurance from the seller or lessor?
5. Does the institution provide a copy of the notice of special flood hazards to the servicer of the loan within the required time frames?
6. Does the institution retain a record of receipt of the notifications provided to the borrower and the servicer for as long as it owns the loan?

Notice of Option to Escrow

1. If the institution is required to mail or deliver a notice of the option to escrow flood insurance premiums and fees, ascertain that written notice is mailed or delivered to the borrower: 1) by June 30, 2016 for any loan covered by flood insurance and outstanding as of January 1, 2016; or 2) if applicable, by September 30 of the first calendar year in which the institution has had a change in status and no longer qualifies for the small lender exception in the regulation for any loan covered by flood insurance and outstanding on July 1 of that calendar year.
2. Verify that the notice contains:
 - A statement that the borrower has an option to escrow required flood insurance premiums and fees.
 - A statement about the methods the borrower may use to request the escrow.

Insurance Requirements

1. If an improved property or mobile home is located in an SFHA and flood insurance is required, does the institution have the borrower obtain a policy, with the institution as loss payee, in the correct amount prior to closing?
2. When multiple properties securing the loan are located in SFHAs, does the institution have sufficient insurance, either through a single policy with a scheduled list of several buildings or multiple policies, to meet the minimum requirements of the regulation? (See narrative for description of minimum requirements.)

Escrow Requirements

1. Does the institution require the escrow of premiums and fees for flood insurance on designated loans secured by residential improved real estate or a mobile home made, increased, extended, or renewed after January 1, 2016 unless the loan qualifies for one of the exceptions or the institution qualifies for the small lender exception?
2. If a designated loan secured by residential improved real estate or a mobile home no longer qualifies for the loan-related exception, does the lender establish an escrow as soon as reasonably practicable?
3. If the institution no longer qualifies for the small lender exception, did the lender begin requiring escrow on designated loans secured by residential improved real estate or a mobile home made, increased, extended, or renewed on or after July 1 of the first calendar year of changed status?
4. Did the institution (or its servicer) offer and make available to borrowers the option to escrow flood insurance premiums and fees for designated loans secured by residential improved real estate or a mobile home that are outstanding as of January 1, 2016? In addition, did the institution start escrowing as soon as reasonably practicable after receiving a borrower's request to escrow?
5. If the institution no longer qualifies for the small lender exception, did the institution mail or deliver, for any loan covered by flood insurance and outstanding on July 1 of the first calendar year in which the institution no longer qualifies for the small lender exception, the notice of the option to escrow by September 30 of that year? In addition, did the institution start escrowing as soon as reasonably practicable after receiving a borrower's request to escrow?
6. Does the institution comply with the provisions of section 10 of RESPA (12 CFR §1024.17 of Regulation X) for escrows?

Force Placement Requirements

1. If at any time during the life of the loan, the institution determines that property securing a designated loan lacks adequate flood insurance coverage:
 - Does the institution provide written notice to the borrower stating that the necessary coverage must be obtained or the institution will purchase it on the borrower's behalf?
 - Does the institution purchase the coverage on the borrower's behalf if the borrower does not obtain the required policy 45 days after the notice to the borrower has been sent?
2. If the institution purchases required flood insurance on the borrower's behalf and charges the borrower for premiums and fees incurred for coverage, verify that within 30 days of receiving confirmation of a borrower's existing flood insurance coverage, the institution:

- Notifies the insurance provider to terminate the existing force-placed insurance, and
- Refunds to the borrower all force-placed insurance premiums and any fees paid for by the borrower during any period of overlap between the borrower's policy and the force-placed policy.

Notice to Administrator of FEMA

1. Does the institution provide the appropriate notice to the carrier of the insurance policy (the Administrator of FEMA's designee) regarding the identity of the servicer of a designated loan?
2. If the institution sells or transfers the servicing of designated loans to another party, does it have procedures in place to provide the appropriate notice to the Administrator's designee within 60 days of the effective date of the transfer of the servicing?